**EX. CAPTAIN Y. U. ZAKARI**

**V.**

**THE NIGERIAN ARMY AND ANOTHER**

IN THE COURT OF APPEAL (LAGOS JUDICIAL DIVISION)

THE 9TH DAY OF FEBRUARY, 2012

SUIT NO: CA/L/385/2002

**LEX (2012) - CA/L/385/2002**

OTHER CITATIONS:

(2012) LPELR-CA/L/385/2002

**BEFORE THEIR LORDSHIPS**

HELEN MORONKEJI OGUNWUMIJU, JCA

JOHN INYANG OKORO, JCA

SIDI DAUDA BAGE, JCA

**BETWEEN**

EX. CAPTAIN Y. U. ZAKARI - Appellants

AND

1. THE NIGERIAN ARMY

2. ATTORNEY GENERAL OF THE FEDERATION - Respondents

**ORIGINATING COURT(S)**

SPECIAL COURT MARTIAL CONVENED BY BRIGADIER GENERAL AZIZA (as he then was) COMMANDER OF LAGOS GARRISON COMMAND (pursuant to the Armed Forces Act Cap A20, Laws of the Federation of Nigeria, 2004)

**REPRESENTATION**

PAUL C. ANANABA Esq., UKENI O. OGBONNAYA, Esq. - For the Appellants

TOYIN BASHORUN, J. A. ADAMU Esq., DAUDA SHAKIRUDEEN, Esq., ADIMA NOSARIEMI, UWHA IKECHUKWU, Esq. and AGUBE ELEMI - For the Respondents

**ISSUES FROM THE CAUSE(S) OF ACTION**

CONSTITUTIONAL LAW - FAIR HEARING: Doctrine of fair hearing- Basis and ambit of in the Constitution of the Federal Republic of Nigeria – Applicability of in the processed relating to the sanctioning of a member of the Nigerian Armed Forces - Effect of failure thereto

CRIMINAL LAW AND PROCEDURE – DEMANDING AND RECEIVING GRATIFICATION:- Proof of – Evidence of pre-arranging the receipt of money from persons/entities under criminal investigation by investigating officer for private use – Whether adequate to sustain the charge

CRIMINAL LAW AND PROCEDURE - EVIDENCE OF AN ACCOMPLICE:- Reliance of court on the evidence of an accomplice to convict an accused person- Section 178(1) of the Evidence Act Cap E14 Laws of the Federal of Nigeria 2004 – Validity of conviction where court did not insist on some corroboration where available

CRIMINAL LAW AND PROCEDURE - EVIDENCE OF AN ACCOMPLICE:- What constitutes evidence of an accomplice – Legality of - Distinction from evidence of a co-accused person – Settled law that an accomplice is a competent witness against an accused person and a conviction based on the evidence of such accomplice is not illegal, even where such evidence is uncorroborated – Duty of trial court under Section 177(1) of Evidence Act, where such a trial is with a jury to warn the jury of the danger of conviction on the uncorroborated evidence of an accomplice – Implications for trials without a jury

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Proof beyond reasonable doubt – Meaning of ". What really does that expression mean? It is proof that precludes every reasonable hypothesis except that which it tends to support and verily it is proof that is consistent with the guilt of the accused person or against whom the allegation has been made. Therefore, it can be said that for evidence to attain the height that could bring about a conviction, it must exclude beyond reasonable doubt, every other hypothesis or conjecture or proposition or presumption except that of the guilt of the accused. If the evidence is wobbly, themative or vague or is compatible with both innocence or guilt, then it cannot be described as being beyond all reasonable doubt."OKORO, J.C.A (Pp.23-24, Paras. G-E) - read in context

MILITARY LAW – COURT MARTIAL:- Jurisdiction of a court martial under Sections 129, 130, 131 and 133 of the Armed Forces Act – How properly constituted - Legal effect

MILITARY LAW – COURT MARTIAL:- Section 131 of the Armed Forces Act – Powers of the Commanding Officer power to convene a Court Martial to try offences committed by persons subject to military or service law - Where an appropriate officer convenes a Court Martial in accordance with that Section – Whether does not make him a Complainant or a Judge in his own cause - Where the complaint which led to the convening of the Court Martial is personal to the convening authority – Proper course open to the commanding officer

MILITARY LAW – COURT MARTIAL:- Conduct prejudicial to Military or service discipline – Proof of - Demanding and receiving gratification in the course of official assignment - Whether sufficient to establish same

**PRACTICE AND PROCEDURE ISSUES**

COURT - JURISDICTION OF THE COURT:- Essence and purport of - What constitutes – Whether a military court martial must possess the same elements to be deemed properly constituted - Provisions of the Armed Forces Act, Cap A20, Laws of Federation of Nigeria 2004 in review

JURISDICTION - ISSUE OF JURISDICTION:- Proceedings conducted without jurisdiction – Legal effect – Proper order for a court to make

INTERPRETATION OF STATUTE - SECTION 131 OF THE ARMED FORCES ACT: Interpretation of

INTERPRETATION OF STATUTE - SECTION 178(1) OF THE EVIDENCE ACT:- Interpretation of

WORDS AND PHRASES - "JURISDICTION": Definition of

WORDS AND PHRASES - "PROVED BEYOND REASONABLE DOUBT": Meaning of

WORDS AND PHRASES:- “An accomplice” – Meaning of -

DECISION OF COURT OF APPEAL

1. The prosecution must prove the following in order to secure the conviction of the Appellant under S.103 of the Armed Forces Act:

i. That the accused (Appellant) is subject to service (Military) law.

ii. That he is guilty of an act which is prejudicial to service discipline.

iii. That such act or conduct must have brought the Armed Forces into disrepute.

2. The act of demanding and receiving of gratification can be proved by evidence that: an investigating officer, after arresting a suspect directed a third party to collect and “whatever” the employers of the suspect “might want to give” the investigating officer; evidence that a sum was indeed collected for and on behalf of the said investigating officer and handed over to him; that the arrested person was released after the exchange of money; and that the investigating officer did put money so received for his personal uses.

3. It must be noted that the Appellant was appointed Chairman of a Task Force to investigate the use of NITEL lines used for illegal business commonly called "419". Instead of bringing to bear on the job the best of military tradition, he decided to embrace the disgraceful "get rich quick" syndrome which has eaten deep into the very fabric of the Nigeria polity. The evidence shows that the said N40,000.00 was paid on the same date the man was arrested and while the man was still in detention. The prosecution discharged the onus of proving the guilt of the Appellant as his conduct was very prejudicial to Military or service discipline.

4. There is nowhere in the record which suggests that Brigadier General Aziza was the Complainant in this case or that he gave evidence before the Court Martial. The evidence shows that he set up the Court Martial which tried and convicted the Appellant. Section 131 of the Armed Forces Act gives the Commanding Officer power to convene a Court Martial to try offences committed by persons subject to military or service law. That in itself does not make him a Complainant or a Judge in his own cause. Where however, the complaint which led to the convening of the Court Martial is personal to the convening authority, he should allow another person to convene the court so as to make the process transparent and fair to the accused person. In the instant case, apart from discharging his statutory function in convening the Court Martial, there is no evidence that General Aziza did any other thing to impugn the independence and impartiality of the court. He cannot in the circumstance be said to have been a Judge in his own cause.

5. The Military has authority within its confines to disciple any erring or misbehaving soldier. However, the principle of fair hearing as enshrined in the Constitution of the Federal Republic of Nigeria must be the guiding principle in applying of sanction against a misbehaving Soldier. The rule of natural justice must at all times be complied with. In the instant case, the army authorities complied with rules of fair hearing.

6. There is no law which prevents a court from convicting an accused person on the evidence of one witness alone provided that the evidence is cogent and direct on the issue before the court. It is not the number of witnesses that can prove a charge but the potency and credibility of the evidence of witnesses.

7. The question whether any person is an accomplice is a question of fact which must be supported by the evidence on record. However, even where so established, that person’s evidence does not thereby become illegal and the court can still rely on the evidence to convict. However, the court has to exercise some caution in relying on such evidence.

**MAIN JUDGMENT**

JOHN INYANG OKORO, J.C.A, (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the decision of a Special Court Martial convened by Brigadier General Aziza (as he then was) Commander of Lagos Garrison Command pursuant to the Armed Forces Act Cap A20, Laws of the Federation of Nigeria, 2004 on 9th of December, 1996 wherein the Appellant was convicted and sentenced to two years imprisonment on 6th January, 1997. A synopsis of the facts will suffice.

The Appellant, while serving in the Nigerian Army was appointed Chairman of Task Force and deployed to Iponri NITEL Exchange for investigation on the allegation that certain NITEL lines were used for illegal (419) businesses. In the course of performing his duties, the Appellant arrested a staff of Chayoma Ventures for interrogation following a tip off that the company was doing "419" business. The said staff of Chayoma Ventures was handed over to Mr. Odibo Issac who was a Customer Engineering Manager with NITEL, Iponri Exchange at that time with instruction to investigate the file of the said company. When the Appellant returned to the office that day, Mr. Isaac Odibo gave him an envelope which contained the sum of N40,000.00, an amount given to the Appellant by the Managing Director of Chayoma Ventures. The Appellant took the money and in appreciation, gave N5,000.00 to Odibo Isaac. The Appellant is of the view that the N40,000.00 was an appreciation of the MD of Chayoma Ventures to the Appellant for the time and efforts in carrying out the investigation. The Nigerian Army however thought otherwise saying that the amount was given as gratification for the release of the arrested staff of Chayoma Ventures. Consequently, the Court Martial was convened which tried and convicted the Appellant.

Dissatisfied, the Appellant filed an appeal which was later dismissed by this court on 2nd day of November, 2007 for want of diligent prosecution. On a further appeal to the Supreme Court, the Apex Court, on the 8th of October 2009, in Appeal No SC/371/07, set aside the: order of the Court of Appeal and ordered that the appeal be heard de novo by another panel of this court.

Notice of Appeal was filed on 18th December, 2002 sequel to an order for extension of time to appeal given by this court on 12th December, 2002. The said notice contains nine grounds of appeal out of which the Appellant has distilled seven issues for determination. The issues are:-

"1. Whether the Judgment of the Court Martial is a nullity for want of Jurisdiction.

2. Whether the Special Court Martial erred in Law in convicting the Appellant on charge 1 (the only charge) when the purported amendment of convening order for General Court Martial dated 16th December, 1996 in which the Appellant was named was palpably defective.

3. Whether the Special Court Martial did not err in law in trying, convicting and sentencing the Appellant on the charge of demanding and receiving gratification, when the prosecution had failed to prove beyond reasonable doubt that there was ever a demand by the Appellant for gratification from any interested party.

4. Whether the Special Court Martial erred in law in trying, convicting and sentencing the Appellant when its constitution and procedures cumulatively amounted to a denial of the Appellant's constitutional right to fair hearing.

5. Whether the Special Court Martial erred in law in convicting and sentencing the Appellant for the offence charged on the evidence of Mr. Odibo alone who is deemed to be an accomplice before, during and after the offence of demanding and receiving gratification (if proved) without warning itself.

6. Whether the Appellant in submitting himself for trial before the Special Court Martial had waived his legal and constitutional rights to fair hearing, fair trial and natural Justice under S.36 of the Constitution of the Federal Republic of Nigeria 1999, the African Charter Human and People's Right and the rules of Natural Justice.

7. Whether the Special Court Martial erred in law in convicting and sentencing the Appellant to a total of two years imprisonment being a sentence that is both obnoxious and speculative having regards to the evidence".

In their joint brief, the first and second Respondents have adopted the seven issues as postulated by the Appellant. I shall therefore determine this appeal based on the seven issues. In so doing, I intend to resolve issues one and two together, three and seven together and four, five and six together in view of the similarity of the issues and arguments they treat.

Before I start to consider the arguments on the issues formulated, I wish to observe that the brief as settled by the learned counsel for the Appellant is too brief. A situation where argument on an issue occupies only one paragraph consisting of only one sentence leaves much to be desired. Arguments in some of the issues are just a repeat of the statement of the issue. Issue seven has only one sentence. It has to be noted, that where an issue is raised and no argument is made in respect of it, such an issue is as good as abandoned. This is a criminal matter and I think learned counsel for the Appellant should have done a better job. I need not say more on this.

I shall reproduce verbatim the argument of the learned counsel for the Appellant on issue one as follows:-

"We humbly submit that the Special Court Martial that tried, convicted and sentenced the Appellant lacked Jurisdiction on account of improper constitution.

Contrary to the provisions of the Armed Forces Decree No. 105 of 1993, one of the officers captain E.D. Bashir a Junior Officer to the Appellant sat on the Tribunal that tried and convicted the Appellant without .satisfying certain conditions precedent ie , obtaining the consent of a superior before constituting the Special Court Martial. It is our submission that failure to satisfy the condition precedent robs the Special Court Martial of Jurisdiction to 'try the Appellant which goes to the root of this finding".

That was all as far as issue one is concerned'

On the second issue, learned counsel submitted that the original convening order of 9th December, 1996 was for a Special Court Martial in which the name of the Appellant was not reflected but that the amendment of 16th December 1996 in which the name of the Appellant appeared was for a General Court Martial dated 10th December, 1996. He contended that as there was no existing convening order for a General Court Martial dated 10th December, 1996, the purported amendment of 16th December, 1996 is invalid and of no effect. It was his final submission on the issue that there is a serious doubt as to the veracity and existence of the amendment of 16th December, 1996 and the mode of arraignment of the Appellant. Learned counsel then urged this court to resolve the two issues in favour of the Appellant.

It was however the contention of the learned counsel for the Respondents that by virtue of section 131(1)(d), (2)(d), (3)(b) and (4) of the Armed Forces Act, 2004, an officer commanding or Brigadier can convene a court Martial. That whether it is tagged General or Special Court Martial, it remains properly convened if it is done by any of the officers listed in the above mentioned section of the Act. According to learned counsel, Brigadier General Aziza (as he then was), as Commanding Officer of Lagos Garrison Command was capable of convening a Court Martial which tried the Appellant. On the argument that Capt. I. D., Bashir was improperly made a member of the panel, he submitted that since Capt. Bashir and the Appellant are of the same rank, the composition complied with Section 134 of the Armed Forces Act, Cap. A20, 2004.

On the second issue, he submitted that considering that Annexure A-A3 contained in the record of proceedings all bear a reference No. LGC/77/A, save for the isolated reference to the 10th of December, 1996, it is clear from these annexures that it was the Court Martial convened on the 9th of December, l996 that was in issue. That this is all the more so when there was no Court Martial on the 10th of December, 1996. Learned counsel urged this court to hold that this was a typographical error.

It was further contended that the Appellant, having agreed to proceed and be tried in the Special Court Martial as constituted, is estopped from protesting the membership of the Court Martial. This is estoppel by the conduct, he opined, citing and relying on the cases of Fawehinmi v. Abacha (1996) 9 N.W.L.R. (pt.4751 710 at 744 paras E - G and I.G.A. & Ors. v. Amakiri & Ors. (1976) 10 NSCC 611 at 616 paras 35 - 50. Finally, it was submitted that the argument as regards the description of the Court. Martial as either a Special or General is of ne consequence. He then urged this court to resolve the two issues i5n favour of the Respondents.

The Appellant's complaint in the first issue is that the Special Court Martial which tried and convicted him had no jurisdiction to do so in that it was not properly constituted as to the members of the panel. It was specifically stated that one Capt. I. D. Bashir who was a member of the panel was junior in rank to the Appellant contrary to the provision of the Armed Forces Decree No. 105 of 1993.

I am quite aware, and it is trite that issue of jurisdiction is very fundamental to adjudication in our courts because where a court has no jurisdiction to entertain a matter, the proceedings thereof and the decision reached no matter how well conducted, is a nullity and a waste of the valuable time of the court. See Utih v. Onoyivwe (1991) 1 N.W.L.R. (pt.166) 166 at 206; Jeric Nigeria Ltd. v. Union Bank of Nigeria (2000) 12 SC (pt.11) 133 at 139; Kato v. Central Bank of Nigeria (1991) 9 N.W.L.R. (pt.214) 126 at 148.

In Shell Petroleum Development Company Nigeria Ltd. v. Isaiah (2001) 5 SC (pt.11) 1, the Apex Court, per Mohammed, JSC, citing with approval the views expressed by the learned Author of Halsburys Laws of England, observed that:-

"Jurisdiction of a court has been judicially defined as very fundamental and priceless "commodity" in the judicial process. It is the fulcrum, centrepin, or the main pillar upon which the validity of any decision of any court stands and around which other issues rotate. It cannot be assumed or implied, or cannot also be conferred by consent or acquiescence of parties".

See also Attorney General of Lagos State v. Hon. Justice L.J. Dosunmu (1989) 3 N.W.L.R. (pt.111) 552 at 566 - 567.

The issue of jurisdiction is so important that it can be raised at any time by a party even on appeal in this court or even at the Supreme Court. See Bronic Motors v. Wema Bank Ltd. (1993) 1 SCNLR 296 at 310. That is why every court has to satisfy itself that it has the requisite jurisdiction before setting out to hear any matter that is brought before it. The Appellant herein is complaining that the Court Martial that tried him was not properly constituted and this is one of the ingredients which the Supreme Court laid down in the case of Madukolu v. Nkemdilim (1962) 1 All NLR (pt.4) 557. The Apex court held that in order for a court to have jurisdiction in a matter, it must be:-

1. Properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; and

2. The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Was the Court Martial which tried the Appellant properly constituted? This brings me to the provisions of the Armed Forces Act, Cap A20, Laws of Federation of Nigeria 2004, particularly Sections 129, 130, 131 and 133 of the Act. Section 133(1) of the Act states:-

"(1) Subject to the provisions of Sections 128 and 129 of this Act, a Court Martial shall be duly constituted if it consists of the President of the Court Martial, not less than two other officers and a waiting member".

Section 128 relates to officers who are to act as appropriate superior authority in relation to a person charged with an offence and that includes:-

"a. the commanding officer, and

b. any officer of the rank of brigadier or above or officer of correspondent rank or those directed to so act under whose command the person is for the time being".

Section 129 of the Act spells out two types of Courts Martial as follows:-

"There shall be, for the purposes of carrying out the provisions of this Act, two types of courts Martial, that is:-

(a) A general court Martial, consisting of a President and not less than four members, a waiting member, a liason officer and a Judge advocate;

(b) A Special Court Martial, consisting of a President and not less than two members, a waiting member, a liaison officer and a Judge advocate;

From all indications, the Appellant does not complain about the above provisions which seem to have been complied with. The complaint of the Appellant has to do with section 133(3)(b) which states:-

"133(b) where an officer is to be tried, the President shall be above or of the same or equivalent rank and seniority of the accused and the members thereof shall be of the same but not below the rank and seniority of the accused."

The tragedy of this issue is that apart from the argument of the learned counsel for the Appellant in their brief that Capt. I D. Bashir, a member of the court was lower in rank to the Appellant, there is no evidence to support this. As was observed by the learned counsel for the Respondent, both the Appellant and I. D. Bashir are all Captains and that being the case, there is no breach of Section 133(b) of the Act. At the court below, this issue was never raised. It only surfaces in the brief of the Appellant. How does the Appellant expect this court to verify whether Capt. I. D. Bashir was junior to him or not especially when the Respondent also asserts that they are equal in rank? I need not waste more time on this issue as the Appellant appears not to have been serious in putting forward his case on this issue. Without anything to the contrary, I think the Court Martial was property constituted having regard to section 150 of the Evidence Act. Issue one therefore, does not avail the Appellant at all.

On the second issue, I wish to state clearly that whether a Court Martial is Special or General, they both have the same jurisdiction save where it consists of a president and two members, it cannot sentence above one year or impose sentence of death. Section 130(1)&(3) of the Act states:-

"130(1) A General Court Martial shall, subject to the provisions of this Act, try a person subject to service law under this Act for an offence which, under this Act, is triable by a Court Martial and award for the offence a punishment authorized by this Act for that offence, except that, where the Court Martial consists of less than seven members it shall not impose a sentence of death.

(2) ....

(3) A Special Court Martial shall have the powers of a General Court Martial except that, where the Court Martial consists of only two members it shall not impose a sentence that exceeds imprisonment for a term of one year or of death".

The Court Martial which tried the Appellant consisted of five Judges as follows:-

1. Lt. Col. Olojode - President

2. Major Uzzi - Member

3. Captain K. Bello - Member

4. Captain I. D, Bashir - Member

5. Captain J. M Aboli - Member

as well as a Judge Advocate Major S.M. Okeke.

It has to be noted that the court Martial was not convened for the Appellant alone. The first order No. LGC/77/A was convened on 9/12/96 to try 25 listed accused persons. Then on 16/2/96, the name of the Appellant and two others were submitted to the court to be tried by "the ongoing General Court Martial". The mistake there is that the amendment referred to a General court Martial of 10/12/96 though it bears the reference number of LGC/77/A as the convening order of 9/12/96. This is clearly a typographical error which much weather should not be made out. In any case, how has that typographical error affected the case of the Appellant? Definitely, the learned counsel for the Appellant was unable to show that this occasioned a miscarriage of Justice. The issue does not help the Appellant at all and is accordingly resolved against him.

The next sets of issues to be taken together are issues three and seven which are closely related, at least the arguments thereof. It was the submission of the learned counsel for the Appellant that since there was no piece of evidence to substantiate the fact that the Appellant demanded for gratification, the prosecution had failed to prove its case beyond reasonable doubt. In support of the submission that the prosecution is duty bound to prove its case beyond all reasonable doubt, learned counsel cited the following cases: Solola v. State (2005) 30 WRN 89; R. v. Adamu (1944) 10 WACA 161; Nwankwere v. Adewunmi (1967) NWLR 45; Ikoku v. Ikoli (1962) 1 All NLR and Buhari v. Obasanjo (2005) 50 WRN 1.

It was also the contention of the Appellant that failure to call the party from whom the gratification was alleged to have been received is fatal to the case of the Respondents. Relying on Section 149(d) of the Evidence Act, learned counsel opined that had the man been called to testify, his evidence would have been unfavourable to the Respondents. He urged this court to resolve this issue in favour of the Appellant.

On issue seven, the learned counsel made a one sentence argument, repeating the same argument in issue three that the Respondents failed to prove that the Appellant demanded any sort of gratification from the company.

The learned counsel for the Respondents submitted that contrary to the assertion of the Appellants in issue 3, he was charged, tried and convicted of charges under Section 103 of the Armed Forces Decree 1993 which is now the Armed Forces, Act, Laws of the Federation of Nigeria 2004, Cap A20. That there was no time throughout the proceedings which the Appellant was charged with demanding and receiving gratification. That the prosecution was therefore not required to prove beyond reasonable doubt that there was a demand by the Appellant for gratification from an interested party.

The learned counsel further submitted that the conduct prejudicial to service discipline relates to the receipt by the Appellant of the sum of N40,000.00 from the Managing Director of Chayoma Ventures Ltd. at the material time the company was being investigated by the Appellant as Chairman of the Special Investigative Task Force on NITEL. On what constitutes conduct prejudicial to service discipline, he refers to Section 69 of the Army Act of 1955 especially the explanatory notes therein and also Ministry of Defence Manual of Military Law Part 1 (1972) used by the command of the Defence Counsel London. Referring further to Section 114 of the Armed Forces Act and Section 98 of the Criminal Code Act, learned counsel submitted that this is a strict liability offence. Once it is shown that the Appellant is subject to service law and that he committed that offence as in this case, the receipt of the money, the Appellant was duly found guilty and convicted. He urged the court to resolve issues 3 and 7 against the Appellant.

Section 103(1) of the Armed Forces Decree 105 of 1993, now Section 103 of the Armed Forces Act, Cap A20, Laws of the Federation of Nigeria 2004 under which the Appellant was charged states:-

"103. Conduct to the prejudice of service discipline.

(i) A person subject to service law under this Act who is guilty of a conduct or neglect to the prejudice of good order and service discipline is guilty of an offence under this section and liable, on conviction by a Court Martial, to imprisonment for a term not exceeding two years or any less punishment provided by this Act".

The charges preferred against the Appellant reads:-

"Charge: STATEMENT OF OFFENCE Conduct to the prejudice of service discipline contrary to Section 103 AFD 1993.

Particulars of Offence: In that he in Lagos on or about July 1996 demanded and received the sum of N40,000.00k as gratification for the release of operators of Chayoma Ventures Ltd. before they could be released from custody".

The following are what the prosecution must prove in order to secure the conviction of the Appellant under S.103 of the Armed Forces Act.

1. That the accused (Appellant) is subject to service (Military) law.

2. That he is guilty of an act which is prejudicial to service discipline.

3. That such act or conduct must have brought the Armed Forces into disrepute.

The Appellant is not complaining about the first and third ingredients of this offence. All he is saying is that the Respondents failed to prove the act which is prejudicial to service discipline. The act in this case is that of demanding and receiving of gratification. The evidence of the PW1, one Isaac Odibo is that on the fateful date, the Appellant, after arresting the employee of Chayoma Ventures Ltd, he kept him in the custody of the PW1 with an instruction to keep him till he came back from Lafiaji. He added that he should keep whatever the people might want to give him until he returned. On the same day, the Managing Director of the company came and gave N40,000.00 to PW1 to keep for the Appellant. That is why the arrested man was released.

The Appellant's counsel has argued that the Respondents failed to prove that the Appellant demanded and received N40,000.00 as gratification.

The Court stated clearly in Buhari v. Obasanjo & Ors. (2005) 13 N.W.L.R. (pt.941) 1 at 295 paras B - E that -

"Moreover it is essential to know that most of the allegations questioning the propriety of the elections verged on counsel acts and other unethical acts. On the authority of Jim Nwobodo v. Onoh & 2 Ors. (1984) 1 SCQLR 1, they must be "proved beyond reasonable dobut". What really does that expression mean? It is proof that precludes every reasonable hypothesis except that which it tends to support and verily it is proof that is consistent with the guilt of the accused person or against whom the allegation has been made. Therefore, it can be said that for evidence to attain the height that could bring about a conviction, it must exclude beyond reasonable doubt, every other hypothesis or conjecture or proposition or presumption except that of the guilt of the accused. If the evidence is wobbly, themative or vague or is compatible with both innocence or guilt, then it cannot be described as being beyond all reasonable doubt."

In the instant appeal, it is in evidence that the Appellant instructed the PW1 to detain the man arrested by the Appellant. At the same time, he instructed the PW1 to collect something that may be paid and keep for him while he left for Lafiaji. On his return, all he saw was the N40,000.00 which he admitted unequivocally that he received and even dashed the PW1 the sum of N5,000.00 from it. However, the man arrested was let off the hook. The Appellant argued that it was a "gift" for a job well done. It was argued that the prosecution did not prove that the Appellant demanded for the money. lt is however my view that he did. When he told the PW1 to collect something and keep for him, he was actually saying that he had struck a deal when he went out to arrest the man.

It must be noted that the Appellant was appointed Chairman of a Task Force to investigate the use of NITEL lines used for illegal business commonly called "419". Instead of bringing to bear on the job the best of military tradition, he decided to embrace the disgraceful "get rich quick" syndrome which has eaten deep into the very fabric of the Nigeria polity. The evidence shows that the said N40,000.00 was paid on the same date the man was arrested and while the man was still in detention. I hold the view that the prosecution ably discharged the onus of proving the guilt of the Appellant as his conduct was very prejudicial to Military or service discipline. Therefore, the position of the Court Martial that the prosecution proved its case, is in my opinion, unassailable. The two issues i.e 3 and 7 are hereby resolved against the Appellant.

The main plank and arguments in issues 3, 4, and 6 is that at the trial of the Appellant, he was not given fair hearing at the court below. The Learned Counsel for the Appellant stated that Major General Patrick Aziza who was the Commanding Officer, Lagos Garrison Command was the Complainant in this case, the investigating authority and was also the officer who convened the Special Court Martial. He submitted that the whole exercise carried out by the General amounts to a breach of the Appellant's fundamental right of fair hearing as enshrined in Section 36 of the Constitution of the Federal Republic of Nigeria citing the case of Garba v. University of Maiduguri (1986) 2 SC and Eziaga v. UNICA (2004) 21 WRN 28. He, contended that a person cannot be a judge in his own matter Any decision reached where a person was denied fair hearing, is a nullity, he concluded, further citing the case of Eke v. Ogbonda (2007) 6 WRN l. The learned counsel submitted that all courts including a Court Martial are bound by the principle of fair trials, relying on the case of The Nigerian Army v. Mohammed (2002) 15 NWLR (pt 789) 42.

It was his further contention that the Court Martial in convicting and sentencing the Appellant erred in law by relying solely on the evidence of Mr. Isaac Odibo who he describes as an accomplice contrary to Section 178 of the Evidence Act. He also refers to the case of Nwankwoala v. State (supra). He concluded that the Appellant's right to fair hearing cannot be waived by mere submission of himself to the Special Court Martial's jurisdiction. He then urged this court to resolve these issues in favour of the Appellant.

In his reply, the Learned Counsel for the Respondents submitted that there is no evidence in the Record of Proceedings that the convener of the Special Court Martial Brigadier-General Aziza was the Complainant or that he gave evidence at any time during the proceedings as postulated by the Appellant in his fourth issue. That by law, the convener was required pursuant to Sections 131 and 132 of the Armed Forces Act to convene the Court Martial and he did no more than that. He concluded that the Appellant's argument and authorities cited, in this regard are misconceived

On the issue that the Court Martial should not have convicted the Appellant on the evidence of PW1 alone, Learned Counsel for the Respondent submitted that it is not illegal to convict an accused person on the evidence of an accomplice simpliciter. He cites the cases of Nwakwoala v. State (supra) and Okasi & Anor. v. The State (1989) NSCC (pt. 1) 375 at 382 lines 5-25. Finally, on the issue as to whether the submission of the Appellant to the Court Martial is fatal to his right of fair hearing, learned counsel submitted that this issue is one that will take this court on a voyage of discovery and an academic prowess and urged the court not to embark on such an exercise. He cites and relies on the case of Odebo v. INEC (2008) 10 MJSC 1 at 24 lines A-F. He then urged this court to resolve these issues against the Appellant. I like to state here that it is a futile effort to raise an issue and proffer argument thereon which has no root in the judgment of the court. There is nowhere in the record which suggests that Brigadier General Aziza was the Complainant in this case or that he gave evidence before the Court Martial. All I can see is that he set up the Court Martial which tried and convicted the Appellant. Section 131 of the Armed Forces Act gives the Commanding Officer power to convene a Court Martial to try offences committed by persons subject to military or service law.

I should state further that where an appropriate officer as listed in Section 131 of the Army Forces Act convenes a Court Martial in accordance with that Section, he is just discharging his statutory function.

That in itself does not make him a Complainant or a Judge in his own cause. Where however, the complaint which led to the convening of the Court Martial is personal to the convening authority, I think he should allow another person to convene the court so as to make the process transparent and fair to the accused person. In the instant case, apart from discharging his statutory function in convening the Court Martial, there is no scintilla of evidence that General Aziza did any other thing to impugn the independence and impartiality of the court. He cannot in the circumstance be said to have been a Judge in his own cause. Thus, the facts of this case do not support the cases cited by the Appellant on this issues.

Let me use this opportunity to emphasize the fact that the Military has authority within its confines to disciple any erring or misbehaving soldier. However, the principle of fair hearing as enshrined in the Constitution of the Federal Republic of Nigeria must be the guiding principle in applying of sanction against a misbehaving Soldier. The rule of natural justice must at all times be complied with. See Esiaga v. University of Calabar (2004) 21 WRN, 28. In the instant case, I am satisfied that the army authorities complied with rules of fair hearing. The Appellant was duly given opportunity to state his own case and I am satisfied with the method which the Court Martial was convened.

On the argument that the Appellant should not have been convicted on the evidence of PW1 alone, it is my view that there is no law which prevents a court from convicting an accused person on the evidence of one witness alone provided that the evidence is cogent and direct on the issue before the court. It is not the number of witnesses that can prove a charge but the potency and credibility of the evidence of witnesses.

On the issue that the PW1 was an accomplice that remains an allegation which issue has not been determined by the court. PW1 was not a member of the Task Force, at least, there is no evidence to say that he was. He did not take part in the arrest of the man of whose head the N40,000,00 was paid. At least, these are facts we can gather from the record. How he became an accomplice is not bourn out of the record. How he became an accomplice is not bourn out of the record. Even if he was an accomplice, the Apex court has held that his evidence is not illegal and the court can still rely on his evidence to convict but the court has to exercise some caution in relying on such evidence. In Okasi & Anor. v. The State (1989) NSCC 375 at 382 & lines 5 - 15, the Supreme Court stated the position as follows:-

"The next question is as to the role of PW5, whether he could be regarded as an accomplice. An accomplice is certainly a person that participates in a crime for which the accused now in court are being tried and if tried with them on the same evidence would equally be guilty with the accused being tried. In essence an accomplice is not tried but it brought to trial along with other participles criminis, would become a co-accused person. In law an accomplice is a competent witness against an accused person and a conviction based on the evidence of such accomplice is not illegal, even where such evidence is uncorroborated, but by virtue of Section 177(1) of Evidence Act, there is a proviso that where such a trial is with a jury the Judge shall warn the jury of the danger of conviction on the uncorroborated evidence of an accomplice... It is up to the trial Judge to make sure that he weighs seriously such uncorroborated evidence of an accomplice before convicting on it."

In the recent past, the Apex court reiterated the above principle and decision that conviction based on the uncorroborated evidence of an accomplice is not illegal. See Nwankwoala v. State (2006) 46 WRN 13. I am bound by these decisions. Therefore, assuming that the PW1 was an accomplice, the Court Martial still had the power to convict the Appellant based on the uncorroborated evidence of PW1. By virtue of Section 178(1) of the Evidence Act Cap E14 Laws of the Federal of Nigeria 2004; the reliance on such evidence to convict is not illegal. It is however safer for the court to insist on some corroboration where available in view of the proviso therein. See Danlami Ozali v. The State (1990) 1 NWLR (pt.124) 92 at 113 & 117; Christopher Okosi & Anor v. The State (1989) 1 NWLR (pt 100) 642 at 657-658.The last thing I want to say on this issue has to do with the question posed by the learned counsel for the Appellant on issue six i.e whether the Appellant in submitting himself for trial before the Special Court Martial had waived his legal and constitutional right to fair hearing. The question, as was observed by the learned counsel for the Respondents does not arise from any issue which transpired at the court below. It is an academic question which the Appellants want his court to go on a voyage of discovery. This court has no such time and as such I shall not embark on such an academic exercise. See Odedo v. INEC (supra).

The three issues are according resolved against the Appellants.

On the whole, having resolved the seven issues against the Appellant, I hold that this appeal lacks merit and is hereby dismissed. The conviction and sentence of the Appellant by the Court Martial is hereby upheld.

**HELEN MORONKEJI OGUNWUMIJU, J.C.A:**

I have read the judgment just delivered by my learned brother JOHN INYANG OKORO JCA, I am in complete agreement given the facts and law applicable that the appeal is wholly unmeritorious and should be dismissed. It is hereby dismissed. I abide by all consequential orders.

**SIDI DAUDA BAGE, J.C.A:**

I read in draft the judgment of my learned brother, J.I. Okoro, JCA. I am in complete agreement with. By way of amplification, let me add a few words, on the test for determination, of the fairness of a hearing

The question of fair hearing is not just an issue of dogma. Whether or not a party has been denied of his right to fair hearing is to be judged by the nature and circumstances surrounding a particular case. The crucial determinant is the necessity to afford the parties equal opportunity to put their case to the court before the court gives its judgment. A complaint founded on a denial of fair hearing is an invitation to the court hearing the Appeal to consider whether or not the court is against which a complaint is made has been generally fair on the basis of equality to all the parties before it.

It is wrong and improper to approach the meaning of fair hearing by placing reliance on any prior assumption as to its technical requirements. The simple approach is to look at the totality of the proceedings before the court and then form an opinion on objective standards whether or not an equal opportunity has been afforded to parties to fully ventilate their grievances before a court. The principle of fair hearing cannot be applied as if it were a technical Rule based on prescribed pre-requisites. See - Pom & Anor. vs. Mohammed & Anor. (2008) 5 - 6 SC (Pt. 1) 83.

For the detail reasons contained in the lead judgment, I too hold that this appeal lacks merit and' is hereby dismissed by me. I have equally upheld the conviction and, sentence of the court martial on the Appellant.