**M.W.O KENABU PHILIP**

**V.**

**NIGERIAN ARMY**

IN THE COURT OF APPEAL, (KADUNA JUDICIAL DIVISION)

4TH DAY OF MARCH, 2016

SUIT NO: CA/K/415/C/2015

**LEX (2016) - CA/K/415/C/2015**

OTHER CITATIONS

**BEFORE THEIR LORDSHIPS:**

UWANI MUSA ABBA-AJI, JCA

IBRAHIM SHATA BDLIYA, JCA

OLUDOTUN ADEBOLA ADEFOPE-OKOJIE, JCA

**BETWEEN**

M. W. O. KENABU PHILIP - Appellant(s)

AND

NIGERIAN ARMY - Respondent(s)

**ORIGINATING COURT**

GENERAL COURT MARTIAL OF THE NIGERIAN ARMY, SITTING AT 1 DIVISION HEADQUARTERS OFFICERS' MESS, KANTA ROAD, KADUNA (CORAM: Col. M.E. Odion (N/8437) as President, Col. J.O. Obasa (N/9025), Col. A. Garba (N/9496), Col. A.A. Bamgbose (N/9453), Lt. Col. B. Garke (N/9478), Lt. Col. S.I. Abdullahi (N/9854) Lt. Col. R.B. Akindoyeje (N/9653) as members; Capt. A. Mohammed (N/12687) as Judge Advocate)

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

MILITARY LAW - OFFENCE OF DISOBEDIENCE TO STANDING ORDERS:- Section 56(2) of the Armed Forces Act, 2004 – Proof of – Requisite elements

CRIMINAL LAW AND PROCEDURES – PROSECUTORIAL POWERS OF THE ATTORNEY-GENERAL:- Sections 174(2) and 211(2) of the 1999 Constitution - Permit given to the Attorneys-General of the Federation and States respectively to delegate their prosecutorial powers – Extent of – Proper exercise of

CONSTITUTIONAL LAW – POWERS OF THE ATTORNEY GENERAL:- Constitutional delimitation of the powers of the Attorney-General to delegate their prosecutorial function – Duty of Attorney-General to obtain consent of a High Court Judge before preferring a criminal charge in the State High Courts nationwide – Failure thereto - Whether is fatal to the charge

ADMINISTRATIVE AND GOVERNMENT LAW – DELEGATION OF POWERS:- Necessity of delegation of powers to subordinate oﬃcers in administration – Basis and justification of

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - REPLY BRIEF:- Essence of a reply brief –Settled law that a Reply Brief is not for re-argument or adumbration of issues but for addressing new issues raised in the Respondent's brief, if any – Attitude of court to failure thereto

EVIDENCE – BURDEN OF PROOF - ONUS OF PROOF:- Legal burden of proof in an adversarial system – How determined - Party who would otherwise fail if no evidence at all were given on either side – Requirement of the Evidence Act - Stipulation by an existing law that proof of that fact shall lie on any particular person – Duty of court thereto

EVIDENCE – EXHIBITS:- Duty of a trial or appellate Court to see the Exhibits before taking any decision on them – Justification for – Effect of failure thereto

EVIDENCE – ORAL AND DOCUMENTATY EVIDENCE:- Where a court is presented with oral and documentary evidence on the same fact – Proper treatment of – Whether the documentary evidence carries more weight

EVIDENCE – UNCHALLENGED OR UNCONTROVERTED EVIDENCE :- Where evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so – Duty of court thereto

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

This is an appeal against the decision of the 1 Division General Court Martial of the Nigerian Army, sitting at 1 Division Headquarters Officers' Mess, Kanta Road, Kaduna, presided over by Col. M.E. Odion (N/8437) as President, Col. J.O. Obasa (N/9025), Col. A. Garba (N/9496), Col. A.A. Bamgbose (N/9453), Lt. Col. B. Garke (N/9478), Lt. Col. S.I. Abdullahi (N/9854) Lt. Col. R.B. Akindoyeje (N/9653) as members; Capt. A. Mohammed (N/12687) as Judge Advocate, delivered on 24/3/2013 and confirmed on 4/4/2014, wherein

The Appellant was charged, inter alia, with “Disobedience to Particular Order contrary to *Section 56(2) of the Armed Forces Act CAP A20 Laws of the Federation of* *1*(2016) LPELR-40255 (CA) *Nigeria, 2004*.” Specifically, the case of the prosecution against the Appellant was that he failed in his position as the chief Clerk of the 41 Division Engineers of the Nigerian Army, Kaduna, to pass on a routine order by the Commander of the 41 Division Engineer to the Chief of Staff (COS) detailed on Maj. E.I. Sam as field officer from 01-14 February, 2012 which failure resulted in the break-up in command and paralysed the activities of the affected officers.

DECISION OF THE GENERAL COURT MARTIAL

The Appellant contention that he passed on the communication orally was rejected and he was convicted as charged and his rank reduced to SSgt whereupon he appealed to the Court of Appeal

ISSUES FOR DETERMINATION OF APPEAL

BY APPELLANT

1. Whether the judgment or finding of the trial General Court Martial was valid, same having not been signed immediately it was delivered as mandatorily required by *Section 294(1) of the 1999* *Constitution (as amended)* and *Rule 76(3) of the* *Rules of Procedure (Army) 1972*. (Ground I of Amended Notice of Appeal)

2. Whether the trial General Court Martial had jurisdiction to try the Appellant when the charge that formed the basis of the trial of the Appellant was not signed by his Commanding Officer. (Ground 2 of Amended Notice of Appeal)

3. Whether the trial General Court Martial was right in convicting the Appellant on the charge of disobedience to particular orders when the mental element of the said offence was not proved and when the Respondent had not discharged the legal burden of proof placed on them by law. (Ground 3 and 5 of Amended Notice of Appeal)

4. Whether the trial General Court Martial was right when it denied the Appellant of his right to cross-examine PW2 who had given evidence on oath and who had tendered a documentary evidence relevant and vital to the charge. (Ground 4 of Amended Notice of Appeal)

5. Whether the trial General Court Martial was right when it held that the prosecution had proved the allegation in the charge beyond reasonable doubt. (Ground 7 and 8 of Amended Notice of Appeal)

6. Whether the trial General Court Martial's finding that the Appellant's subordinate clerks had denied receiving any verbal instruction from the Appellant in relation to Exhibit 2 is supported by evidence. (Ground 6 of Amended Notice of Appeal).

BY RESPONDENT

1. Whether the finding/record of proceedings of the General Court Martial in this case signed and dated on the 24th day of March, 2013 by the President and Judge Advocate is valid.

2. Whether the trial of the accused/appellant upon the charge sheet signed by Col. C.O.C. Ekulide on behalf of the General Officer Commanding 1 Division is capable of vitiating the trial of the accused person?

3. Whether the General Court Martial was right in convicting the accused/appellant for the offence of disobedience to particular order contrary to *Section* *56(2) of the Armed Forces Act, CAP A20 LFN 2004*.

AS ADOPTED BY COURT FOR DETERMINATION OF APPEAL

1. Whether the trial General Court Martial convicted and sentenced the Appellant for the offence charged as proved beyond reasonable doubt.

2. Whether the conviction of the Appellant can be set aside on the bases that the judgment was not signed immediately pursuant to *Section 294(1) of the 1999* *CFRN (as amended)* and the charge sheet not signed by his Commanding Officer.

DECISION OF THE COURT OF APPEAL

1. There are no new issues in the argument of the Respondent that necessitated a Reply brief from the Appellant. In fact, the Respondent has rather abandoned issues 4 and 6 raised and argued by the Appellant which are deemed admitted. A Reply brief is not for re-argument or adumbration of issues but for addressing new issues raised in the Respondent's brief, if any.

2. Oral instructions are lawful ways of communicating military orders. Where there is a denial that an order was communicated orally as asserted, the onus is on the prosecution to call evidence to establish the contrary as asserted. Thus, the 2 subordinate clerks should have been called as witnesses to impute on the Appellant that he never gave them any verbal instruction. That then would have amounted to disobedience to obey commands.

**MAIN JUDGMENT**

UWANI MUSA ABBA AJI, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the decision of the 1 Division General Court Martial of the Nigerian Army, sitting at 1 Division Headquarters Officers' Mess, Kanta Road, Kaduna, presided over by Col. M.E. Odion (N/8437) as President, Col. J.O. Obasa (N/9025), Col. A. Garba (N/9496), Col. A.A. Bamgbose (N/9453), Lt. Col. B. Garke (N/9478), Lt. Col. S.I. Abdullahi (N/9854) Lt. Col. R.B. Akindoyeje (N/9653) as members; Capt. A. Mohammed (N/12687) as Judge Advocate, delivered on 24/3/2013 and confirmed on 4/4/2014, wherein the Appellant contrary to ***Section 56(2) of the Armed Forces Act, CAP A20, LFN 2004***, was convicted at page 129 and his rank reduced to SSgt subject to confirmation by Appropriate Superior Authority (ASA) as contained at page 131 of the records.

The charge against the Appellant dated 31/7/2012 contained on the NA Form B252 at page 4 of the records reads as follows:

STATEMENT OF OFFENCE:

Disobedience to Particular Order contrary to *Section 56(2) of the Armed Forces Act CAP A20 Laws of the Federation of* *1*(2016) LPELR-40255 (CA) *Nigeria, 2004*.

PARTICULARS OF OFFENCE:

In that you at HQ 41 Division Engineers Dalet Barracks, Kaduna on or about 31 January 2012 disobeyed a Lawful Command by refusing to inform Maj El Sam (N/11110) that he was the field Officer from 01-14 February 2012 as you were ordered to do by your Superior Officer Lt Col BT Vandi (N/9544).

*COC EKULIDE Col*

*For General Officer Commanding*

The facts that formed the basis of the charge and prosecution against the Appellant was that he was the chief Clerk of the 41 Division Engineers of the Nigerian Army, Kaduna, and has served in that capacity from 2009 till his trial in 2012.

In January, 2012, a routine order by the Commander of the 41 Division Engineer to the Chief of Staff (COS) detailed on Maj. E.I. Sam as field officer from 01-14 February, 2012, was passed to the Appellant who for the purpose of proper flow of information, administration, command and management of the 1 Mechanized Division was mandated to promptly inform and ensure that Maj. E.I. Sam received the routine/administrative assignment or order but failed to carry out the command which resulted in the break-up in command and paralysed the activities of the affected officers.

During the investigation, Maj. E.I. Sam made a written statement that he never received the routine order from the Appellant and at his trial by the GCM, the Appellant was convicted as charged and his rank reduced to SSgt.

The Appellant being dissatisfied with the said conviction and sentence appealed vide an Amended Notice of Appeal dated 2/10/2014 and filed on 3/10/2014 and granted on 10/2/2016, wherein he raised 8 Grounds of Appeal hereunder reproduced without their particulars:

**GROUNDS OF APPEAL:**

**GROUND 1**

**The honourable trial General Court Martial erred in** **law when it found the Appellant guilty of** **disobedience to Particular orders under instruction in relation to Exhibit 2 from the** **Appellant.**

**GROUND 5**

**The honourable trial General Court Martial erred in law when it held that the charge against the Appellant had been proved beyond reasonable doubt.**

**GROUND 6**

**The verdict of the Honourable General Court Martial is unreasonable and cannot be supported, having regard to the evidence.**

**GROUND 7**

**The honourable General Court Martial erred in law when it failed to sign the record of its proceedings/judgment immediately after the conclusion of trial on 1st November, 2012, as mandatorily required by section 294(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), Rule 76(3) of the Rules of *Procedure (Army) 1972***.

**GROUND 8**

**The Honourable trial General Court Martial erred in law when it assumed jurisdiction and tried and convicted the Appellant on the charge which was not signed by the Appellant's Commanding Officer as required by Paragraphs 39 (c) and 43 of the Manual of Military Law (MML) applicable to the General Court Martial.**

In accordance with the Rules of this Court, the Appellant filed his Brief of argument dated and filed on 12/2/2015, settled by A.I. Omachi, Esq; wherein he formulated 6 issues for the determination of the appeal to wit:

In accordance with the Rules of this Court, the Appellant filed his Brief of argument dated and filed on 12/2/2015, settled by A.I. Omachi, Esq; wherein he formulated 6 issues for the determination of the appeal to wit:-

**1. Whether the judgment or finding of the trial General Court Martial was valid, same having not been signed immediately it was delivered as mandatorily required by *Section 294(1) of the 1999* *Constitution (as amended)* and *Rule 76(3) of the* *Rules of Procedure (Army) 1972*. (Ground I of Amended Notice of Appeal)**

**2. Whether the trial General Court Martial had jurisdiction to try the Appellant when the charge that formed the basis of the trial of the Appellant was not signed by his Commanding Officer. (Ground 2 of Amended Notice of Appeal)**

**3. Whether the trial General Court Martial was right in convicting the Appellant on the charge of disobedience to particular orders when the mental element of the said offence was not proved and when the Respondent had not discharged the legal burden of proof placed on them by law. (Ground 3 and 5 of Amended Notice of Appeal)**

**4. Whether the trial General Court Martial was right when it denied the Appellant of his right to cross- examine PW2 who had given evidence on oath and who had tendered a documentary evidence relevant and vital to the charge. (Ground 4 of Amended Notice of Appeal)**

**5. Whether the trial General Court Martial was right when it held that the prosecution had proved the allegation in the charge beyond reasonable doubt. (Ground 7 and 8 of Amended Notice of Appeal)**

**6. Whether the trial General Court Martial's finding that the Appellant's subordinate clerks had denied receiving any verbal instruction from the Appellant in relation to Exhibit 2 is supported by evidence. (Ground 6 of Amended Notice of Appeal).**

The Respondent on the other hand, filed his Brief of Argument dated 22/5/2015 and filed on 25/5/2015, settled by Chief A.T. Udechukwu, Esq; wherein he formulated 3 issues for the determination of this appeal thus:

**a. Whether the finding/record of proceedings of the** **General Court Martial in this case signed and dated** **on the 24th day of March, 2013 by the President and** **Judge Advocate is valid.**

**b. Whether the trial of the accused/appellant upon** **the charge sheet signed by Col. C.O.C. Ekulide on** **behalf of the General Officer Commanding 1 Division** **is capable of vitiating the trial of the accused person?**

**c. Whether the General Court Martial was right in** **convicting the accused/appellant for the offence of** **disobedience to particular order contrary to *Section*** ***56(2) of the Armed Forces Act, CAP A20 LFN 2004*.**

In response, the Appellant filed his Reply Brief dated 1/9/2015 and deemed properly filed on 29/9/2015. At the hearing of the appeal on 1/2/2016, the Counsel to the Appellant adopted his Brief of Argument and prayed this Court to allow the appeal and set aside the conviction and sentence of the Appellant while the Counsel to the Respondent adopted his Brief and urged the Court to sustain the conviction and sentence of the trial Court.

I shall consider this appeal on 2 issues summed up thus:

**1. Whether the trial General Court Martial convicted and sentenced the Appellant for the offence charged as proved beyond reasonable doubt.**

**2. Whether the conviction of the Appellant can be set aside on the bases that the judgment was not signed immediately pursuant to *Section 294(1) of the 1999* *CFRN (as amended)* and the charge sheet not signed by his Commanding Officer.**

Issue 1 will handle issues 3,4,5 and 6 of the Appellant's and issue C of the Respondent's while Issue 2 will take care of the Appellant's issues 1 and 2 and issues a and b of the Respondent's.

**ISSUE 1:**

**Whether the trial General Court Martial convicted and sentenced the Appellant for the offence charged as proved beyond reasonable doubt.**

It is submitted that the Appellant's offence is that he disobeyed a lawful command by refusing to inform Major E.I. Sam (N/11110) that he was the field Officer from 01-14 February, 2012 as he was ordered to do by his superior officer, Lt. Col. B.T. Vandi (N/9544). However, that the Appellant passed the said information verbally to the 2 subordinate clerks under him as contained in Exhibit 1B and corroborated by PW1, hence was not guilty of disobeying lawful command by refusing to inform Major E.I. Sam (N/11110) that he was the field Officer from 01- 14 February, 2012. Also, that PW2 did not give any evidence in proof of the allegation in the charge against the Appellant. Therefore, it is on the prosecution to prove the allegation in the charge beyond reasonable doubt. He relied on ***KALU vs. NIGERIAN ARMY* (2010) 4 NWLR (PT. 1185) 433 AT 446.** That by Exhibits 1A and 1B, the Appellant unequivocally proved that he passed instruction to his subordinate clerks to carry out. This creates reasonable doubt to be resolved in favour of the Appellant. He relied on ***GABRIEL vs. THE STATE* (2010) 6 NWLR (PT. 1190) 280 AT 295,** He submitted that by the evidence of the Appellant, he has proved that his subordinate officers carry out his verbal and written instructions and orders whether highlighted or not as in the present appeal. Thus, that the Appellant did not REFUSE to inform Major E.I. Sam. That by the above evidence, there is doubt cast on the case of the prosecution which ought to be in favour of the Appellant. He submitted that the burden of, proof is always on the prosecution. He relied on ***AWOSIKA VS. THE STATE* (2010) 9 NWLR (PT.** **1198) 49 AT 52: *AIGBANGBON VS. THE STATE*** **(2007) 7 NWLR (PT. 666) 686: *NWOSU VS. THE*** ***STATE* (1998) 8 NWLR (PT. 562) 433.**

It is further submitted that the GCM was wrong to have denied the Appellant the right to cross-examine PW2 who was called and sworn as a witness to the Respondent contrary to ***Section 219 of the Evidence Act, 2011***. He relied on ***ONWOAMAKA VS. OKOLIE* (1955-56)** **WRNLR 1959; *AKONO VS. NIGERIAN ARMY* (2000)** **FWLR (PT.28) 22121; *FAMAKINWA VS. UNIVERSITY*** ***OF IBADAN* (1992) 7 NWLR (PT.255) 608.** Thus, this amounted to denial of the Appellant's right to fair hearing. He cited ***SURGEON CAPTAIN C.T. OLOWU VS*** ***NIGERIAN NAVY* (2007) ALL FWLR (PT.350) 1278 AT** **1320 PARA C, *OMOKHODION VS. F.R.N.* (2006) ALL** **FWLR (PT.292) 1 AT 19 PARAGRAPH D.**

Furthermore, he contended that the GCM's finding that the Appellant subordinate clerks denied receiving any verbal instruction from him is not supported by any evidence on record. Thus, the GCM ought to give the reason for its decision and where such is not done; the finding can be set aside. He relied on ***NIGERIAN*** ***ARMY VS. AMINUN-KANO* (2010) 5 NWLR (PT. 1188) 429 AT 460; *AFFEGBAI VS. A.G. EDO STATE* (2001) FWLR (PT. 69) 1352; *FEDERAL COMMISSIONER FOR* *WORKS & HOUSING VS. LABADEBI* (1977) 11-12 SC 15; *AKPATA VS. UGO* (2007) ALL FWLR (PT. 349) 1203 AT 1212 C-D.** He urged this Court to resolve thisissue in his favour.

I see no merit to consider the 12-page Reply brief of the Appellant dated 1/9/2015 and filed on 29/9/2015. Obviously, there are no new issues in the argument of the Respondent that necessitated a Reply brief from the Appellant. In fact, the Respondent has rather abandoned issues 4 and 6 raised and argued by the Appellant which are deemed admitted. A Reply brief is not for re-argument or adumbration of issues but for addressing new issues raised in the Respondent's brief, if any. See ***NITEL PLC v. OCHOLI* (2001) FWLR** **(PT.74) 254 AT 267.** I will therefore consider this appeal on the Appellant's and Respondent's briefs.

***Section 56(2) of the Armed Forces Act, 2004***, under which the Appellant was charged provides thus:

***Section*** ***56*:**

**(2) A person subject to service law under this Act** **who, whether wilfully or through neglect, disobeys a** **lawful command is guilty of an offence under this** **subsection 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 case of the Respondent in this appeal is that the Appellant is the Appellant **"at HQ 41 Division Engineers** **Dalet Barracks, Kaduna on or about 31 January 2012** **disobeyed a Lawful command by refusing to inform** **Maj El Sam (N/11110) that he was the field officer** **from 01-14 February 2012 as you were ordered to do** **by your superior officer Lt Col BT Vandi (N/9544)''**

Whereas the Appellant's case as contained on Exhibit 1B at page 165 is that **"I passed the correspondence to my** **clerks, SSgt Afakadi Ali and Sgt Zakariya Jibril to** **carry out accordingly."** This correspondence turned out to be the verbal instruction to the afore-listed subordinate clerks to the Appellant. Is the Appellant supposed to instruct them verbally? This was answered by the Respondent's PW1 as contained at page 34 lines 19-21 of the records that passing oral or verbal instructions in the military is also one of the recognized ways.

It has been asserted by the Respondent that he carried out the lawful order by instructing verbally the 2 subordinate clerks under him but they denied receiving any verbal instruction from the Appellant to Major E.I. Sam. However, the trial GCM acted on this in its judgment at page 129.

Unfortunately, this evidence or extra judicial statement of the denial by the 2 subordinate clerks is not before this Court to consider. A trial or appellate Court must see the Exhibits before taking any decision on them, see ***EKPENUPOLO v. EDREMODA* (2009) 3 MJSC AT 87** **PARAS A-B.** Nevertheless, where there are such contradictions, the 2 subordinate clerks to the Appellant, in persons of SSgt Afakadi Ali and Sgt Zakariya Jibril, it is ideal in an adversarial system of adjudication to bring an accuser face to face with the suspect, otherwise the asserting party will fail. In ***VEEPEE IND. LTD. v. COCOA IND. LTD.* (2008) NWLR (PT.1105) 486,** the SupremeCourt held **"In our adversarial system of litigation inthis country, the law places the burden of proving anexisting fact which is claimed by a partywho would otherwise fail if no evidence at all weregiven on either side ... The Evidence Act requiresfurther that the burden of proof as to any particularfact lies on that person who wishes the Court tobelieve in its existence, unless it is provided by anylaw that proof of that fact shall lie on any particularperson".**

Yet, the Respondent did not care to call the 2 subordinate clerks to assert that they were not given any verbal instructions by the Appellant.

Besides, whereas in the present appeal, it is disputed both by the extrajudicial statement of the Appellant on the one hand and the statements of his subordinate clerks that no verbal instruction was dished out to them by the Appellant on the other hand; to have resolved same by calling on oral evidence which would have settled the doubt in the mind of the GCM. Thus, the 2 subordinate clerks should have been called as witnesses to impute on the Appellant that he never gave them any verbal instruction to Major E.I Sam.

This then would have amounted to disobedience to obey commands. It is therefore only the evidence of the Appellant that stands out here that he verbally instructed SSgt Afakadi Ali and Sgt Zakariya Jibril to inform Major E.I. Sam that he was the field officer within that stated period. This was never in any way challenged by the Respondent as the evidence of PW1 and pW2 did not establish that, neither the said SSgt Afakadi Ali nor Sgt Zakariya Jibril. In ***OGUNYADE v. OSHUNKEYE* (2007) 15 NWLR** **(Pt.1057) 218,** the Supreme Court held thus:

**"The law in my view is settled that where evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so, it is always open to the Court seised of the proceedings to act on the unchallenged evidence before it. Unchallenged sand uncontradicted evidence ought to be accepted by the Court as establishing the facts therein contained."**

Of course, it is not in contention as acceded even by the Respondent's PW1 that passing oral or verbal instructions in the military is also one of the recognized ways particularly contained at page 34 lines 19-21 of the records. Where therefore there is oral and documentary evidence, the documentary evidence carries more weight. See ***KIMDEY V. MILITARY GOVERNOR OF GONGOLA*** ***STATE* (1988) 2 NWLR (PT.77) 445**. In the instant appeal, by Exhibits 1A and 1B, the Appellant unequivocally proved that he passed instruction to his subordinate clerks to carry out. This creates reasonable doubt to be resolved in favour of the Appellant. See ***GABRIEL vs. THE STATE*** **(2010) 6 NWLR (PT. 1190) 280 AT 295.**

From the evidence thus far of PW1, PW2, the Interrogation and statement of the Appellant, it has nowhere been shown or led that the Appellant is forbidden by the Service Law of the Nigerian Army from Clerk to any of the 7 subordinate clerks under him listed at pages 163- 164 of the records, nor is he also in disobedience to give them verbal instructions. Also, it has not been proved, (though he was instructed in writing) by his Superior officer, Lt Col BT Vandi (N/9544) that he was bound to carry it out personally himself and in writing. It has rather been established and admitted that he has been dishing out and delegating such functions of informing field officers of their assigned dates of field duty through his subordinate clerks and that passing verbal instructions is recognised in the military. On the necessity of delegation of powers to subordinate officers in administration, the English Court held in ***CARLTONA LIMITED v. WORKS*** ***COMMISSIONERS* (1943) 2 ALL ER 560** thus:

**"In the administration of government in this country, the functions which are given to ministers,.. are functions so multifarious that no minister could personally attend to them...The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the [minister's] department, Public business could not be carried on if that were not the case."**

Nevertheless, it has been shown and even admitted even by the Appellant at page 64 in answer to Question 18 that -

**"They have not carried out the directive". Does this therefrom amount and portent that the Appellant**

**"disobeyed a Lawful command by refusing to inform Maj El sam (N/11110) that he was the field officer from 01-14 February 2012 as you were ordered to do by your Superior Officer Lt Col BT Vandi (N/9544)."**

He might have been negligent in supervision of his subordinate clerks but not in disobedience to lawful command by refusing to inform Maj E.I. Sam that he was the field officer from 01-14/2/2012. This clearly and inevitably informed the decision of the GCM when at page 129 lines 16-18 it admitted that **"During the investigation, the** **accused failed to supervise his subordinates to see** **that his verbal instructions were carried out."** It follows therefore that he was not in disobedience to the lawful command by refusing to inform Maj E.I. Sam that he was the field officer from 01-14/2/2012 and this issue is accordingly resolved against the Respondent.

**ISSUE 2:**

**Whether the conviction of the Appellant can be set aside on the bases that the judgment was not signed immediately pursuant to *Section 294(1) of the 1999* *CFRN (as amended)* and the charge sheet not signed by his Commanding Officer.**

It is the submission of the learned Counsel to the Appellant that the judgment was signed more than 4 months after it was delivered contrary to ***Rule 76(1)***, ***(2)*** and ***(3) of the*** ***Rules of Procedure (Army), 1972***, ***Sections 296(1) of*** ***the CPC***, ***245 CPA*** and ***279 of the Administration of*** ***Criminal Justice Law, Lagos State*** and the case of ***LIEUTENANT YAHAYA YAKUBU VS. CHIEF OF NAVAL*** ***STAFF* (2004) NWLR (PT. 853) 94 AT 114H-115 A-B.**

Thus, that the said judgment which ought to have been dated and signed on 1/11/2012 and not on 4/3/2013 is liable to be set aside.

Again, that the charge sheet was not signed by the commanding officer of the Appellant as required by ***paragraph 14 of the Rules of Procedure (Army) 1972*** and ***Paragraphs 38***, ***39*** and ***43 of Chapter II of the*** ***Manual of Military Law***. Thus, the Appellant was tried on a bad charge even after an objection to same, He relied on ***OLOWOYO VS. THE STATE* (2012) 17 NWLR (PT. 132)** **346 AT 369 TO 370 H-A , *MADUKOLU VS.*** ***NKEMDILIM* (1962) 1 ALL NLR 587, *BASINCO*** ***MOTORS LTD. VS. WOERMANNLINE* (2009) FWLR** **(PT. 485) 1634 AT 1655 B-E.** He urged this Court to resolve this issue in his favour.

The learned Counsel to the Respondent however objected that Grounds 4 and issue 4 of the Appellant did not spring from the judgment, hence should be struck out. He relied on ***OSIGWELEM VS. INEC* (2011) 9 NWLR (PT. 1253)** **425, *L.S. W.C. V. SAKAMON CONST. (NIG) LTD.*** **(2011) AT 605, *ABUBAKAR VS. JOSEPH* (2008) 13** **NWLR (PT. 1104) 307.**

It is his submission that the findings of the GMC dated and signed on 24/3/2014 is valid and in accordance with ***Section 141*** and ***148 of the Armed Forces Act*** and same has been saved by ***Section 294(5) of the*** ***1999 CFRN (as amended)***. He also relied on ***MAGAJI vs.*** ***NIGERIAN ARMY* (2008) 8 NWLR (PT. 1089) 338 AT** **394.**

Similarly, that the charge sheet upon which the Appellant was tried is valid as same was signed on behalf of the Commanding Officer.

He relied on ***Section 286 of the Armed Forces Act*** and ***NIGERIAN AIR FORCE vs. OBIOSA* (2003) 4 NWLR** **(PT. 810) 233.** Again, that objection to be tried upon a defective charge ought to be taken before plea and not after. He relied on ***MAGAJI v. NIGERIAN ARMY* (supra),** ***OKAROH vs. STATE* (1990) 1 NWLR (PT. 125) 128,** ***AGBO vs. STATE* (2006) 6 NWLR (PT. 977) 545.** He urged this Court to resolve this issue in his favour and allow the appeal, set aside the judgment of the trial GCM, restore the Appellant to his rank of Master Warrant Officer (MWO) and pay him all the difference in arrears of salaries and allowances commensurate with the rank of MWO from the date of confirmation of the judgment of the trial GCM, being 4/4/2014.

The Respondent on the contrary argued that the Appellant was convicted and sentenced under a written law pursuant to ***Section 56(2) of the AFA***. He also relied on ***Section*** ***36(12) of the 1999 CFRN (as*** ***amended)***. He further cited ***AOKO vs. FAGBEMI* (1963)** **1 ALL NLR 400; *OGBOMOR VS. STATE* (1985) 1** **NWLR (PT. 85) 222; *AMAECHI vs. INEC* (2008) 5** **NWLR (PT.1080) 227 SC; *NNADOZIE vs. MBAGWU*** **(2008) 3 NWLR (PT. 1074) 363 SC.** He submitted that the ingredients for securing conviction for disobedience under ***Section 56(2) of the AFA*** are:-

(a) That the accused is subject to service law and the jurisdiction of the GCM;

(b) That the accused was given a lawful command;

(c) That the accused disobeyed the command, and

(d) That the disobedience was wilful or through neglect. He submitted that it is on the prosecution to prove the offence against the Appellant.

He relied on ***SECTION 135(1)* AND *(2) OF*** ***THE EVIDENCE ACT, 2011*, *STATE VS. AZEEZ* (2008)** **14 NWLR (PT.1108) 439 SC; ISMAIL VS. STATE** **(2008) 15 NWLR (PT. 1111) 593 CA, *S.P.D.C. LTD VS.*** ***OLAREWAJU* (2008) 18 NWLR (PT. 1118) 1 SC. That** **by the evidence of PW1, PW2, Exhibits A1, 1B & 2,** the Respondent can be rightly said to have discharged the heavy burden placed on it to prove the offence beyond reasonable doubt in accordance with ***Section 139(1) of*** ***the Evidence Act***, ***OJO vs. F.R.N.* (2008) 11 NWLR (pr.** **1099) 467, *TANKO VS. THE STATE* (2008) 15 NWLR (PT.1114) 591.** That the decision of the trial GCM was based on evidence before it as required by law. He relied on ***AMAECHI vs. INEC* (2008) 5 NWLR** **(PT. 1080) 227 AT 363.** That since the decision was based on evidence, this Court should not tamper with it. He cited ***EBENOGWU VS. ONYEMAOBIM* (2008) 3** **NWLR (PT. 1074) 396.** It is argued in conclusion that evidence of the prosecution not controverted is deemed admitted. He quoted ***MAGAJI vs. NIGERIAN ARMY*** **(2008) 8 NWLR (PT. 1089) 338 AT 393.** He urged this Court to dismiss the appeal and uphold the finding of the GCM.

On whether the GCM had jurisdiction to try the Appellant on a signed charge-sheet by Col. COC Ekulide instead of the General Officer Commanding, Osamo, Bob, in his book "***Fundamentals of Criminal Procedure Law in Nigeria"*** ***2004, Dee-sage Nigeria Ltd. Abuja, p.118***, wrote on the delegation of the powers of the Federal and State Attorneys-General stated:

**"*Sections 174(2)* and *211(2) of the 1999 Constitution* permit the Attorneys-General of the Federation andStates respectively to delegate their powers...againstany person in any Court of law in Nigeria except aCourt-Martial."** (underlined for emphasis)

Again, he settled in his book at page 148 that:

**"The requirement of consent before filing or preferring a charge also applies to Attorneys-General, except in Kano where *Section 185(b) of* *the CPC* has been amended."**

Though the Attorney General can delegate his power of instituting criminal proceedings, the officer must be from within his department. It was also held in ***IBRAHIM v. THE STATE* (1996) 1 NWLR (PT.18)** **650:**

**"i. That the Attorney-General can validly delegate all his powers to an officer in his department; and**

**ii. That where an Attorney-General; delegated all his constitutional powers to the Director of public Prosecutions, in writing by gazette, that the charges filed on behalf of the Attorney-General could be signed by a State Counsel."**

It must be stressed that there is also a limitation to the Attorney-General's power which has to do with the requirement of consent of a High Court Judge to file or prefer a charge and failure to so obtain in filing a criminal charge in the State High Courts nationwide is fatal to the charge. See ***Osamo, Bob "Fundamentals of*** ***Criminal Procedure Law in Nigeria" 2004,*** ***Dee-sage Nigeria Ltd, Abuja, p.125***. This must be seen mutatis mutandis with the charge-sheet signed by Col. COC Ekulide, who claimed to have been authorized to sign on behalf of the Commanding Officer.

The law on this as provided by ***Paragraph 43 of the Manual of Military Law*** provides as follows:

**"A C.O having remanded the accused in accordance with R.P.13 will sign the charge-sheet, Care must be taken to ensure that a person who signs the charge-sheet is the C.O. of the accused at the date of signing; it must not be signed by another officer on his behalf." (The underlined for emphasis)**

***Paragraph 39 of the Manual of Military Law*** also provides:

**"The charge-sheet contains the whole of the issues to be tried at one time and consists of:**

**(a) The commencement of the charge-sheet;**

**(b) The charges, each being divided into –**

**(i) The statement of offence, and**

**(ii) The particulars of the act, neglect or commission constituting the offence;**

**The signature of the commanding officer; and The order of trial" (The underlined for emphasis)**

***Paragraph 14 footnote (b) of the Rules of Procedure (Army) 1972*** provides:

**"The charge-sheet should be prepared by the unit and the commanding officer will sign it after complying with A.A. 1955, S.77 (3)." (The underlined for emphasis)**

The law remains the law and must be obeyed and it does not matter whether the Appellant was adversely affected by the signing of the charge sheet by another officer unauthorized to so sign. On this note the Apex Court in ***AGBITI VS. NIGERIAN NAVY* (2011) 13 WRN 1 AT 49** per Rhodes-Vivour JSC held:

**"If the law states what is required for the Court martial to be properly constituted as regards its members and there is an infraction, no matter how negligible, so long as it is an infraction of the Act the trial ought to be nullified."**

**In the instant case there is an infraction of the law which requires the appropriate superior authority to determine the charge to be tried by a Court martial. In which case the trial based on the charge altered and signed by an officer who is not the appropriate superior authority render it a nullity." (The underlined for emphasis)**

Inanother place, the Court held in ***KUDAMBO v. NIGERIAN* *NAVY* (2014) LPELR-22624(CA) Per OSEJI, J.C.A**, thus:

**"This is indeed trite and incontestable even in a trial before a Court martial as in this case, but it must be done in accordance with the relevant statutory provision as presented by *Section 126 of the Armed Force Act* which requires that where an appropriate superior authority in the military determines that it is desirable that a charge shall be tried by a Court Martial, the prescribed steps shall be taken with a view to its being so tried, Hence the convening officer signs the charge for which an officer is to be tried.**

**There is a contrast here with what obtains in the regular Courts where there is a standing and implied mandate enabling any legal officer to sign a charge sheet as well as amend it when necessary." (The underlined for emphasis)**

The law here is unambiguous and devoid of double interpretation.

It further gives a caveat that the power cannot be exercised by another.

It is express that this power of signing the charge sheet has been delegated only to the Commanding officer; hence power delegated cannot be sub-delegated (Delegatus Non Potest Delegare). See ***IBADAN CITY COUNCIL V. J. O.*** ***ODUKALE* (1972) All N.L.R. 755.**

Furthermore, by the rule of interpretation, the express mention of one thing is the exclusion of another (Expessio Unis Est Exclusio Atterius). See ***A.G. BENDEL v. AIDEYAN* (1989) 4 NWLR (PT.188) 646 AT 672 and *INEC v. PDP* (1999) 11 NWLR (PT.626) 174 AT 191.** Because the CommandingOfficer has been expressly mentioned, it therefore excludes any other officer from signing a charge-sheet on his behalf.

Similarly, though Col. C.O.C. signed on behalf of the General Officer Commanding, there is nowhere that he was armed with a letter or instrument of delegation. At page 137 relied upon by the Respondent that Col. COC Ekulide was delegated to sign on behalf of the GOC, it is indisputably clear that it refers to:

**"OFFICERS AUTHORIZED TO SIGN FOR CONVENING OFFICER**

**10. The following officers are authorized to sign all routine correspondence relating to the Court on behalf of the Convening Officer."**

It is clear therefore that the authority was to sign **"routine correspondence"** which can by no means be the samewith **"charge sheet."**

The said ***Section 186 of the AFA*** relied upon by the Counsel to the Respondent that gave jurisdiction to the GCM to try and convict the Appellant based on the signed charge sheet provides:

***Section 186 of the AFA*** provides:

**"An order or a determination by an officer of the Armed Forces or service authority may, unless otherwise prescribed by rules or regulations made under this Act, be signified under the hand of an officer authorized in that behalf, and an instrument signifying the order or determination and purporting to be signed by an officer stated therein to be so authorized shall, unless the contrary is provided, be accepted by all Courts and persons as sufficient evidence accordingly."**

***Section 131(4) of the Armed Forces Act, 2004*** provides:

**"The Senior officer of a detached unit, establishment or squadron may be authorized by the appropriate Superior Authority to order a Court-martial in special circumstances"**

With due respect to the aforestated sections of the AFA and the case of ***NIGERIAN AIR FORCE V. OBIOSA* (2003) 4** **NWLR (PT.810) 233 AT 269-270**, what is at stake is the signing of a charge sheet and not an instrument which are both very distinguishable. In fact, what the Supreme Court decided in ***NIGERIAN AIR FORCE v. OBIOSA*** (supra) has clearly and distinctly nothing to do with signing of a charge sheet (but an "instrument" or a "convening order for a General Court Martial") which is the bedrock and bottom-line of jurisdiction to the trial of the Appellant in a GCM. An "instrument" is not and does not include a charge sheet referred to in a GCM. A charge sheet therefore cannot be equated with a "routine correspondence" as argued by the Respondent's Counsel.

At page 12 of the records, the Appellant through his counsel objected to the defectiveness of his charge sheet so promptly and before his plea when he submitted before the GCM at page 12 from line 3 of the records thus:

**"Def:' my lord before my client plea to the charge we just want to raise one objection...that objection is for the fact that the charges signed by one COC Ekulide Col for the GOC and we are of the opinion or rather submit that the charge has to be signed by his CO or at best the GOC..."**

Needless to say, the simplest step to have been taken after the painstaking and strenuous objection of the charge sheet was to take it to his CO OR GOC to sign and explain it to the Appellant. What would it have caused the GCM to have amended the "allegedly defective" charge sheet after the objection by the Appellant? Indeed, this was not done in defiance to the express provision of the law that says **"Care must be** **taken to ensure that a person who signs the charge-sheet** **is the C.O. of the accused at the date of signing;** **it must not be signed by another officer on his** **behalf."**

Again, on whether the findings of the trial GCM was valid having not been signed immediately after it was delivered, I will like to foremostly consider whether it was a decision that qualified as a judgment or not. The sentence of the GCM at page 131 of the records reads:

**"Gentlemen, this Court in arriving at this sentence, the Court hereby reduces the accused person to the rank of SSgt subject to confirmation by ASA."**

The disturbing question to ask here is: When does the finding or conclusion or decision of the GCM qualify as a judgment of the GCM?

To my humble opinion, it is after it has been concluded and signed by the President and Judge Advocate as provided under ***Rule 76(1)***,***(2)*** and ***(3) of the Rules of Procedure*** ***(Army) 1972***, which says that:

**"76. (1) The sentence, and any recommendation to mercy together with reasons for making it, shall be announced in open Court.**

**(2) When *paragraph (1)* of this rule has been complied with, the president shall announce in the open Court that the trial is concluded.**

**(3) Immediately after the conclusion of the trial, the president and judge advocate (if any) shall date and sign the record of the proceeding. The president or the judge advocate shall then forward it as directed in the convening order."**

A judgment generally must contain amongst others the decision of the Court on the points for determination and the reasons for the Court's decision by virtue of the combined reading of ***Sections 245 CPA*** and ***268*** & ***269*** ***CPC.*** This invariably implies a fact, data and evidence-based determination of the issues as personally observed and carried out by the trial judge or members of the GCM in the instant appeal. In other words, a judgment must be written by a Judge who has handled the matter and not by any other person on his behalf who did not have the opportunity of observation, analysis and evaluation of the evidence.

Simply, can the Army council or the confirming authority of the pronouncement of the GCM which did not try the accused write or confirm a judgment it did not sit over? Is the confirming authority doing that confirmation with an appellate power and jurisdiction or what?

Unless the confirmation is done (no matter how protracted), does that pronouncement of the GCM remain an exercise in futility? What is then the function and duty of the GCM if it cannot after trying an accused person pronounce judgment and sentence the accused? I think that the caveat "subject to confirmation" is for administrative decorum. Besides, what about the 90 days period within which a judgment must be read and pronounced as statutorily provided? Moreover, ***Sections 141*** and ***148 of*** ***the AFA*** stipulate that the confirmation be done within 60 days, which invariably has recognized the 90 days statutory provisions.

The crux of the Appellant's case nevertheless is that the judgment/findings of the GCM is not valid having not been signed immediately after it was delivered as mandatorily provided by ***Rule 76 (3) of the Rules of Procedure (Army) 1972***, which I have produced supra. In the saidprovision, the Rule provides that after signing,

**"Thepresident or the judge advocate shall thenforward it as directed in the convening order."** See ***Rule 76 (3) of the Rules of Procedure (Army) 1972***.

This was clearly not done until after 3 Months therefrom. It is on record that the judgment of the GCM was not signed on 1/11/2012 when it was delivered until 24/3/2013, more than 4 months thereafter. In ***LIEUTENANT YAHAYA***

***YAKUBA v. CHIEF OF NAVAL STAFF* (2004) NWLR (PT.853) 94 AT 114-115 PARAS A-B,** the Court heldamongst others that:

**"... signing and dating of a judgment of a Court Martial is a mandatory requirement and failure of the Court Martial to sign and date the judgment at the time of pronouncing the verdict is void and thus rendered the entire exercise a nullity."**

If I must be loud, it is my opinion that the Respondent lacked the jurisdiction to try the Appellant on a charge-sheet not signed by his commanding officer, Maj. Gen. G.A. Wahab. Similarly, the verdict of the trial GCM having not been signed immediately it was delivered on 1/11/2012 is not valid. This issue is also resolved against the Respondent.

I must quickly observe, though it is not an issue before this Court that by the provision of ***Section 56(2) of the*** ***Armed Forces Act***, the Appellant if found guilty should be sentenced **"to imprisonment for a term not exceeding two years or any less punishment provided by this Act."** The lesspunishment in lieu of less than 2 years imprisonment ofdemoting the Appellant to 2 steps down to SSgt is notcommensurate to his offence having observed rightly by theGCM that he had put in more service to the Nigerian Armysince 1984 till date, which is about 32 years now.

It is without doubt that the guilt of the Appellant has not been proved beyond reasonable doubt contrary to ***Section*** ***56(2) of the Armed Forces Act, 2004*** and that his trial was without jurisdiction.

Consequently, the conviction and sentence of the Appellant in the judgment of the trial Court martial delivered on 24/3/2013 and confirmed on 4/4/2014, is hereby set aside.

This appeal succeeds. The Respondent is ordered to restore the Appellant to his rank of Master Warrant Officer (MWO), pay all the difference in arrears of salaries and allowances commensurate with the rank with effect from 24/3/2013 when the GCM delivered its judgment.

***IBRAHIM SHATA BDLIYA, J.C.A.*:**

I agree that the appeal be allowed for being meritorious.

The judgment delivered by the General Court Martial (GCM) on the 24/3/2013 and confirmed on the 4th of April 2014, is hereby set aside. I abide by the orders made in the lead judgment.

***OLUDOTUN ADEBOLA ADEFOPE-OKOJIE, J.C.A.*:**

I have had the privilege of reading in advance the judgment of my learned brother **UWANI MUSA ABBA AJI JCA**.

The facts of this case have been succinctly stated in the lead judgment. I am in entire agreement with my learned brother's treatment of the issues in consideration and also hold that the trial of the Appellant was without jurisdiction.

I consequently set aside the conviction and sentence of the Appellant and order the Respondent to restore the Appellant to his rank of Master Warrant Officer with the payment of outstanding salaries as ordered in the lead judgment.