

**SUPREME COURT OF NIGERIA**  
16TH DECEMBER, 1994. SC 218/1992  
**CORAM:- M. BELLO CJN, S. M. A. BELGORE,**  
**I. L. KUTIGI, M. E. OGUNDARE, E. G. OGWUEGBU,**  
**S. U. ONU, A. I. IGUH, JJSC.**

JUSTICE F.O.M. ATAKE ..... COMPLAINANT

AND

CHIEF N.A. AFEJUKU ..... DEFENDANT

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**CONSTITUTIONAL LAW** - *Fair hearing under S.33 (1) of the 1979 Constitution - Proper import - Whether the complainant is entitled to fair hearing - In a criminal complaint commenced by him - Under S. 211 (1) of the CPL Lagos State.*

**CONSTITUTIONAL LAW** - *Retired judicial officer - Whether barred by S. 256 (2) of the Constitution - from personally conducting before a court a case in which he is a party or complainant.*

**CONSTITUTIONAL LAW** - *Referring constitutional questions to the Supreme Court - Under S. 259(3) of the constitution - When a question on criminal procedure will not be answered for being incompetent.*

**FACTS**

The complainant was a judicial officer as a retired Judge of the High Court of the defunct Bendel State. He instituted a private prosecution against the Defendant upon five charges of publication of defamatory matters against the complainant in the Vanguard Newspapers, and thereby committed an offence in respect of each charge contrary to section 375 of the Criminal Code Lagos. Before the trial of the case, the Defendant raised a preliminary objection contending that the complainant had no locus standi to institute criminal proceedings in Lagos against the Defendant by way of private prosecution. The trial Judge also raised another preliminary issue suo motu, as to whether the complainant being a retired judicial officer was entitled to conduct the prosecution of the case in person in view of S.256 (2) of the 1979 Constitution.

The trial Judge in his ruling dismissed the Defendant's preliminary objection. But he held that though the complainant could initiate the case, he was barred from prosecuting it personally as a retired judicial officer. Both parties appealed to the Court of Appeal. Before the hearing of the appeal, the complainant applied to that Court to refer the constitutional issues and the question of locus standi to the Supreme Court for determination under S.259 (3) of the Constitution. The Court of Appeal granted the application. The matter has now been referred to the Supreme Court to determine inter alia, whether the complainant as a retired judicial officer was barred from personally prosecuting his complaint by virtue of S. 256 (2) of the 1979 Constitution.

**HELD** (Unanimously deciding that the Complainant was not barred as per lead judgment of **BELLO CJN**)

***1. 8.33(1) Of the 1979 Constitution - Proper import of fair hearing thereunder***

There is no doubt that by virtue of section 33(1) of the Constitution, the Complainant is entitled to fair hearing in the prosecution of his case and "fair hearing" includes giving to a party or a legal practitioner of his choice the opportunity to present his case before an impartial court. Furthermore, being the Complainant in the case, the Complainant is entitled to prosecute in person under section 211(1) of the Criminal Procedure Law of Lagos State (P. 91 L 33)

***2. "Appear to act as a legal practitioner" properly construed***

I accept the Complainant's submission that to "appear or act as a legal practitioner" within the purview of section 256(2) of the Constitution, a legal practitioner must appear or act for and on behalf of a client. The Complainant, though a legal practitioner, did not appear or act for and on behalf of a client in the High Court. I hold that the subsection does not deprive the Complainant his right to conduct and prosecute his case in person. (P. 93 L 29)

***3. Retired judicial officer's right to personally conduct his case***

Accordingly, my answer to question No. 6(A) is: section 256(2) of the Constitution does not bar a judicial officer who has ceased to be one from appearing before a court or tribunal to conduct in person a case in which he is a party or a complainant in a criminal case. (P. 94 L 7)

**4. Question on criminal procedure is not competent for reference**

Certainly, question No. 6(C) is not a question as to the interpretation or application of the 1979 Constitution. It is a question for the interpretation or application of section 340(2) of the Criminal Procedure Law of Lagos State and is therefore incompetent for reference under section 259(3). For this reason, I shall not decide the question and I remit it to the Court of Appeal for its determination. (P. 95 L 14)

**NOTABLE POINTS OF INTEREST****BELLO CJN****1. Whether legal practitioners have monopoly of citation of authorities**

Learned counsel for the Defendant did not show us any authority in support of his submission that it is trite law that legal practitioners have the monopoly of citations of authorities in a court of law. Surely, the submission is not correct. It is not only trite law but it is also not law at all. A litigant, whether a legal practitioner or a layman, who conducts his case in person has the right like any legal practitioner who appears and acts for a client to cite authorities to advance his case. (P. 93 L 36)

**OGUNDARE JSC****2. When a legal practitioner can appear without representing any party - *amicus curiae***

There is, however, an exception to the rule that a legal practitioner who is not a party to the proceeding can only appear and have right of audience if he represents one of the parties - his client. The exception is where he appears as *amicus curiae* before a court. Every court has an inherent power to invite barristers and/or solicitors of considerable experience to appear before it to assist in the proper administration of justice when important issues of law or fact are being considered. A legal practitioner so invited, gives his views of the law in a dispassionate manner. He does not act for any of the parties but is in court to assist the Bench in unravelling intricate questions of law it is faced with. (P. 105 L 6)

**3. *Audi alteram partem* - A party is not compelled to brief a lawyer**

There is also the requirement of the rule of natural justice that a party be heard - the audi alteram partem rule. In my view, to refuse a party audi

ence because he is not represented by a legal practitioner is to deny him of his fundamental right to be heard. I know of no rule of law or practice which compels a party to seek representation by counsel in the prosecution of his case. The nature of the proceeding may be such that prudence requires that he does just that; but he is under no compulsion to retain the services of counsel. (P. 107 L 7)

**OGWUEGBU JSC**

***4. Whether the complainant was appearing or acting as a legal practitioner***

10 To appear or act as a legal practitioner, there must be that element of legal service rendered to a third party whether for a fee or not. When therefore, the complainant was in the High Court of Lagos State prosecuting Suit No LCD/31/90 against the defendant, he was not appearing or acting as a legal practitioner within the provision of section 256(2) of the Constitution  
15 which bars a retired judge from appearing or acting as such. A barrister who is a party in a case must elect to conduct his own case or to have it conducted by counsel. (P. 112 L 5)

**ONU JSC**

20 ***5. Denial affair hearing by imposition of a legal practitioner***

To afford a party the opportunity to present his case in person, is to accord him fair hearing as one of the twin pillars of justice. By denying the Complainant the right and consequently the opportunity of presenting his case in person, the learned trial Judge denied him a fair hearing. Any hearing  
25 granted to the Complainant through a legal practitioner forced down his throat, so to say, could not be rightly said to be a legal practitioner of his (complainant's) choice; he is *ipso facto* a legal practitioner the court compels him to brief as a counsel to conduct his case for him. (P. 117 L 31)

30 **IGUH JSC**

***6. Retired judge's performance of legal duties outside the court***

We are however not now concerned with the prohibition of a retired Judge in respect of his performance of legal duties outside the court or tribunal as quite clearly, section 256(2) of the 1979 Constitution does not appear to  
35 preclude him from acting practitioner outside the court. That section of the Constitution only precludes him from appearing and acting in his capacity as a legal practitioner before a court of law or tribunal in Nigeria. (P. 128 L 20)

***7. Implications of a legal practitioner appearing in person as a litigant***

Accordingly a litigant who is also a legal practitioner in a cause or matter ceases to be a legal practitioner in so far as such a cause or matter is concerned and is therefore not competent to represent or conduct the case of any other party in the proceedings. In such a case, he appears in person as a litigant and not as a legal practitioner and may therefore only speak on his own behalf. (P. 129 L 7)

***REPRESENTATION***

Dr. E. Atake with A.R. Fatunde and A.E. Atake for the complainant. 10  
Fred Agbaje with Miss I. Juliet Ibekaku and Mr. V.E. Eghigator for the Defendant

***CASES REFERRED TO***

Akilu v. Fawehinmi 122 (No. 2) (1989) 2 N.W.L.R. 15  
Adesanya v. President of Nigeria (1981) N.S.C.C. 146  
Okoduwa v. The State (1988) N.S.C.C. (Part 1) Ahmed 718 at 733  
Ahmed v. Bench (1950) S.C.J. 131 (F.C.)  
Rowtley Holmes & Co v. Barber (1977) 1 All. E.R. 801  
Salomon v. Salomon & Co. Ltd (1897) A.C. 22. 20  
R.V. Aluko (1963) All N.L.R. 398  
Horn v. Richards (1963) N.N.L.R. 67.  
Nwokocha v. Governor of Anambra State (1984) 6 S.C. 362  
Governor of Kaduna State v. Dada (1986) 4 N.W.L.R. (pt. 38) 687.  
The Queen v. Judge of County Court of Oxfordshire (1894) 2 QB 440, 447 25  
Newton v. Ricketts (1862) 9 HLR 626 11 E.R. 731  
Queen v. Philips (1843 - 1846) 1 cox Criminal Cases 17.  
R. v. Philips (1844) 1 Cox. C.C. 17  
Newton v. Denman (1874) L.R. Eg. 127  
Thomas & Ors. v. Olufosoye (1986) 1 N.W.L.R. (Part 18) 669 30  
Nneji v. Chukwu (1988) 3 N.W.L.R. (Part 81) 184.  
Gamioba & Others v. Ezezi 11 (1961) All NLR 584  
Olawayin & Others v. Commissioner of Police (1961) All NLR 622.

***STATUTES REFERRED TO***

Criminal Code of Lagos State S.375 35  
Constitution of the Federal Republic of Nigeria 1979 SS. 256(2), 259(3), L

33(1) & (6), 17(2)

Criminal Procedure Law of Lagos State Cap. 32 Vol. 2 Laws of Lagos State 1973 SS. 340(2), 211(1)

5 Legal Practitioners Act 1975 SS. 24, 7(1), 2 (1-4), 6(1)

Indian Constitution SS. 124(7) & 220

Constitution of the Federal Republic of Nigeria 1960 S. 108(2)

### **BOOKS REFERRED TO**

10 1. Blacks Law Dictionary 5th Edition page 1055

2. Dias Jurisprudence 5th Ed.

3. Salmon on Jurisprudence 12th Ed.

### **LEAD JUDGMENT BY BELLO CJN**

15        The Complainant was a judicial officer as a Judge of the High Court of the former Bendel State. He retired as such on 30th September, 1977. On the 11th of April, 1990, he instituted in the High Court of Lagos State a private prosecution against the defendant upon five charges of publication of defamatory matters of him in the Vanguard Newspaper in its  
20 issue of 17th of February, 1990 and thereby committed an offence in respect of each charge contrary to section 375 of the Criminal Code of Lagos State.

      Before the trial of the case, the defendant raised a preliminary objection that having regard to the decision in *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Pt.102)122, the complainant had no locus standi to institute criminal proceedings in Lagos against the defendant by way of private prosecution. Also, suo motu Kessington J. before whom the preliminary objection was taken raised another preliminary issue on the interpretation of section 256(2) of the Constitution of the Federal Republic of Nigeria  
25 1979 as to whether the Complainant, being a retired judicial officer, was entitled to conduct the prosecution of the case in person. After having heard the arguments of counsel for the parties on the two preliminary matters, the Judge in his ruling dismissed the preliminary objection of the defendant but held that by virtue of section 256(2) of the Constitution the  
30 Complainant could initiate the case but was barred from prosecuting it. He struck out the case on this latter ground.

      Both parties were not satisfied with the ruling. The Complainant appealed to the Court of Appeal against the order striking out his case on

the ground of the constitutional issue while the defendant cross-appealed against the dismissal of his preliminary objection.

After the parties had filed their briefs in the Court of Appeal but before the hearing of the appeal, the Complainant applied to that Court requesting it to refer the constitutional issues and the attendant question of locus standi raised in the appeal to this Court for decision. In accordance with the decision of this Court in *Adesanya v. President of Nigeria* (1981) N.S.C.C. 146, the Court of Appeal did not hear and determine the appeal. It granted the request and on the facts of the case, which I had already stated, referred the following questions to this court for decision under section 259(3) of the Constitution which provides:-

*(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate.*

The questions referred are as follows:-

*(A) Does section 256(2) of the Constitution of the Federal Republic of Nigeria 1979 bar a judicial officer who has ceased to be one from appearing before a Court or Tribunal to conduct in person a case to which he is a party (in the instant case a complainant in a criminal case).*

*(B) If it does, and the judicial officer who has ceased to be one has already appeared before the Court to conduct in person a case in which he is a party is it a proper application of section 256(2) for the Judge before the case is being heard to strike out the entire suit-*

*(i) at all,*

*(ii) Without giving the retired Judge an opportunity to brief counsel to conduct the case on his behalf.*

*(C) Does section 340(2) of the Criminal Procedure Law of Lagos State Cap. 32 Vol.2 Laws of Lagos State 1973 as amended, apply to all offences as implied in the judgment of Karibi- Whyte, J.S.C. or to indictable offences only as stated in the judgment of Bello, C.J.N in *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Pt. 102) page. 122.*

Both parties filed briefs in this Court and emphasised the salient points by oral argument at the hearing of the reference. In respect of question No.6(A), the Complainant contended that Kessington J. had erred in law when he held that the Complainant, being a retired Judge, could not  
5 conduct and prosecute the case in person because of the provision of section 256(2) of the Constitution. He argued that the subsection read with the definition of 'Legal Practitioner' under section 24 of the Legal Practitioners Act 1975 only precluded a retired Judge from appearing and acting as a legal practitioner in a court of law and it did not bar him, the Complainant, from conducting and prosecuting personally the case of which he was  
10 party.

Buttressing his argument that to appear and act as legal practitioner there must be rendering before the court a legal service to a client, he referred to Blacks Law Dictionary 5th Edition page 1055, R. J. Edwards  
15 Inc. v. Hart OKL 504 P2nd 407 at 416; Rhode Island Bar Association v. Lesser 68 p. 1 1426 A 2nd 6 and State v. Schumacher 214 Kan 11510 P2nd L15, 1227.

He further argued that by denying him to prosecute the case personally, Kessington J. had deprived him of his right to a fair trial under  
20 section 33(1) of the Constitution and in accordance with the dictum of Nnaemeka-Agu J.S.C. in Okoduwa v. The State (1988) 1 N.S.C.C. (Pt.1) 718 at 733; (1988) 2 NWLR (Pt.76) 333, fair hearing includes giving to a party or a legal practitioner of his choice the opportunity to present his case before an impartial court or other tribunal. He also stated that the Judge  
25 had denied him of his right to prosecute the case under section 211 (1) of Criminal Procedure Law of Lagos State.

The Complainant also referred us to section 24(7) and 220 of the Indian Constitution, which is in *pari materia* with our section 256(2) and which ban and prohibit an ex-Judge from practice. However, he did not  
30 cite any case on the interpretation of the sections. Igbal Ahmed v. Alahabad Bench (1950) S.C.J. 131 (F.C.) referred to by the Complainant is not relevant to the circumstances of the case before us. He urged the Court to answer the question in the negative.

The substance of the contention of learned counsel for the defendant in respect of question 6(A) is that the Complainant, being a retired Judge, could not by virtue of section 256(2) of the Constitution prosecute the case in person and must brief counsel to do it for him. In his brief, he indulged himself into jurisprudence on the concept of a 'person' and "sec-

ond person" as expressed in Dias Jurisprudence 5th Ed. and Salmon on Jurisprudence 12th Ed. He cited *Re King's Will Trusts* (1964) CH 542 (1961) AC 12; *Rowtley Holmes & Co. v. Barber* (1977) 1 All. E.R. 801; *Lee v. Lee Air Farming Ltd* ab1960) 3 All ER 420 and *Solomon v. Solomon and Co. Ltd.* (1897) A.C. 22. In parenthesis, I may state that I have been unable to appreciate the relevance of these cases to the present case subject to this reference.

Learned counsel submitted in his brief that the Complainant as a legal practitioner was rendering the services of a legal practitioner for and on behalf of himself in the case and he, the Complainant, had cited authorities copiously and skillfully as any other competent legal practitioner of his maturity and experience would have done. He gave as an example *R. v. Aluko* (1963) All NLR 398 which according to him the Complainant had cited. He did not show the page in the records of reference where the case was cited and I am unable to find the case in both the old and new (1963) All Nigeria Law Report Volumes. He submitted that it is trite law that the right to cite authorities in our courts is a monopoly of legal practitioners but did not support the assertion with any authority. He urged us to hold that the Complainant was engaged in the practice of law and appeared and acted as a legal practitioner in the case which was a violation of section 256(2) of the Constitution. In making this submission learned counsel stated that he was not unmindful of section 17(2) of the Constitution, *Fawehinmi v. N.B.A* (1989) 2 NWLR (Pt.105) 494 at 532 and *Okoduwa v. The State* (1988) 2 NWLR (Pt.76) 333. He then dealt with the provision of section 33(6) of the Constitution which guarantees every person charged with a criminal offence the right to defend himself in person or by a legal practitioner of his own choice.

Finally, he contended that section 211 (1) of the Criminal Procedure Law was inconsistent with section 256(2) of the Constitution and was therefore void. The provisions of the Constitution prevailed. He invited us to answer the question positively.

There is no doubt that by virtue of section 33(1) of the Constitution, which reads:-

*'In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to*

*secure its independence and impartiality'*

The Complainant is entitled to fair hearing in the prosecution of his case and 'fair hearing' includes giving to a party or a legal practitioner of his choice the opportunity to present his case before an impartial court:  
5 Okoduwa v. The State (supra) at p. 733 and Fawehinmi v. N.B.A. (1989)  
2 N.S.C.C. (Pt.11) 3 at page 32.

Furthermore, being the Complainant in the case, the Complainant is entitled to prosecute in person under section 211(1) of the Criminal Procedure Law of Lagos State. The subsection provides:-

10 Both the complainant and defendant shall be entitled to conduct their respective cases in person or by a legal practitioner.

Now, the question is whether section 256(2) of the Constitution deprives the Complainant the afore stated right to conduct and prosecute his case in person. For ease of reference, the provision of the subsection  
15 may be reiterated. It provides:

Any person who had held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria.

There is no dispute that the Complainant had held office as a  
20 judicial officer and ceased to be so. The issue therefore is whether he appeared or acted as a legal practitioner in the case before the High Court. The proposition that a barrister litigant who conducted his case in person was acting as a legal practitioner was held to be misconceived in the Fawehinmi v. N.B.A. (supra) at page 20 where Obaseki, J.S.C. delivering  
25 the lead judgment stated:-

A barrister litigant is entitled to conduct his case personally or by counsel of his choice. This right is not guaranteed in civil cases under our Constitution but it is in criminal cases. See section 33(6)(C) of the Constitution of the Federal Republic of Nigeria 1979. I agree with Lord Westbury,  
30 L.C. when in the case of New Brunswick & Anor v. Conybeare 11. E.R. 907 he said the characters should not be mixed. A barrister litigant has a right to conduct his case in person as any other member of the public. It is not right or correct to say that a barrister represents himself. Such a representation does not exist in law although the legal training he has acquired  
35 can be utilised for his own benefit and for the benefit of others who retain his services when he has properly enrolled and paid his fees as a legal practitioner. See:

Section 7(1) of the Legal Practitioners Act 1975;

Section 2(1) of the Legal Practitioners Act 1975;

Section 6(1) of the Legal Practitioners Act 1975.

The word 'represent' in the context of legal representation means to act or stand for or be an agent for another. 5

In his judgment at pages 32 to 33, Karibi-Whyte, J.S.C. observed as follows:-

*The question is whether he should as a litigant enjoy the privileges of his profession? In New Brunswick and Canada Railway Co v. Conybeare (supra), Lord Westbury seems to suggest that the respondent must elect to argue in person or not. Mr. Conybeare, the respondent, had appeared as junior counsel to Mr. G. I Russel. Thus inferring that Conybeare should appear in person as respondent and not also as a junior counsel. The issue is both one of capacity and the privileges attaching to the capacity. Counsel appears at the Bar of the Court and will be entitled to address the court on behalf of his client. This right is exercised by counsel for the client and can also be exercised by the client himself. I do not appreciate the problems that may arise where the counsel who is a litigant will be required to give evidence in his own behalf and will be cross examined by the opponent. This is understandable since he is not merely counsel and ought to be able to give credible evidence in his action. It is not the case of counsel giving evidence in an action in which he is merely counsel- See Horn v. Richards (1963) NRNL 67.* 10 15 20

*A litigant who is a legal practitioner conducts his case as a litigant, not as legal practitioner representing himself, the litigant.* 25

*The personality here is not split. He merely draws on the fountain of his legal training. It is not the question of a mixture of two characters.*

I accept the Complainant's submission that to 'appear or act as a legal practitioner' within the purview of section 256(2) of the Constitution, a legal practitioner must appear or act for and on behalf of a client. The Complainant, though a legal practitioner, did not appear or act for and on behalf of a client in the High Court. I hold that the subsection does not deprive the Complainant his right to conduct and prosecute his case in person. 30 35

Learned counsel for the defendant did not show us any authority in support of his submission that it is trite law that legal practitioners have the monopoly of citations of authorities in a court of law. Surely, the sub-

mission is not correct. It is not only trite law but it is also not law at all. A litigant, whether a legal practitioner or a layman, who conducts his case in person has the right like any legal practitioner who appeared and acts for a client to cite authorities to advance his case. Obaseki and Karibi-Whyte  
5 JJ.S.C. correctly stated the law in the passages I have earlier set out in *Fawehinmi v. NBA*. (supra).

Accordingly, my answer to question No. 6(A) is: section 256(2) of the Constitution does not bar a judicial officer who has ceased to be one from appearing before a court or tribunal to conduct in person a case in  
10 which he is a party or a complainant in a criminal case.

Undoubtedly, question No.6(B) was based on the supposition that the answer to question No.6(A) was in the positive. Since I have answered the latter question in the negative, question No.6(B) has become futile and a decision on it will be a mere academic exercise. This Court has persist-  
15 tently refused to decide academic constitutional question: See *Nkwocha v. Governor of Anambra State* (1984) 6 S.C. 362 (1984) 1 SCNLR 634 and *Governor of Kaduna State v. Dada* (1986) 4 NWLR (Pt.38) 687. For this reason, I would refrain myself from deciding question No.6(B).

It remains to examine question No.6(C). Now, the provision of  
20 section 259)(3) of the Constitution is clear and unambiguous that a question as to the interpretation or application of the Constitution is the foundation for making reference under the subsection. Any question of law, however substantial it is, which does not involve the interpretation or application of any of the provisions of the Constitution is outside the ambit of  
25 the subsection and is therefore not referable.

The case of *Otugor Gambioba v. Ezezi II* (1961) 2 SCNLR 237 was a reference by the High Court of Western Nigeria to the then Federal Supreme Court under section 108(2) of the 1960 Constitution where the Court held that the only issue referable under that subsection was a ques-  
30 tion of law as to the interpretation of the Constitution. The Court refused to answer the question referred to it because it was premature. In *Olawoyin v. Commissioner of Police* (1961) 2 SCNLR 278 which was also a reference from the High Court of Northern Nigeria under the same subsection, the Court found that the question referred to it did not involve the interpreta-  
35 tion of the 1960 Constitution but merely its application. It did not decide the question and remitted it to the High Court to proceed with the appeal before it.

It may be observed that although section 108(2) was in pari mate-

ria with our present section 259(2), the two are not identical. The former subsection provided:

*(2) Where any question as to the interpretation of this Constitution or the Constitution of a Region arises in any proceedings in the High Court of a territory and the Court is of opinion that the question involves a substantial question of law the court may, and shall if any party to the proceedings so request, refer the question to the Federal Supreme Court.*

The subsection did not include question as to the ‘application’ of the Constitution as the present section 259(3) has done. Nevertheless, except that the Court would have decided the question in Olawoyin’s case if it had come under section 259(3), the decision in the two references are still valid and relevant in reaching decision on the reference before us.

Certainly, question No.6(C) is not a question as to the interpretation or application of the 1979 Constitution. It is a question for the interpretation or application of section 340(2) of the Criminal Procedure Law of Lagos State and is therefore incompetent for reference under section 259(3). For this reason, I shall not decide the question and I remit it to the Court of Appeal for its determination.

To summarise, my answers to the questions are:-

1. Question No.6(A) No;
2. Question No.6(B) Not answered; and
3. Question No.6(C) Not answered.

The case is remitted to the Court of Appeal to proceed with the appeal and cross-appeal before it.

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### **BELGORE JSC**

This reference by the Court of Appeal is by virtue of S. 259 (3) of the Constitution and the main question relates to S.256(2) of the Constitution of 1979 which provides:

S.256(2) Any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria.

What are the operative words in this subsection? To my mind the most important words are ‘appear’ and ‘act’. The two words operate in subsection as alternatives and qualify the word ‘legal practitioner’. Then who is a legal practitioner? He is that person that has been called to the

Bar to practice as a barrister and solicitor of the Supreme Court of Nigeria as provided in section 2(1), (2), (3) and (4) of Legal Practitioners Act.

The appellant in this matter under reference by the Court of Appeal was no doubt entitled at one time to practice as a legal practitioner in Nigeria as a result of which he was appointed a Judge of the High Court of Mid-Western State from which he retired. By virtue of S.256 (2) (supra), he cannot appear or act as legal practitioner again in Nigeria. This prohibition is to the effect that he can no longer practice in the Court or before any tribunal as a legal practitioner. But there is a further question whose resolution will give a final answer to the points now in reference. Is a person who ceased to be a judicial officer and has a Writ issued against him in his personal capacity precluded from answering the writ whether in writing or by appearance before a Court? Or to put it in another way: Is a retired judicial officer held for a criminal offence and cannot afford the services of a counsel precluded from appearing before the Court to answer to the charge and offer his defence? My answer to the question is that a judicial officer ceasing to hold office who intends to exercise his constitutional right of defending himself and prosecute his case whether in civil or criminal matter, is not a legal practitioner before that Court or tribunal; he is a party simpliciter. He does not wear wig and robe, he does not sit in the well of the Court reserved for legal practitioners i.e. the bar, and to all intent and purposes remains a litigant simpliciter. So for the purpose of S. 256 (2) of the Constitution of 1979 the appellant in this case is a litigant, not a judicial officer who has ceased to hold office, in which case the answer to question 6B even assuming that the answer to question 6A has been in the positive, the suit is not vitiated or voided simply by reason of who filed it, it must be adjourned for the applicant to brief a counsel. The applicant must at least be heard and the matter should not be peremptorily struck out as done in the instant case. At any rate, since the answer to question 6A is in the negative, the attempt to answer question 6B fully is merely academic.

But the question as to S.340 (2) Criminal Procedure Law of Lagos State, the reference to my mind is not one of those allowed under the law. Only matters as to the interpretation of the Constitution can be so referred just as S.256(2) (supra) has been referred. Court of Appeal can have a proper look at the section and interpret it in accordance with the preponderance of any authority available. For the Supreme Court, I believe the

reference is not only premature but also without jurisdiction and the answer to the reference on S.340(2) (supra) will better be left for determination by the Court of Appeal. Perhaps a more auspicious occasion will arise to revisit *Akilu v. Fawehinmi* (No.2) (1988) 2 NWLR (Pt.102) 122. The purport of reference is clear under S. 259(3) of the Constitution of 1979 quoted in the lead judgment of the Chief Justice of Nigeria. 5

I therefore answer as the Chief Justice of Nigeria has done in this reference that Question 6C is not within the jurisdiction of the Court of Appeal to refer to this Court; similarly this Court has no jurisdiction to look into the reference. The purport of S. 259(3) of the Constitution of 1979 is clear where it provides: 10

(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal and the Court is of opinion that the question involves substantial question of law, the Court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate. 15

I therefore hold this Court has no jurisdiction to entertain this particular reference much as the Court of Appeal cannot under the Constitution make such a reference. 20

### **KUTIGI JSC**

I have had the privilege of reading before now the judgment just delivered by my learned brother Hon. Chief Justice of Nigeria, Bello, C.J.N. The facts and the issues involved have been fully and beautifully set out. I entirely agree with the reasons and conclusions so lucidly stated therein. I do not wish to add anything. 25

Consequently, I would answer the three questions referred to the court as follows:- 30

Question 6(A) No

(B) Not answered

(C) Not answered

I will also remit the case to the Court of Appeal for the determination of the appeal and cross-appeal. 35

**OGUNDARE JSC**

The complainant, Justice F.O.M. Atake was a one-time High Court Judge of Mid-Western (later Bendel) State; he retired on 30th September, 5 1977. Sometime in April, 1990, he preferred a complaint in the High Court of Lagos State against the defendant charging him on five counts with the offence of publishing defamatory matter contrary to and punishable under Section 375 of the Criminal Code, Cap. 31 Laws of Lagos State, 1973. The case eventually came before Kessington J. for trial. The defendant 10 raised by way of a motion on notice, seven objections to the proceedings. At the hearing of the motion only one of the objections was pursued with, that is to say that the right of a private prosecutor to bring anybody before the court for the punishment of any offence under the Criminal Code, Cap. 31 Laws of Lagos State 1973 (except for the offence of perjury) has been 15 abolished.

The learned trial Judge took arguments from the complainant who appeared in person and learned counsel for the defendant, at the conclusion of which he raised suo motu the competence of the complainant, in the light of Section 256(2) of the Constitution of the Federal Republic of 20 Nigeria 1979 (hereinafter is referred to as the Constitution), to conduct the prosecution of the case in person. Legal arguments were proffered by the complainant and defence counsel. The complainant argued that Section 256(2) did not preclude him from appearing in person to prosecute a case in which he was a party. Needless to say that the learned defence counsel, 25 Fred Agbaje Esq. argued to the contrary.

The learned trial Judge in a considered ruling held (1) that the complainant was not barred from bringing a private prosecution for a criminal offence which is a mis-demeanour and (2) that the complainant can initiate but not personally prosecute the case before him. In the same ruling 30 he turned down the complainant's earlier request for a reference to the Court of Appeal of the Constitutional issue of the application of section 256(2) of the Constitution. Because of his conclusion on the propriety of the complainant to prosecute the case, he struck it out.

Both parties were dissatisfied - the Complainant on the learned 35 Judge's conclusion in Section 256(2) and the striking out of the case, and the defendant on the Judge's finding that the complainant had locus to

bring a private prosecution in the matter. Each appealed to the Court of Appeal (Lagos Division). Both parties filed and exchanged their respective Briefs of argument. At the request of the complainant for a reference to this Court of the constitutional issue and the attendant question of locus standi raised in the appeal, the court below in a case stated referred the following 5 questions to this Court for determination:

(A) Does Section 256(2) of the Constitution of the Federal Republic of Nigeria 1979 bar a Judicial Officer who has ceased to be one from appearing before a Court or Tribunal to conduct in person a case to which he is a party (in the instant case a complainant in a criminal case). 10

(B) If it does, and the Judicial Officer who has ceased to be one has already appeared before the Court to conduct in person a case in which he is a party is it a proper application of Section 256(2) for the Judge before whom the case is being heard to strike out the entire suit:-

(i) at all. 15

(ii) without giving the retired Judge an opportunity to brief counsel to conduct the case on his behalf.

(C) Does section 340(2) of the Criminal Procedure Law of Lagos State Cap. 32 Vol. 2 Laws of Lagos State 1973 as amended, apply to all offences as implied in the judgment of Karibi-Whyte, J.S.C. or to indictable offences only as stated in the judgment of Bello, C.J.N. in *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Pt. 102) p. 122. 20

The parties filed and exchanged their respective briefs of arguments in this Court and learned counsel appearing for them proffered oral arguments. Their submissions shall be considered hereafter as necessary. 25

I have earlier stated the facts which are undisputed. For ease of reference, however, I shall state them hereunder once again in the words used by the court below in its reference to this Court.

They are:

(a) *That the complainant is a retired Judge of the High Court of Bendel State.* 30

(b) *That he was conducting the case, i.e. the prosecution of the defendant in person.*

(c) *That the five charges laid by the complainant against the defendant are laid under Section 375 of the Criminal Code Law of Lagos State Cap. 31 Vol. 2 and punishable thereunder.* 35

(d) That before the High Court the defendant's counsel by way of a preliminary objection contended that the complainant has no locus standi to institute criminal proceedings in Lagos State against the defendant by way of private prosecution and that after hearing arguments thereon the  
 5 High Court in its ruling dismissed the objection.

(e) That the High Court (Kessington, J.) however *Suo motu* raised the question of the interpretation of Section 256(2) of the Constitution of the Federal Republic of Nigeria, 1979 contending that the complainant being a retired Judge of the High Court could not conduct the prosecution  
 10 in person and that after hearing arguments the judge (Kessington, J.) in his ruling held on to his contention and struck out the charges.

(f) That the complainant consequently appealed to the Court of Appeal against the ruling in paragraph (2)(e) and the defendant cross appealed against the ruling in paragraph 2(d) above.

15 Question A:

Section 256(2) of the Constitution provides:

Any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria.  
 20 (italics is mine)

The resolution of this question rests on the interpretation that is placed on the underlined portion of the sub-section. The expression 'legal practitioner' is not defined in the Constitution but it is defined in Section 24 of the Legal Practitioners Act, Cap. 207 Laws of the Federation of Nigeria,  
 25 1990 as meaning:

a person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings.

Sub-section (1) of Section 2 of the Act states:

30 Subject to the provisions of this Act, a person shall be entitled to practise as a barrister and solicitor if, and only if, his name is on the roll.

Reading these two provisions together, a legal practitioner is, thus a person whose name is on the roll as defined in Section 23(1) of the Act.

It is not in dispute that the complainant is one of such persons. He  
 35 is therefore a legal practitioner within the meaning of that expression in Section 256(2) of the constitution. The question that follows however is:

when he appears in person before a court or tribunal as a party conducting his own case, is he appearing or acting as a legal practitioner before that court or tribunal?

It is complainant's contention in the trial High Court, in his brief in the court below, in his brief in this Court and in the forceful arguments of learned counsel appearing for him at the oral hearing before us that he is not. He contends that to appear or act as a legal practitioner, he must be seen to practise as a barrister or solicitor, rendering legal service to another a client. He refers to Black's Law Dictionary, 5th Edition at page 1055, Sections 124(7) and 220 of the Indian Constitution and the history behind those provisions in the Indian Constitution, and a number of other authorities some of which I shall refer to later in this judgment and concludes that Section 256(2) of the Constitution does not preclude a retired Judge from conducting in person before a court or tribunal a case in which he is a party.

Mr. Agbaje, for the defendant contends to the contrary. It is his submission all along that the complainant being a judicial officer who has ceased to be one cannot personally conduct a case before any court or tribunal because he would be assuming the role of a barrister and/or solicitor, a role he relinquished on being appointed a judge and on taking the judicial oath and that the interpretation and application of Section 256(2) of the Constitution by the learned trial Judge are correct. After delving in his brief before us into what he refers to as 'legal abstraction', he submits that the complainant appears in two distinctive capacities, that is, a complainant and a legal practitioner/prosecutor. He argues in paragraphs 14 and 15 of his brief thus:

14. Acting in the capacity of a complainant in the case, he gave orders to himself in another capacity as legal practitioner to 'appear' and 'act' for and on behalf of himself to prosecute the defendant/respondent in the case.

15. I further submit my lords that by so doing, the appellant being a retired Judge acted in violation of Section 256(2) of the Constitution.

I think Question (A) can be resolved without calling in aid the 'legal abstraction' learned counsel for the defendant engaged in. All the arguments advanced by learned counsel in support of his submission in paragraph 15 above remain, to all intents and purposes, 'legal abstraction'. With profound respect to him, I find no merit in these arguments; they are far from the reality of the situation before us.

That a legal practitioner can appear to conduct in person a case in which he is a party is no longer open to argument. This Court so decided in *Fawehinmi v. Nigerian Bar Association (No.1)* (1989) 2 NSCC 1.21; (1989) 2 NWLR 494, 532 where Obaseki, J.S.C. delivering the lead judgment of  
5 the court, observed:

Every appellant, be he a barrister or solicitor or ordinary member of the public, has a right to argue his case either at first instance or on appeal in person.

But in so doing, will he be acting as a legal practitioner? I rather  
10 think not.

A legal practitioner cannot be said to be a barrister or solicitor acting as such in a case unless the relation of barrister or solicitor and client exist between him and a third party known as his client. A legal practitioner can only appear or act as such in court when he appears for a particular  
15 client. Indeed, his appearing in that character is the condition of his being heard, otherwise he would have no right of audience in a case in which he is not a party. As Lord Cairns put it in *Ex parte Broad house*, (1866-1867) 21 R.Ch. App. 655, 658-659:

The main object of allowing and favouring the appearance of a  
20 solicitor as representing another person is, that the court should have before it a person who, on the one hand, is under an obligation to the Court because he is one of its officers, and, on the other hand, is under an obligation to the suitor because he is in privity with him, and is the actual person who represents him. Unless that chain of connection is maintained and  
25 kept complete, the object of allowing solicitors to appear on behalf of other parties is entirely defeated.

See also *The Queen v. Judge of County Court of Oxfordshire* (1894) 2 QB 440,447, where the above passage was quoted with approval. The test suggested by Lord Cairns - and I agree with him - is this: Is the person  
30 who claims audience the barrister or solicitor of a particular client? While parties to a cause or matter, be they legal practitioners or not, have, as of right, a right of audience in court, a legal practitioner acting as such only has such a right when he acts as barrister or solicitor to one of the parties (his client) in the cause or matter. It is then that he is said to be practising  
35 as a barrister or solicitor. And when a party to a proceeding engages the services of a legal practitioner, he may appear in the proceeding either in person or by his legal practitioner: - See *Kehinde v. Ogunbunmi* (1967) 1 All NLR 306 at 309; (1967) All NLR 326, 329-330; (1968) NMLR 37

(reprint) where this Court. Per Brett, J.S.C. observed.

*'... the sole question was whether if a plaintiff is not present in person, but has instructed a legal practitioner who is present in person, the plaintiff has 'appeared' within the meaning of Or. 26, rule 6. We have no doubt that the answer must be Yes. Or. 2, rule 6, 9 and 12 recognises the right of a plaintiff to sue by a solicitor: 26 deals with the trial and if the whole of the Order is read there can be no doubt that the rights it gives to one or other of the parties may be exercised on his behalf by a legal practitioner, although this is nowhere expressly stated either in this or any other Order. To give one instance Or. 26 rule 14 reads:-*

*When the party beginning has concluded his case, the other party shall be at liberty to state his case and to call evidence, and to sum up and comment thereon.*

*There can be no warrant for holding that in rule 6(2) 'plaintiff' means the plaintiff in person if in rule 14 'party' means the party in person or by the legal practitioner representing him.*

*As a matter of accepted usage, it was pointed out during the hearing of the appeal that a legal practitioner instructed in a case introduces himself to the court of trial by saying 'I appear for' one of the parties. There is the same implication when it is said that a practitioner 'represents' one of the parties.*

Indeed, Fawehinmi v. NB.A. (No.1) (supra) seems to have settled the issue. For in that case, Obaseki. J.S.C. observed at page 20 of the 1st Report (page 531 of the latter report):

*... as parties, a barrister litigant is entitled to conduct his case personally or by counsel of his choice. This right is not guaranteed in civil cases under our Constitution but it is in criminal cases. See section 33(6)(c) of the Constitution of the Federal Republic of Nigeria, 1979. I agree with Lord Westbury, L.C. when in the case of New Brunswick & Anor v. Conybeare (supra) he said the characters should not be mixed. A barrister litigant has a right to conduct his case in person as any other member of the public. It is not right or correct to say that a barrister represents himself. Such a representation does not exist in law although the legal training he has acquired can be utilised for his own benefit and for the benefit of others who retain his services when he has properly enrolled and paid his fees as a legal practitioner. See:*

*Section 7(1) of the Legal Practitioners Act 1975;*

*Section 2(1) of the Legal Practitioners Act 1975;*

*Section 6(1) of the Legal Practitioners Act 1975.*

*The word 'represent' in the context of legal representation means to*  
 5     *act or stand for or be an agent for another,*

The learned Justice of the Supreme Court referred to *Newton v. Ricketts* (1862) 9 HLC 626, 11 E.R. 731 a case where a barrister who was a party conducted his case in person, Lord Campbell. LC commented at p. 732.

10     'My Lords, the case has been very ably argued by the appellant in person and continued at Page 21 (Pp. 532-533)

*'He did not say the case was argued as counsel. This is because a party cannot appear both as a person and as counsel for himself, this point was emphasized in the case of new Brunswick and Canada Railway Co. v.*  
 15     *Conybeare (1862) 9 H.L.C. 711, 11 E.R. 90 when Mr. G.L. Russell, appeared for the 1st respondent and suggested that Mr. Conybeare appeared as his junior on the same case citing Newton v. Ricketts G.H.L. Cas. 262 where a party appeared as counsel at the Bar of the House. Lord Westbury, the Lord Chancellor retorted:*

20     *'Certainly but not both as party and counsel. The respondent must elect to argue in person or not. There cannot be a mixture of the two characters.*

*In that case, Mr. Coybeare was a party in the real sense of the word.*

25     Later on the same page (P. 533) the learned Justice stated the position in Criminal case where a barrister is the accused and where he is a prosecutor. He said:

*'In the case of a barrister who is standing trial for an offence, he is a party in the comprehensive sense of the term and unless the Criminal*  
 30     *Procedure Law Code or Act in Nigeria otherwise provides his proper place during trial is in the dock and he cannot stay at the Bar fully robed to stand his trial and or address the court whether he is conducting his case in person or is represented by counsel.*

*Similarly, a barrister who conducts criminal prosecution on his*  
 35     *own behalf is entitled to no other privileges than as an ordinary person. This has been declared so since the case of Queen v. Phillips (1843-1846) 1 Cox Criminal Cases 17.*

In the case on hand I cannot find a mixture of the two characters in the complainant, that is, that of a prosecutor and legal practitioner acting as such. His appearance at the trial court was as a prosecutor and not as a legal practitioner representing a client. He cannot, in court, represent himself.

There is, however, an exception to the rule that a legal practitioner who is not a party to the proceeding can only appear and have right of audience if he represents one of the parties - his client. The exception is where he appears as *amicus curiae* before a court. Every court has an inherent power to invite barristers and/or solicitors of considerable experience to appear before it to assist in the proper administration of justice when important issues of law or fact are being considered. A legal practitioner so invited, gives his views of the law in a dispassionate manner.

He does not act for any of the parties but is in court to assist the Bench in unraveling intricate question of law it is faced with. The invitation to legal practitioners is understandable for after all, they are equally officers of the court and owe a duty not to mislead the court but to assist it in ensuring that justice is done.

*Amicus curiae* has been defined in Osborn's Concise Law Dictionary 7th Edition at Page 25 as:

*A friend of the Court. One who calls the attention of the Court to some point of law or fact, which would appear to have been overlooked; usually a member of the Bar. On occasion the law officers are requested or permitted to argue a case which they are not instructed to appear.*

And in *Grice v. The Queen* (1957) 11 DLR (2d) 699, 702 Ferguson, J. defined the expression thus:

*"Amicus curiae is defined as a bystander, usually a lawyer, who interposes and volunteers information upon some matter of law in regard to which the Judge is doubtful or mistaken, or upon a matter of which the Court may take judicial cognisance. He is one whom as a stander by, where a Judge is doubtful or mistaken in a matter of law, may inform the Court. In its ordinary use the term implies the friendly intervention of counsel to remind the Court of some matter of law which has escaped its notice and in regard to which it is in danger of going wrong."*

A similar definition appears in Earl Jowitt's Dictionary of English Law where it is stated:

*"Amicus curiae. a friend of the court, that is to say, a person,*

*whether a member of the Bar not engaged in the case or any other bystander, who calls the attention of the court to some decision, whether reported or unreported, or some point of law which would appear to have been overlooked.*

The position appears slightly different in the United States. For in  
5 Black's Law Dictionary, the expression *amicus curiae* is defined thus:

'*Amicus curiae*, means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such *amicus*  
10 *curiae* brief are commonly filed in appeals concerning matters of a broad public interest; e.g. civil rights cases.

Such may be filed by private persons or the government. In appeal to the U.S. courts of appeals, such brief may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or  
15 at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an Officer or Agency thereof.'

It would appear from the above definition that counsel for a party may divorce himself from his client for the purpose of drawing points of law  
20 and fact to the attention of the Court so that the client may take the benefit, but none of the consequences, of his appearance and argument; he then files a brief as '*Amicus curiae*. This practice at one time crept into Canada but was criticized and disapproved of and appears not to be the practice there any longer. For in *Grice v. The Queen* (*supra*), Ferguson, J. at  
25 Page 703 of the Report opined:

'I need not dwell on the fact that the client is bound by his counsel.

I am of the opinion that when counsel has been instructed by a client, the client is bound by the effect of the counsel's appearance.

30 He cannot after instructions divorce himself from his client and appear under the guise of '*Amicus curiae*,

The Courts here seem to follow the Practice in England and Canada and I think it is a better practice.

Now, Section 211 (1) of the Criminal Procedure Law, Cap. 32  
35 Laws of Lagos State, 1973 provides:

"Both the complainant and defendant shall be entitled to conduct their respective cases in person or by a legal practitioner.'

The above provision invests the complainant with the right to conduct the prosecution in this case in person and unless this provision is

inconsistent with some provision in the Constitution (and I cannot find any such inconsistency), I can see no reason to deprive the complainant of the right to conduct the proceeding in the trial High Court in person. There is nothing, in my respectful view, in Section 256(2) of the Constitution taking away the right given to the complainant by Section 211 (1) of the Criminal Procedure Law. 5

There is also the requirement of the rule of natural justice that a party be heard -the audi alteram partem rule. In my view, to refuse a party audience because he is not represented by a legal practitioner is to deny him of his fundamental right to be heard. I know of no rule of law or practice which compels a party to seek representation by counsel in the prosecution of his case. The nature of the proceeding may be such that prudence requires that he does just that; but he is under no compulsion to retain the services of counsel. In this respect I endorse the observation of Denning L.J. (as he then was) in R. v. Staff Sub-Committee of LCC's Education Committee & Anor Ex parte Schonfield & Ors (1956) 1 All ER 753 to the effect that: 10 15

*'Much as we value the help of the Bar, we must never go so far as to refuse an applicant simply because he is in person.'*

Morris, L.J. also observed at p. 753: 20

*'There are often reasons why it is helpful from the point of view of the court that there should be appearance by counsel in cases of this kind. The eight appellants, however, appeared personally. Their interest in this case is a joint one, and we have heard two of the appellants. In fact none of the other appellants wished to address us. I see no reason for not allowing Dr. Schonfield and his colleagues to appear in person, though, the interest being a joint one, we would not have arguments from each one separately.'* 25

And Romer, L.J. in his own contribution said at page 754:

*'Having regard to the established practice of the Court, it is quite plain that Dr. Schonfield could not appear on behalf of the other governors as well as on behalf of himself; but was entitled to address us on his own behalf, and he did so. The substance of his arguments and submissions was adopted in effect by his fellow governors.'* 30 35

It would appear in that case that Dr. Schonfield was a legal practitioner. His fellow governors took advantage of his legal prowess by associating themselves with his submissions.

From all I have been saying above I must answer Question A in the negative.

Questions B & C:

5        For the reasons given by my brother, Bello, C.J.N. in his judgment a preview of which I have had the advantage of and which reasons I adopt as mine I too decline to answer Questions B & C.

Finally, for the reasons stated herein I agree entirely with the conclusion reached by my learned brother Bello, C.J.N. on Question A. Consequently, I answer the Questions referred to this Court by the court below thus:

Question A: No

Question B: Not answered

Question C: Not answered

15        I abide by the consequential orders made in the judgment of the learned Chief Justice.

### **OGWUEGBU JSC**

20        I had a preview in draft of the judgment just delivered by my learned brother Bello, C.J.N. I agree with his reasoning and conclusion.

Because of the constitutional importance of the issues canvassed in this appeal, I feel I should add a few comments of my own. The charge No. LCD/31/90 which led to this appeal was as a result of a complaint  
25 made on oath by the complainant (Justice F.O.M. Atake), a retired judge of the High Court of former Bendel State of Nigeria against the defendant (Chief Nelson Asigboro Afejuku).

The defendant was charged with the offence of publishing defamatory matter contrary to Section 375 of the Criminal Code of Lagos  
30 State.

While the charge was pending in the Lagos State High Court, the defendant filed an application in the said court questioning the right of the complainant (a private prosecutor) to initiate and prosecute the criminal charge against him. It was his contention in the High Court that the right of  
35 a private prosecutor to initiate and prosecute a criminal proceeding in Lagos State in view of the decision of this Court in *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Pt. 102) 122 except for perjury had been abolished.

In the course of the oral submissions on the above issue, the learned

trial Judge. Kessington, J. suo motu raised the issue of the competence of the complainant to conduct the prosecution of the charge having regard to Section 256(2) of the Constitution of the Federal Republic of Nigeria, 1979. After taking oral arguments on both issues, he ruled that the complainant could initiate the criminal proceeding but could not personally prosecute it as that would be in contravention of Section 256(2) of the Constitution. 5

Following the appeal and cross-appeal filed by the complainant and the defendant in the Court of Appeal, Lagos Division against the decision of Kessington, J. that court on the application of the complainant referred three questions to this court for its decision thereon pursuant to Section 259(3) of the Constitution. The questions are:- 10

*“(i) Does Section 256(2) of the Constitution of the Federal Republic of Nigeria bar a judicial officer who has ceased to be one from appearing before a court or tribunal to conduct in person a case to which he is a party (in the instance (sic) case a complainant in a criminal case).”* 15

*“(ii) If it does, and the judicial officer who has ceased to be one has already appeared before the court to conduct in person a case in which he is a party is it a proper application of Section 256(2) for the judge before whom the case is being heard to strike out the entire suit; at all without giving the retired judge an opportunity to brief counsel to conduct the case on his behalf.”* 20

*“(iii) Does section 340(2) of the Criminal Procedure Law of Lagos State 1973 as amended apply to all offences as implied in the judgment of Karibi- Whyte, J.S.C. or to indictable offences only as stated in the judgment of Bello, C.J.N. in Akilu v. Fawehinmi (No.2) (1989) 2 NWLR (Pt. 102) 122.”* 25

The first question relates to Section 256(2) of the Constitution which provides: 30

*“256(2) Any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria.”*

In this case, it is not disputed that:- 35

(1) the complainant retired as a judicial officer of the High Court of the former Bendel State;

(2) he was the complainant in Suit No. LCD/31/90 before the

High Court of Lagos State; and

(3) he was conducting the case (the prosecution of the defendant) in person.

Having regard to the admitted facts and section 256(2) of the Constitution, can it be said that the complainant was appearing or acting as a legal practitioner in the circumstances? The learned complainant's counsel (Dr. Atake) referred the court to the definition of 'legal practitioner' in the Legal Practitioners Act of 1975.

He also referred to the provisions of the said Act dealing with the liability of a legal practitioner for negligence and recovery of the legal practitioner's charges. He further contended that Section 211 (I) of the Criminal Procedure Law Cap. 32. Vol. 2 Laws of Lagos State, 1973 allows the complainant to conduct the case in person, or by a legal practitioner.

The complainant's submissions on the first question can be summarised as follows:

(a) *That Section 256(2) only precludes a retired judge from 'appearing and acting' as a legal practitioner before a court or tribunal;*

(b) *that the complainant was not appearing or acting as a legal practitioner before the court since he was not rendering any legal service to a client;*

(c) *that it does not preclude a retired judge from access to courts, clothe him with immunity from court processes nor impose on him a condition that he must employ the services of a legal practitioner if he is a party to a case in court or before a tribunal;*

(d) *that denying the complainant the right to conduct his case in person is a breach of Sections 17(2)(a) and 33(1) of the Constitution.*

In reply to the first question, Mr. Agbaje, learned counsel for the defendant drew the court's attention to the word 'person' contained in Section 256(2) of the Constitution as a legal conception and the doctrine of the 'second' person in our legal jurisprudence; that the concept of 'person' refers to a variety of jural relations including human beings and legal persons.

He stated that the legal implications of the above legal abstraction is the possibility to categorize and subdivide an individual jural relations into a unit group by which an individual may be ascribed and distinguished by role, social or racial characteristics or status, for example parent or husband.

He referred to the case of *Lee v. Lee Air Farming Ltd.* (1960) 3 All

ER 420 where it was said that a person could possess dual capacities as director and servant of a company and when acting in one capacity could give order to himself in another capacity.

It was Mr. Agbaje's further submission that the complainant had appeared in two capacities in this case namely, as a complainant and as a legal practitioner/prosecutor; that as a legal practitioner, he was rendering the services of a legal practitioner for and on behalf of himself in the case and in the circumstance, it is not necessary for the complainant to appear 'for a client' before he could be said to be engaged in the practice of law.

Our attention was drawn to the word 'whatsoever' qualifying the phrase 'any reason' in Section 256(2) of the Constitution. Learned counsel also referred the court to Section 33(6)(c) of the Constitution and Section 211 of the Criminal Procedure Law of Lagos State. He submitted that the latter should not be interpreted so as to restore the right denied the complainant (a retired Judge) by Section 256(2) of the Constitution.

The question, who is a legal practitioner immediately arises. To answer this question, I have to fall back on Section 24 of the Legal Practitioners Act Cap. 207 Laws of the Federation of Nigeria, 1990 which defined 'legal practitioner' as:

*'a person entitled in accordance with the provisions of this Act to practise as a barrister or as barrister and solicitor either generally or for the purpose of any particular office or proceedings.'*

Was the complainant practising as a barrister and solicitor either generally or for the purpose of a particular office (for example, Director of Public Prosecutions) or particular proceedings?

A person is entitled to practise as a barrister and solicitor if he fulfils the conditions laid down in Section 2 of the Legal Practitioners Act and the practice of Law is the rendering of services requiring the knowledge and the application of legal principles and techniques to serve the interest of another with his consent. It is not limited to appearing in court, or advising and performing of services in the conduct of the various shapes of litigation, it includes the preparation of pleadings.

A Person also engages in the 'practice of law' by maintaining an office where he is held out to be an attorney, using letterhead, describing himself as an attorney, counselling clients in legal matters, negotiating with opposing counsel about pending litigation, and fixing and collecting fees for

services rendered. See *G.R.J. Edwards v. R. L. Hert*, Ok 504 P.2d., *State v. Schumachex* 214 Kan 1,519 P. 2d. and *Black's Law Dictionary*, 6th Edition Pages 1142-1143. It is my view that the above represent part of the duties of a legal practitioner.

5            To appear or act as a legal practitioner, there must be that element of legal service rendered to a third party whether for a fee or not. When therefore, the complainant was in the High Court of Lagos State prosecuting Suit No. LCD/31/90 against the defendant, he was not appearing or acting as a legal practitioner within the provision of Section 256(2) of the  
10 Constitution which bars a retired judge from appearing or acting as such. A barrister who is a party in a case must elect to conduct his own case or to have it conducted by counsel.

            In this country, a legal practitioner who is a litigant has a right to conduct his case in person as any other member of the public or be represented by counsel. He can speak from the Bar wearing his robes in civil  
15 cases. In criminal proceedings where the legal practitioner is standing trial for an offence, his proper place is the dock. It will be undesirable to allow him stay at the Bar fully robed. See *Fawehinmi v. N.B.A (No.1) 1989) 2 NWLR (Pt. 105) 494*.

20            In England, a barrister who conducts a criminal prosecution on his own behalf is entitled to no other privilege than any ordinary person. See *R. v. Phillips (1844) 1 Cox, c.c. 17* and Practice Direction by Parker, C.J. (1961) 1 All ER 319.

            There is nothing wrong in counsel litigant appearing in the dress of his  
25 profession in civil cases. See *Neate v. Denman (1874) L.R. Eq. 127*. In the Indian case of *Re West Hopetown Tea Co. (1886) I.L.R. 9 All 180*, it was held that a legal practitioner who appears as a litigant in person must not address the court from the advocate's table or in robes but from the same place and in the same way as any ordinary member of the public.

30            The complainant herein will be entitled to no other privilege than an ordinary person.

            Mr. Agbaje, learned counsel for the defendant drew the court's attention to the 'person' appearing in Section 256(2) of the Constitution and the doctrine of the 'second' person in our legal jurisprudence. I agree  
35 that the word person refers to a variety of jural relations including human beings and legal persons. It is true that 'person' in general usage is a human being (natural person), though by statute, the term may include labour organisations, partnerships, associations, corporations, legal representatives

and trustees among others. Those species of legal persons are not natural person and are not within the provision of Section 256(2) of the Constitution. A Judge whether retired or serving must be a natural person. The complainant cannot therefore be said to be acting in two capacities. A body corporate may not be able to conduct its case in court without being represented by counsel owing to its inability to appear in person. See *Frinton & Walton U.D.C. v. Walton & District Sand & Mineral Co. Ltd. & Or.* (1938) 1 All E.R. 640 and *Scriven v. Vescott (Leeds) Ltd.* (1908) 53 Sol.JO.101.

The phrase 'for any reason whatsoever' in the subsection must relate to his appearing or acting in the case as a legal practitioner before any court or tribunal.

It does not apply when the retired judge is conducting his case in person and does not enjoy the rights and privileges accorded to counsel appearing and acting for a client in a court or tribunal.

Section 211(1) of the Criminal Procedure Law of Lagos State provides that a complainant and a defendant shall be entitled to conduct their respective cases in person or by a legal practitioner. The option is that of the complainant or defendant and in this case, the complainant opted to conduct his own case. Section 211 (1) of the Criminal Procedure Law of Lagos State is not inconsistent with Section 33(6)(c) of the Constitution.

For the above reasons, I hold that Section 256(2) of the Constitution does not bar the complainant who had ceased to be a judicial officer from conducting this case in person. I will therefore answer the first question in the negative.

Since I have come to the conclusion that Section 256(2) of the Constitution does not bar the complainant, the second question does not arise.

The third question referred to this court for our decision does not relate to the interpretation or application of the 1979 Constitution.

For the reasons given in the lead judgment, I too, decline to answer the question and abide by all the consequential orders contained in the lead judgment.

35

### ONU JSC

The Complainant/Appellant, Justice F.O.M. Atake, a retired Judge of the

defunct Bendel State of Nigeria, acting pursuant to Section 375 of the Criminal Code Law of Lagos State, Cap. 31 Volume 2, Laws of Lagos State, 1973 privately prosecuted the Defendant/Respondent by laying five charges against the latter in suit No. LCD/31/90 for publication of defamatory matter before Kessington J. sitting in Lagos. When the case came up before the learned trial Judge sometime in 1990, counsel for the Defendant/Respondent (hereinafter in this Judgment referred simply as defendant, by way of a preliminary objection contended that the Complainant/Appellant (hereinafter in the rest of this judgment referred to as Complainant) had no locus standi to institute criminal proceedings in Lagos State against him (Defendant) by way of a private prosecution. After hearing arguments thereon, the High Court in its Ruling dated 1st November, 1990, dismissed the objection but proceeded suo motu to raise the question of the interpretation of Section 256(2) of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter simply referred to as the Constitution) the purport of which is:

256(1).....

(2) *Any person who had held office as a Judicial Officer shall not on ceasing to be a Judicial Officer for any reason whatsoever thereafter appear or act as a Legal Practitioner before any court of law or tribunal in Nigeria.* (Italics mine)

The learned trial Judge further contended that the Complainant being retired Judge of the High Court could not conduct the prosecution of his case against the Defendant in person and concluded by striking out all five charges. The Complainant in consequence appealed to the Court of Appeal against the Ruling hereinbefore alluded to while the Defendant, for his part, cross-appealed against that part of the Ruling dismissing the objection of the want of locus standi on the part of the Complainant.

Sequel to the foregoing, the Court of Appeal (hereinafter referred to as the Court below) acting pursuant to Section 259(3) of the Constitution posed for the answer of this Court the following questions as to the interpretation and application as well as the locus standi of the Complainant to bring criminal charges against the Defendant in Lagos State for the offence of 'Publication of Defamatory Matter' under Section 345 of the Criminal Code Law of Lagos State Cap. 31 Vol. 2 of the Laws of Lagos State 1973, having regard to the seeming conflict of view in the judgments of Karibi-Whyte, J.S.C. and Bello, C.J.N. in the case of Akilu v. Fawehinmi

(No.2) (1988) 2 NWLR. (Part 102) 122, to wit:

*(A) Does Section 256(2) of the Constitution of Federal Republic of Nigeria 1979 bar a Judicial Officer who has ceased to be one from appearing before a Court or Tribunal to conduct in person a case to which he is a party (in the instant case a complainant in a Criminal case).* 5

*(B) If it does, and the Judicial Officer who has ceased to be one has already appeared before the Court to conduct in person a case in which he is a party is it a proper application of section 256(2) for the Judge before whom the case is being heard to strike out the entire suit -*

*(i) At all,* 10

*ii) Without giving the retired Judge opportunity to brief counsel to conduct the case on his behalf.*

*Does section 340(2) of the Criminal Procedure Law of Lagos State Cap. 32 Vol. 2 Laws of Lagos State 1973 as amended apply to all offences as implied in the judgment of Karibi- Whyte, J.S.C. or to indictable offences only as stated in the judgment of Bello, C.J.N. in Akilu v. Fawehinmi (No. 2) (1989)2 NWLR (Part 102) 122.'* 15

In considering question (A) first, it is perhaps pertinent to commence by asking what is meant by the words 'Legal Practitioner'. By Section 24 of the Legal Practitioners Act, 1975 (now set out in Cap. 207 Revised Laws of the Federation of Nigeria, 1990) 'Legal Practitioner' means a person entitled in accordance with the provisions of this Act to practise as a barrister or as a barrister and solicitor, either generally or for the purpose of any particular office or proceedings.' The Act further provides in Section 2 as follows:- 25

*'(1) Subject to the provisions of this Act a person shall be entitled to practise as a barrister and solicitor if, and only if his name is on the roll.*

*(2) If-*

*(a) an application under this sub-section is made to the Chief Justice by or on behalf of any person appearing to him to be entitled to practise as an advocate in any country where the legal system is similar to that of Nigeria; and the Chief Justice is of the opinion that it is expedient to permit that person to practice as a barrister for the purposes of proceedings described in the application.'* 30 35

*The Chief Justice may by warrant under his hand authorise that*

person, on payment to the registrar of such fee not exceeding fifty naira as may be specified in the warrant, to practise as a barrister for the purpose of those proceedings' and of any appeal brought in connection with those proceedings.

5        (3) A person for the time being exercising the functions of any of the following offices, that is to say

          (a) - the office of the Attorney-General, Solicitor-General or Director of Public Prosecutions of the Federation or of a State;

          (b) such offices in the civil service of the Federation or of a State  
10 as the Attorney-General of the Federation or of a State, as the case may be, may by order specify,  
shall be entitled to practise as a barrister and solicitor for the purposes of that office.

(4) ....."

15        By virtue of section 211(1) of the Criminal Procedure Law of Lagos State, Cap. 32(ibid):

          “(1) Both the complainant and the Defendant shall be entitled to conduct their respective cases in person or by a Legal Practitioner.

          (2) Where the Defendant is in custody or on remand he shall be  
20 allowed the access of such legal practitioner at all reasonable times.”  
[Italics is mine].

It was not in dispute at the trial that the complainant was a retired Judge of the High Court of Bendel State and that he was conducting the prosecution of the case in person. Albeit, in his Ruling hereinbefore referred  
25 to, Kessington, J. at the conclusion of arguments by Counsel for the Respondent and the Complainant in person, held suo motu that the Complainant being a retired Judge, could not conduct his case in person except by the aid of a legal practitioner, he thereupon proceeded to strike out the Complainant's complaint without giving him the opportunity to engage the  
30 services of a legal practitioner.

My reading of Section 256(2) of the Constitution and section 211(1) of the Criminal Procedure Law of Lagos State, Cap. 32 already set out above, would appear to indicate in the case of the former, that one who has ceased to be a judicial Officer shall for no reason whatsoever thereafter  
35 appear or act as a legal practitioner, whereas in the latter, both the complainant and defendant shall (mandatorily) be entitled to conduct their respective cases in person or by a legal practitioner. It is in this wise that I share the Complainant's view that section 256(2) of the Constitution only

precludes the retired Judge from appearing and acting as a barrister and solicitor i.e. as a legal practitioner rendering legal services for another (a client) before a court or tribunal. While the words 'appear' and 'act' as contained in section 256(2) (ibid) by their purports must be construed to mean one, joint and indivisible action, in section 211(1) of the Criminal Procedure Law, the word 'in person' and by 'a legal practitioner' are in my opinion separate and disjunctive.

Thus, for the retired Judge to be debarred as envisaged by Section 256(2) of the Constitution, he must be seen to be 'appearing' and 'acting' as a legal practitioner, having a right of audience and having paid his practitioner's fees pursuant to section 7(2) of the Legal Practitioners Act, to wit: that he has a client to whom he is rendering service. In this regard, I think the Complainant was right when he submitted that the learned trial Judge erred when he interpreted section 256(2) of the Constitution by ignoring the word 'act.' By virtue of section 17(2) (a) of the Constitution under the Fundamental Objective and Directive Principles of State Policy of the Nigerian State it is provided that:

*"(2) In furtherance of the social order*

*(a) every citizen shall have equality of rights, obligations and opportunities before the law"* while

Section 33 of the Constitution vests in the citizen a fundamental right to Fair Hearing - an expression that has been variously interpreted on several occasions by our court. That spurn out by this Court (per Nnaemeka-Agu, J.S.C) in *Okoduwa v. The State* (1988) 2 NWLR (Pt. 76) 333; 19 N.S.C.C. (Pt. 1) 718 at page 733 to the effect that-

*"In my opinion Fair Hearing must include giving to a party or a legal practitioner of his choice the opportunity to present his case before an impartial Court or other Tribunal in an atmosphere free from fear and intimidation."* appears apposite to the case in hand. This is because, to afford a party the opportunity to present his case in person, is to accord him fair hearing as one of the twin pillars of justice. By denying the Complainant the right and consequently the opportunity of presenting his case in person, the learned trial Judge denied him a fair hearing. Any hearing granted to the Complainant through a legal practitioner forced down his throat, so to say, could not be rightly said to be a legal practitioner of his (complainant's) choice .. he is ipso facto a legal practitioner the court compels him to brief as a counsel to conduct his case for him. By the joint provisions of section 17(2) (a) and 33(1) of the Constitution (ibid) there-

fore, the Complainant had acquired a fundamental right to conduct his case before any court, or tribunal, not as counsel but either in person as prosecutor or by counsel for payment for his legal services or for no pay. I therefore agree with learned counsel for the Complainant that when the

5 Constitution bestows a fundamental right or indeed any right upon the citizen, it becomes a vested right of the citizen; and if the same Constitution proceeds in a subsequent section to enact a provision capable of more than one interpretation, one of which leans in favour of the vested right and the other abrogates the vested right, the interpretation is to be preferred and

10 upheld which preserves the right. Thus, if section 256(2) of the Constitution can be interpreted to abrogate the Complainant's right to conduct his case in person, it can also be interpreted to permit him to conduct his case in person and so the latter interpretation should prevail. It is in this wise that section 211 (1) Criminal Procedure Law (ibid) comes in for mention since

15 its provisions are given support in the case of Fawehinmi v. Nigerian Bar Association (1989) 20 NSCC 1; (1989) (No.1) 2 NWLR (Pt. 105) 494 wherein Obaseki, J.S.C. at pages 531 and 532 respectively of the Report, said;

20        *'Every Appellant, be he a barrister, solicitor or ordinary member of the public, has a right to argue his case either at first instance or on appeal in person' [italics is mine].*

*There is, in my view, a clear-cut distinction between the right of audience enjoyed by a retired Judge vide Section 256(2) of the Constitution and who is conducting a case initiated by him in person and the right of audience*

25 *enjoyed by a Legal Practitioner. A Legal Practitioner who is also a party or litigant in a case before the court, be it civil or criminal, is entitled under the law and, indeed has the right to conduct his case in person as any other member of the public. He may conduct such a case through counsel of his choice, again, as any other member of the public. However, a litigant who*

30 *happens also to be a legal practitioner, if he elects to conduct, in person a case to which he is a party, conducts such a case as a litigant and not as a legal practitioner representing himself, the litigant. Thus, in the case of a retired Judge, he enjoys all the rights and privileges of a party to a suit, to wit: that he can, without acting as counsel conduct the case in person or*

35 *initiate and prosecute the case by a Legal Practitioner of his choice. Further that he has no right of audience as a practitioner would not, in my opinion, detract from the retired Judge's locus standi to lodge a complaint against the Defendant as prosecutor in a Court of competent jurisdiction and to*

have the complaint heard and determined on the merits. See *Thomas & ors v. Olufosoye* (1986) 1NWLR (Pt. 18) 669 and *Nneji v. Chukwu* (1988) 3 NWLR (Pt. 81) 184. As a matter of fact, *Obaseki, J.S.C.*'s view at page 531 of the Report in *Fawehinmi v. N.B.A. (No. 1)* (*supra*) would seem to 5  
put the issue to rest when he said:

'as parties, a barrister litigant is entitled to conduct his case personally or by counsel of his choice. This right is not guaranteed in civil cases under our Constitution but it is in criminal cases. Section 33(6)(c) of the Constitution of the Federal Republic of Nigeria 1979. I agree with Lord Westbury, L.C. when in the case of *New Brunswick & Anor. v. Coynbeare* (supra) he said the characters should not be mixed. A barrister litigant has a right to conduct his case in person as any other member of the public. It is not right or correct to say that a barrister represents himself. Such a representation does not exist in law although the legal training, he has acquired can be utilised for his own benefit and for the benefit of others who retain his services when he has properly enrolled and paid his fees as legal practitioner. See: 10 15

Section 7(1) of the Legal Practitioners Act 1975;

Section 2(1) of the Legal Practitioners Act 1975;

Section 6(1) of the Legal Practitioners Act 1975. 20

The word 'represent' in the context of legal representation means to act or stand for or be an agent for another."

It will therefore amount to denying a complainant of his fundamental right enshrined in Section 33 of the 1979 Constitution and consequently, his right to a fair trial should he not be given the opportunity of presenting his case in person. 25

Mr. Agbaje, for the Respondent contends to the contrary and his submission is to the effect that the Complainant being a judicial officer who has since ceased to be one, cannot conduct a case before any court or tribunal. He further contends that by so doing the Complainant would be assuming the role of a barrister and/or a solicitor - a role he had since ceased to play on being appointed a High Court Judge and upon his taking the Judicial Oath although agreeing that the learned trial Judge's interpretation of Section 256(2) of the Constitution was correct. Learned counsel for the Respondent thereafter for the rest of his brief and in his oral argument before us delved into jurisprudence and into what I consider (and he too) as legal abstractions. 30 35

For instance, the dichotomy in roles played by the legal practitioner “ that the concept ‘person’ focuses on a large number of jural relations but allocates differently in different cases, and other jurisprudential propositions according to Dias Jurisprudence, 5th Edition Butterworth (1985) at  
5 page 251 as well as decided cases illustrated in this regard by learned counsel for the Respondent, is in my opinion, unhelpful and ought to be jettisoned.

In sum, it will be doing violence to section 33(1) of the Constitution to compel the Complainant to brief a counsel in a case where he can  
10 prosecute or defend himself in person. As section 211(1) of the Criminal Procedure Law Cap. 32 Laws of Lagos State crystalises and preserves that right invested in a party to conduct his case in person, the Complainant’s fundamental right was breached when he was debarred from initiating and prosecuting his case by the learned trial Judge who prematurely and wrongly  
15 struck out his (Complainant’s) case. My answer to Question A is accordingly rendered in the negative.

Since my answer to Question A above is in the negative, an answer to Question B would naturally not arise since it is rendered Non sequitur. With regard to Question C which asks whether section 340(2) of the  
20 Criminal Procedure Law of Lagos State, Cap. 32 Vol. 2, Laws of Lagos State, 1973 as amended applies to all offences as implied in judgment of Karibi- Whyte, J.S.C. or to indictable offences only as stated in the judgment of Bello, C.J.N. in *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Pt.102) 122, I wish to point out firstly, that what sub-section 3 of section 259 of the  
25 1979 Constitution says and what its application are as follows:-

The sub-section provides:

*‘259(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal and the court is of opinion that question involves a substantial question of law,  
30 the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate.’*

The next logical question to ask is whether the consideration of  
35 section 340(2) C.P.L. of Lagos State Cap. 32 Vol. 2 by way of interpretation made by the above-named learned Justices pertains to ‘any question

as to the interpretation or application of this Constitution.’ In so far as the provision of the Criminal Procedure Law are not identical or similar to those of the 1979 Constitution nor can they be applied interchangeably in relation to the views expressed by these learned Justices as regards indictable offences following the amendment of the C.P.L., the question is not 5 that for which an answer is pertinent here. I need only illustrate what I mean by showing what transpired in two Constitutional landmark decisions of the Federal Supreme Court to wit: *Otugor Gamioba & Others v. Ezezi II* (1961) 2 SCNLR 237; (1961) All NLR 584 and 2, *Olawoyin and Others v. Commissioner of Police (No.2)* (1961) 2 SCNLR5; (1961) All NLR 622. In 10 the former case where the High Court referred two questions to the Federal Supreme Court under section 108 (2) of the Constitution of the Federation, 1963, in pari materia (but by no means identical) with Section 259 (2) of the 1979 Constitution, that court refused to decide them since it held them to be premature. In the latter case, the two questions referred to the Federal 15 Supreme Court by the High Court of Northern Nigeria out of what the appellants alleged was the refusal by the trial court to give them an opportunity to further examine prosecution witnesses, amounted in the circumstances, to a violation of the constitutional right to fair trial. It was held inter alia that the questions referred were not questions of the interpretation 20 of the Constitution, but questions of its application; and as such, were not referable to the Supreme Court.

Section 108(2) of the 1963 Constitution provided as follows:-

*‘(2) Where any question as the interpretation of this Constitution or the constitution of a Region arises in any proceedings in the High Court 25 of the territory and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings requests, refer the question to the Federal Supreme court.’*

As can be seen, unlike in section 259(3) of the 1979 Constitution, the above section did not include question as to the ‘application’ of the 30 Constitution. Had it so provided, the *Olawoyin Case* (supra) would have been answered differently. Albeit, the provisions of Section 340 (2) of the C.P.L. being totally unrelated to the provisions of section 259(3) (ibid) and afortiori is incompetent for reference to this Court, I will unhesitatingly decline to answer Question (C). 35

The sum total of all I have been saying is that my answer to Question (A) is No, while those to Question (B) and (C) respectively are: Not answered.

It is for the foregoing reasons and the fuller ones articulated in the lead judgment of my brother, Bello C.J.N., a preview of which I have had, that I entirely agreed with it and make the same consequential orders as contained therein.

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### ***IGUH JSC***

I have had a preview in draft of the lead judgment just delivered  
10 by my learned brother, the Honourable Chief Justice of Nigeria.

I entirely agree with the reasoning and conclusion therein. In view, however, of the constitutional nature of the matters raised in the reference, I consider it necessary to say a few words of my own on the issues.

The facts that gave rise to this reference have been fully set out in  
15 the lead judgment of my learned brother and it is unnecessary to go all over them again. It suffices to state that the complainant had on the 11th day of April, 1990 instituted a criminal charge against the defendant in the Lagos High Court by way of private prosecution. In it, the defendant was charged on five counts with the offence of publishing defamatory matters  
20 contrary to Section 375 of the Criminal Code, vol. 2. Cap. 31 Laws of Lagos State 1973.

It is not in dispute that the complainant is a Retired Judge of the High Court or the former Bendel State of Nigeria. It is also common ground that he was conducting the prosecution of the defendant in person. The  
25 parties are in agreement that the preliminary point taken by learned counsel for the defendant to the effect that the complainant had no locus standi to institute the criminal proceedings by ways of private prosecution against the defendant in Lagos State was dismissed by the trial court presided over by Kessington, J. The learned trial Judge however raised suo motu the  
30 question of the interpretation of Section 256(2) of the Constitution of the Federal Republic of Nigeria 1979 in respect of which he duly received arguments from the parties. In his ruling, the learned trial Judge held that the complainant being a retired High Court Judge might initiate the private prosecution but could not personally prosecute it as this would contravene  
35 the provisions of Sections 256(2) and 227(1) of the Constitution. Accordingly he struck out the case. Both the complainant and the defendant being dissatisfied with the said decision appealed to the Court of Appeal.

After briefs of argument were duly filed, the complainant applied to the Court of Appeal praying that Constitutional issues and the attendant question of locus standi raised in the appeal be referred to this court for its decision. The court below gave this application due consideration and accordingly referred the undermentioned issues to this court for decision that is to say:-

*'(1) Does Section 256(2) of the Constitution of the Federal Republic of Nigeria 1979 bar a Judicial Officer who has ceased to be one from appearing before a Court or Tribunal to conduct in person a case to which he is a party (in the instant case a complainant in a criminal case).*

*(2) If it does, and the Judicial Officer who has ceased to be one has already appeared before the Court to conduct in person a case in - which he is a party, is it a proper application of section 256(2) for the Judge before the case is being heard to strike out the entire suit-*

*(i) at all,*

*(ii) Without giving the retired Judge an opportunity to brief counsel to conduct the case on his behalf.*

*(3) Does section 340(2) of the Criminal Procedure Law of Lagos State Cap. 32 Vol. 2 Laws of Lagos State 1973 as amended, apply to all offences as implied in the judgment of Karibi-Whyte J.S.C. or to indictable offences only as stated in the judgment of Bello C.J.N. in Akilu v. Fawehinmi (No.2) (1989)2 NWLR. (Pt. 102) Page 122.'*

Pursuant to the rules of court, the parties filed and exchanged their written briefs of argument.

Learned counsel for the parties at the hearing of the matter before us adopted their respective briefs of argument and proffered oral arguments in further elucidation of the submission therein.

Learned counsel for the complainant, Dr. Eyimofe Atake, in his submission with regard to the first question argued that Section 256(2) of the Constitution of the Federal Republic of Nigeria 1979, hereinafter simply referred to as 'the Constitution' cannot be interpreted to operate as a bar precluding the complainant, a retired Judicial Officer, from appearing before a Court or Tribunal to conduct in person any case in which he is a party. In his view, the section operates only to bar a judicial officer who for any reason has ceased to hold office from appearing as a legal practitioner conducting a case before a Court or Tribunal in Nigeria on behalf of a client. He drew the attention of the Court to Section 211 (1) of the Crimi-

nal Procedure Law of Lagos State, Cap. 32 which permits a complainant to conduct his case in person or by a legal practitioner. He also referred to Sections 17(2) (a) and 33(1) of the Constitution and submitted that to deny the complainant the right to conduct his case in person is a breach of these Constitutional provisions. He contended that the real issue for determination is whether the complainant at the time he was prosecuting his case was acting as a legal practitioner. It was his submission that to act as a legal practitioner, one must have a client. He therefore argued that the complainant when he was appearing for himself in a case in which he is a party, was not acting as a legal practitioner. He also referred to Section 33(1) of the Constitution which vests the citizen with a fundamental right to Fair Hearing and pointed out that Fair Hearing must include the giving to a party in any proceedings or to a legal practitioner of his choice opportunity to present his case. He urged the court to hold that section 256(2) of the Constitution does not preclude a retired Judge from conducting in person before a Court or Tribunal a case in which he is a party.

In respect of the second question, learned counsel submitted that the learned trial Judge even if he was right in holding that Section 256(2) of the Constitution precluded the complainant from conducting his case in person was wrong to have struck out the case. He contended that the court ought in such a case to have adjourned the proceeding to enable the Retired Judge to brief counsel to conduct the case on his behalf.

With regard to the third question, learned counsel pointed at what he described as an apparent conflict of views' in the decision of this court on the true interpretation of Section 340(2) of the Criminal Procedure Law, Lagos State as amended, in the case of *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR. (Pt. 102) 122. According to learned counsel, the decision of Karibi-Whyte, J.S.C. who delivered the lead judgment of the full court in that case is that the amended section bars a private prosecutor from initiating a prosecution in respect of all offences excepting the offence of perjury. He argued that the learned Karibi-Whyte, J.S.C. in his pronouncement made no distinction whatever between offences which are felonies and those that are misdemeanours and that the ban to private prosecutions, in his Judgment, applies to all classes of offences excepting the offence of perjury. On the other hand, learned counsel continued, Bello, C.J.N. in his judgment held that the said section bars a private prosecutor from initiating a prosecution in respect of only indictable offences excepting perjury. He stressed that the learned Chief Justice of Nigeria made it clear that the

amended section is only in respect of an information for an indictable offence except the offence of perjury. Learned counsel submitted that the interpretation of the amended section as pronounced by Bello, C.J.N. is the correct one and that it appeared Karibi-Whyte, J.S.C. was 'inadvertently in error' when he held that the bar to private prosecution created by section 340(2) of the Criminal Procedure Law, Lagos State applies to all offences with the exception of perjury. He later submitted in the alternative, that there is in fact no conflict of views between Karibi-Whyte, J.S.C. and Bello, C.J.N. on the issue of the interpretation of section 340(2) of the Criminal Procedure Law, Lagos State as amended. He stressed that in so far as the relevant section of the law clearly speaks of a bar against private prosecution in respect of indictable offences, Karibi-Whyte, J.S.C. must be understood to be referring only to offences within the context of section 340(2) of the law under consideration. He concluded by submitting with some force that the ban to private prosecutions created by Section 340(2) of the Criminal Procedure Law, Cap. 32, Laws of Lagos State 1973 as amended, applies only to indictable offences.

Learned counsel for the defendant, Mr. Fed Agbaje in his own reply with regard to the first question submitted that the complainant had appeared in the case in issue in two distinct capacities, namely, as a complainant and as a prosecuting legal practitioner. According to him, in the complainant's capacity as a complainant, he gave orders to himself in another capacity as a legal practitioner. He submitted that in the situation, the complainant being a retired Judge acted in clear violation of section 256(2) of the Constitution. He submitted that the complainant as a qualified legal practitioner was rendering the services of a legal practitioner for and on behalf of himself in the case. He observed that the complainant, like any other competent legal practitioner of his experience at the Bar copiously cited legal authorities before the trial court. He argued that it is not necessary for the complainant to appear for a client before he could be engaged in the practice of law. He therefore urged the court to hold that the complainant engaged himself in the practice of law in the case, that he appeared and acted as a legal practitioner therein and that being a retired High Court Judge, this was a violation of Section 256(2) of the 1979 Constitu-

tion of Nigeria. In his view, the complainant must brief counsel to prosecute a claim or charge or to defend himself in all cases to which he is a party before the court.

Learned counsel referred to sections 17(2) (a) and 33(6) (c) of the  
5 Constitution and submitted that these provisions while conferring a fundamental right on every citizen to defend himself in person merely entrenches a right of defence as against a right of prosecution. According to him, the provision is to be used as a shield and not as a sword. He therefore argued that the complainant cannot be qualified to invoke the fundamental right  
10 to personal defence against a charge as entrenched in Section 33(6) (c) of the Constitution for the prosecution of his case. He further submitted that the provisions of section 211 of the Criminal Procedure Law of Lagos State must not be permitted to derogate from the supremacy of section 256(2) of the Constitution.

15 As to the nature of the order the court must make, learned counsel argued that the charges brought against the defendant by the complainant impeached on the right of the freedom of speech under section 36(1) of the 1979 Constitution. He therefore submitted that the complaint is unconstitutional, incompetent and void and that it was properly struck out.

20 On whether there is a conflict of judicial opinion in the *Akilu v. Fawehinmi* case, *supra*, learned counsel submitted that there is no such conflict. He contended that the ratio decidendi in the *Akilu* case consists of the opinion of Karibi-Whyte, J.S.C., who delivered the lead judgment to the effect that the right of a private prosecutor to initiate prosecution in all  
25 offences other than perjury has now been withdrawn by the amendment to section 340(2) of the Criminal Procedure Law, Cap. 32. Law of Lagos State, 1973 by the Administration of Justice (Miscellaneous Provisions) Law No.4 of 1979 and the Criminal Procedure (Amendment) Edict -No. 7 of 1987. He contended that a private prosecutor can now only initiate  
30 prosecution for the offence of perjury. He argued that this view was supported by the majority judgments of the Honourable Justices who handed down the decision as against the observation of Bello, C.J.N. which stood alone. He therefore submitted that section 340(2) of the Criminal Procedure Law 1973 as amended, places a clear ban on private prosecution in  
35 respect of all offences other than perjury and that it is not confined to indictable offences only.

The first question referred to this Court for its decision concerns the constitutional eligibility of a private prosecutor who is a retired judicial officer to conduct in person a case to which he is party. As already stated, the question had been framed thus, namely -

*'Does Section 356(2) of the Constitution of the Federal Republic of Nigeria 1979 bar a Judicial Officer who has ceased to be one from appearing before a Court or Tribunal to conduct in person a case to which he is a party (in the instant case a complainant in a criminal case)'*

Section 256(2) of the Constitution provides as follows:-

*'Any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or Tribunal in Nigeria.'*

The term 'legal practitioner' is defined in the Legal Practitioners' Act, 1975 to mean-

*'A person entitled in accordance with the provisions of the Act to practice as a barrister and solicitor either generally or for the purpose of any particular office or proceedings.'*

As I have already observed, it is not in dispute that the complainant is a retired Judge of the High Court of the former Bendel State of Nigeria, that he is the complainant in the said charge before the trial court and that he was conducting or prosecuting the case in person. The real question in controversy is whether being a retired Judicial Officer, he is precluded pursuant to the provisions of Section 256(2) of the Constitution from conducting his said case in person before the Court.

Must he only prosecute the charge through the service of counsel he must brief?

A corollary to this question must be when a person can be said to be practising as a barrister and solicitor before a Court or Tribunal.

It is convenient at this stage to examine the term 'Practice of Law' as this may throw some light into the issues in controversy in this reference. Black's Law Dictionary, 5th Edition at page 1055 defines 'Practice of Law' as follows:

*'The rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent. R.J. Edwards Inc. v. R.L. Hart: OKL 504 P2d 407,416. It is not limited to appearing in court or advising and assisting in the conduct of*

litigation, but embraces the preparation of pleadings and other papers incident to actions and special proceedings; conveyancing, the preparation of legal instruments of all kinds and the giving of all legal advice to clients. It  
 5 embraces all advice to clients and all action taken for them in matters connected with law. *Rhode Island Bar Association v. Lesser* 68 P.1 14 26A 2d. 6.7. An attorney engages in the practice of law by maintaining an office where he is held out to be an attorney, using a letter head describing himself as an attorney, counseling clients, in legal matters, negotiating with  
 10 opposing counsel about pending litigation and fixing and collecting fees for services rendered by his associate. *State v. Scumacher*, 214 Kan 1 1510 P. 2d, 115, 1227.' (Italics supplied for emphasis).

What may be deduced from the above definition which in my view appears sound is that to appear or act as a legal practitioner or to practice  
 15 as a barrister and solicitor, there must be legal service rendered by such a person to a client. As has been quite rightly explained, such legal service may be rendered before a court of law or tribunal as envisaged by section 256(2) of the 1979 Constitution or outside the court.

We are however not now concerned with the prohibition of a retired Judge in respect of his performance of legal duties outside the court or  
 20 tribunal as quite clearly. Section 256(2) of the 1979 Constitution does not appear to preclude him from acting as a legal practitioner outside the court. That section of the Constitution only precludes him from appearing and acting in his capacity as a legal practitioner before a court of law or tribunal  
 25 in Nigeria.

It cannot be over-emphasised that any party to an action in court, be it civil or criminal, is entitled under the law to conduct his case in person if he so desires or through counsel of his choice. A legal practitioner who is also a party or litigant in a case before the court, be it civil or criminal, is  
 30 similarly entitled under the law and, indeed, has the right to conduct his case in person as any other member of the public and may conduct such a case through counsel of his choice, again, as any other member of the public. However a litigant who happens also to be a legal practitioner, if he elects to conduct in person a case to which he is a party conducts such a  
 35 case as a litigant and not as a legal practitioner representing himself, the litigant. In other words, a party to some proceedings who is also a legal practitioner cannot in law properly appear both in person and as counsel representing himself. He must elect to argue his case in person or through

counsel of his choice as he cannot in law represent himself even though he is a qualified legal practitioner.

There cannot be a mixture of his characters as a litigant, of the one part and a legal practitioner, of the other part, even though the legal training he has may rightly be utilised for his own benefit while conducting his case in person. Accordingly a litigant who is also a legal practitioner in a cause or matter ceased to be a legal practitioner in so far as such a cause or matter is concerned and is therefore not competent to represent or conduct the case of any other party in the proceedings.

In such a case, he appears in person as a litigant and not as a legal practitioner and may therefore only speak on his own behalf.

See Chief Gani Fawehinmi v. Nigerian Bar Association (No.1) (1989) 2 NWLR (Pt.105) 494.

In this connection, reference may be made to Section 17(2) of the 1979 Constitution which provides thus -

*'Every citizen shall have equality of rights, obligations and opportunities before the law'*

There is also the provision of Section 33(1) of the 1979 Constitution which provides as follows: -

*'In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality'.*

Section 33(6) (c) of the same Constitution also provides

*'Every person who is charged with a criminal offence shall be entitled:*

*(c) To defend himself in person or by a legal practitioner of his own choice"*

It seems to me crystal clear that Section 33 of the Constitution vests the citizen with a fundamental right to fair hearing. This fundamental right, without doubt, includes the giving of a party to a suit or charge or the legal practitioner of his choice representing him in such a suit or charge the opportunity to represent his case before an impartial court or tribunal in an atmosphere free from fear and intimidation. See Okoduwa v. The State (1988) 2 NWLR (Pt.76) 333; Vol. 19 (1988) INSCC (Pt. 1)718 at 733.

There is finally the provision of Section 211(1) of the Criminal Procedure Law of Lagos State. This permits both the complainant and the defendant in a criminal trial to conduct their respective cases in person or

by a legal practitioner. In my view, therefore, the denial of a complainant of his fundamental right and, consequently, the opportunity of presenting his case in person is tantamount to denying him a fair trial contrary to all known provisions of the law. I am in complete agreement with the submission of the complainant to the effect that any hearing, granted him through a legal practitioner whom he is compelled against his will to retain to conduct his case if he is disallowed from conducting his case in person as he prefers cannot be styled fair. This is because such a legal practitioner whom he is compelled to brief against his wish to prosecute his charge cannot in all the circumstances of the case be described as a legal practitioner of his choice. Indeed, such a legal practitioner may be described as one the court has compelled him to brief to conduct his case when on point of fact he did not require any such legal service as he preferred to conduct his case in person. It is therefore my firm view that the provisions of sections 17(2) (a) and 33(1) of the 1979 Constitution and of Section 211(1) of the Criminal Procedure Law of Lagos State confer a fundamental right on the complainant to conduct his case in person before any court or tribunal.

Upon a careful consideration of the first question in issue, it seems to me that for a person to appear or act as a legal practitioner or practice as counselor a barrister and solicitor before any court of law or tribunal, such a person ordinarily must be rendering before that court or tribunal a legal service to another person other than himself and usually referred to as a client whom he represents in the proceedings. This service is generally for a fee although such professional service may also be rendered to a client without reward or fee as prescribed by Section 8(1) of the Legal Practitioners' Act 1975. It should however be pointed out that it is also well recognised in law for a person to appear or act as a legal practitioner before a Court or Tribunal as an *amicus curiae* usually at the invitation of such a Court or Tribunal. The complainant in the present case was not appearing for any client with or without fee but for himself. In the circumstance, I find myself unable to hold that at the time he was conducting his case in person before the Lagos High Court, he was appearing as a legal practitioner in the proceedings.

I have reached the above conclusion notwithstanding the fact that the complainant is a qualified barrister and solicitor of the Supreme Court of Nigeria. It ought to be stressed however that he was clearly prosecuting

his case before the court as a complainant and not as a legal practitioner in the proceedings. He was in court arguing and fighting his own cause and to suggest that he must not do so because he is a retired Judge of the High Court seems to me totally wrong and legally unsupportable. I also entertain 5  
no doubt that it will constitute a flagrant breach of his fundamental right to fair hearing and the opportunity to present his case in person if he is compelled against his wish to retain counsel to conduct a case which he prefers to present personally as a party thereto. In my view the complainant has both the capacity and locus standi to prosecute and argue his case in 10  
person. In the circumstances and for all the reasons given above, my answer to question number one is in the negative.

Turning now to the second question, I have already held that section 256(2) of the 1979 Constitution does not constitute a bar to a Judicial Officer who has ceased to be one from appearing before a court or tribunal 15  
to conduct in person a case, be it civil or criminal, to which he is a party. In the circumstance, the second question referred to this court hardly arises. In my view the questions therein raised are entirely academic, hypothetical and purely speculative and I must in accordance with the well established principle of this court decline to give an answer thereto. See *Nkwocha v. 20  
Governor of Anambra State* (1984) 1SCNLR 634; (1984) 6 S.C. 302 and *Governor of Kaduna State v. Dada* (1986) 4 NWLR (Pt. 38) 687.

The third question deals with the interpretation of section 340(2) of the Criminal Procedure Law of Lagos State and has nothing to do with 25  
the interpretation or application of the 1979 Constitution as provided by section 259(3) of the said Constitution in matter of reference to this court. In my opinion, therefore, the Court of Appeal was, with respect, in error to have referred the third question to this court as it does not pertain to any interpretation or application of any section of the Constitution in accordance 30  
with the said section 259(3) of the Constitution. Consequently I, too, hold the view that the third question should not be answered but remitted to the Court of Appeal for determination.

In the final result my answer to the first question is that Section 256(2) of the Constitution of the Federal Republic of Nigeria does not bar 35  
ajudicial Officer who has ceased to be one from appearing before a Court or Tribunal to conduct in person a case to which he is a party (in the instant case a complainant in a criminal case).

For reasons already given, I decline to answer the second and third questions.

I abide by the consequential orders contained in the lead judgment of my learned brother, the Honourable the Chief Justice of Nigeria.

Constitutional issue referred answered in the negative.

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