

SUPREME COURT OF NIGERIA
14TH JANUARY, 2000. SC. 17/1988
CORAM:- A. B. WALI, E. O. OGWUEGBU, O. ACHIKE, U. A.
KALGO, E. O. AYOOLA, JJSC.

DANG PAM	APPELLANT
AND		
SALE DANG GWOM	RESPONDENT

***APPEALS** - Customary law - Customary Court of Appeal - Improper constitution of - Such an issue cannot be said to have raised a question of customary law.*

***APPEALS** - Customary law - Misdirection of fact - Ground of appeal - Which complains of misdirection of fact by the trial court - Does not raise a question of customary law - And is incompetent.*

***CONSTITUTIONAL LAW** - Jurisdiction - right of appeal - To the Court of Appeal - From the judgment of the customary Court of Appeal of a State - Under section 224(1) of the 1979 Constitution - The right pertains to a question of customary law alone.*

***CUSTOMARY LAW** - Appeals - Native law and custom - Issue of - Ground of appeal - Which raises the issue of native law and custom relating to the burial of one's dead - Is a valid ground.*

FACTS

The plaintiff/appellant sued the defendant/respondent before the Grade I Area Court, Foron-Fan, Heipang sitting at Foron, Plateau State claiming the recovery of a piece of farmland situate in Kampang. After hearing both sides to the dispute the trial court inspected the disputed farm land. It reviewed the evidence adduced and entered judgment for the plaintiff.

The defendant appealed to the Plateau State Customary Court of

Appeal which reviewed the evidence presented in the trial court and allowed the appeal in favour of the defendant holding that the plaintiff failed to establish his claim. Aggrieved, the plaintiff appealed to the Court of Appeal, Jos Division. In the Court of Appeal, six grounds of appeal were filed. That Court in its decision found that none of the grounds contained an issue of customary law as laid down by section 224 of the 1979 Constitution. It therefore struck out the appeal as being incompetent. The plaintiff has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether the appellant's appeal to the Court below was, in terms of section 224(1) of the Constitution, from a decision of the Customary Court of Appeal of Plateau State "with respect to any question of Customary Law."

HELD (Unanimously allowing the appeal in part per lead judgment of WALI JSC)

Constitutional law - Jurisdiction

1. Apart from the jurisdiction spelt out in S. 241(1) of the 1979 Constitution, no any other matter or matters have been prescribed by the National Assembly in line with S. 224(1) (supra). With this back ground I shall now proceed to examine the relevant grounds of appeal to wit: 3, 4, and 6 already reproduced in this judgment and as done by this court in Golok v. Diyalpwan (1990) 3 NWLR (pt. 139) 411. At page 418 of the Law Report Uwais JSC [as he then was] stated the law as follows:-

"It is clear from the provisions of subsection (1) of section 224 of the 1979 Constitution that there is only one right of appeal to the Court of Appeal. This right pertains to a complaint on ground of appeal which raises questions of customary law alone. It does not accommodate any complaint or ground of appeal which does not raise a question of customary law." (p. 10 F)

Customary law - Misdirection of fact

2. Ground 3: This ground in substance complains of misdirection of fact by the trial court in that the farmland in dispute was given out as a loan or

gift. It does not raise the question of customary law as stated by the Court of Appeal. It is incompetent. (p. 11 B)

Appeals - Native law and custom

3. Ground 4: This ground with its particulars in my view raises issue of customary law in that it is part of Berom Native Law and custom to bury their dead on their own land. I hold that it is a valid ground. The appeal succeeds in part and it is allowed. The order striking out the appeal by the Court of Appeal for want of jurisdiction is set aside and the appeal is remitted to the Court of Appeal, JOS division for hearing by a differently constituted panel on ground 4 only. (pp. 11 C/12 B)

Customary Law - Customary Court of Appeal

4. As regards grounds 6 I entirely endorse the view expressed on it by the Court of Appeal that it does not raise the question of customary law. The issue raised of improper constitution of the Customary Court of Appeal that heard the appeal and that cannot be said to have raised a question of customary law. (p. 11 D)

NOTABLE POINTS OF INTEREST

OGWUEGBU.JSC

1. The meaning of Customary Law

One must know what customary law means to be able to determine in an appeal whether a question of customary law is involved. In Oyewunmi v. Ogunesan (1990) 3 N.W.L.R. (pt. 137) 182 at 207, Obaseki, J.S.C. defined "customary law" as "the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people." See also Kharie Zaidan v. Fatima Khalil Mohssen (1973) 11 S.C. 1 at 2. (p. 13 C)

AYOOLA JSC

2. When a question of customary law arises

I venture to think that a decision is in respect of a question of Customary Law when the controversy involves a determination of what the relevant B customary law is and the application of Customary Law so ascertained to the question in controversy. Where the parties are in agreement as to what the applicable customary law is and the Customary Court of Appeal does not need to resolve any dispute as to what the applicable customary C law is, no decision as to any question of customary law arises. However, where, notwithstanding the agreement of the parties as to the applicable Customary law, there is a dispute as to the extent and manner in which such applicable customary law determines and regulates the right, obligation or relationship of the parties having regard to facts established in D the case, a resolution of such dispute can, in my opinion, be regarded as a decision with respect to a question of customary law. Where the decision of the Customary Court of Appeal turns purely on facts, or on question of procedure, such decision is not with respect to a question of E customary law, notwithstanding that the applicable law is customary law. (p. 18 C)

REPRESENTATION

F M. A. Ekone, Abednego and G. O. Ogundare for the appellant
J. D. Moze with Felix Eki for the respondent

CASES REFERRED TO

G Akinfolarin v. Akinola (1994) 4 SCJ (PT. 1) 30 at 42; 47 and 48
Fajinmi v. The Speaker, Western House of Assembly (1962) 1 All NLR (pt. 10) 205
Golok v. Diyalpwan (1990) 3 NWLR (pt. 139) 411
Joseph Ohai v. Samuel Akpoemonye (1999) 1 NWLR (pt. 588) 521
H Oyewunmi v. Ogunesan (1990) 3 N.W.L.R. (pt. 137) 182 at 207
Zaidan v. Mohssen (1973) 11 S.C. 1 at 21
Ohai v. Akpoemonye (1999) 1 NWLR (pt. 588) 521

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979; ss 224 (1) and 247 (1)

LEAD JUDGMENT BY WALIJS

The plaintiff sued the defendant before the Grade 1 Area Court. Foron-Fan, Heipang, sitting at Foron, Plateau State, claiming the recovery of a piece of farmland situate in Kamang. He stated his case as follows:-

" I am suing the defendant claiming from him my farmland which I inherited from my father. It was my father that was doing it and the grandfather of the defendant came to my father as a friend and asked for a place to farm and my father gave him a place to build and he built his house there that was how the place came into the possession of the defendant from some where. He has his own place with his ruined house in it but left to come to where his grandfather not from my father. On the authority of my father his grand father planted some cactus trees which he got from the one already planted by my father.

After the death of his father he went to his former place and left this one and as I went there to start farming he stopped me while in the actual sense there was one given to my father by his grandfather but he refused that is why I demanded for my own given to his grandfather by my father. This dispute was taken to our elders and they directed my father to show his farm and he showed it to them and I was there and as I wanted to take over my farmland he refused me that is why I now came to the court."

After hearing both sides to the dispute the trial court inspected the disputed farmland. It reviews the evidence adduced and entered judgment for the plaintiff. The defendant appealed to the Plateau State Customary Court of Appeal which reviews the evidence presented in the trial court, and allowed the appeal in favour of the defendant wherein it stated:-

"It is our candid view that based on the facts of this case, the trial court entirely failed to advert its mind to the case as essentially argued by both parties. It is our candid view that if the trial court had

properly directed itself to the main issue of the purported gift or loan to the defendant's grand-father by the plaintiff's father; it would have found as a fact that, the plaintiff failed to establish his claim. And even in the alternative argument put up by the learned counsel to the appellant on the presumption of gift (which we do not believe) the plaintiff's case must equally have failed. And guided by the principles in Oniah (supra) a Supreme Court decision, it is our conclusion that all the reasons, given by the court below for finding in favour of the plaintiff were founded on nothing but speculative, and created probabilities."

Aggrieved by the Customary Court of Appeal decision, the plaintiff lodged an appeal against it in the Court of Appeal, Jos Division. He filed six (6) grounds of appeal.

Learned counsel filed and exchanged briefs of argument which they adopted at the oral hearing of the appeal on 27th October, 1997; and judgment was reserved to 9th December, 1997; and on that date, the Court of Appeal (Corum: Oguntade, Edozie and Opene JJCA) in its unanimous judgment by Oguntade, JCA, considered the competence of each of the six (6) grounds of Appeal and concluded:-

"None of the six grounds of appeal survives. All of them are invalid. The position is that the appellant filed a notice of appeal which contained no grounds of appeal. The appeal is therefore defective and incompetent. See Anadi v. Okoli (1977) 7 S.C. 57 at 67. This appeal which is incompetent is therefore struck out."

The plaintiff has now further appealed to this court. Henceforth the plaintiff and the defendant shall be referred to in this judgment as the appellant and the respondent respectively.

Parties filed and exchanged briefs which they adopted and expatiated during the oral hearing of the appeal in court.

Learned counsel for the respondent during the oral hearing of the appeal abandoned his preliminary objection on grounds 2 and 3 of the grounds of appeal based on S. 213 (3) of the 1979 Constitution and same was struck out.

In the brief filed by learned counsel for the appellant, the following 3 issues were raised for determination-

"1. Whether or not the right of appeal under section 224 of the Constitution of the Federal Republic of Nigeria 1979 as amended precluded the Honourable Court of Appeal from determining a ground of appeal that challenged the jurisdiction/competence of the Customary Court of Appeal, Jos.

2. Whether or not ground 3 as contained in the Notice of Appeal did not raise an issue of Customary Law to make it competent before the Court.

3. Whether or not ground 4 did not raise issue of Customary Law and thus competent before the Court."

The Respondent on his part formulated 2 issues in his brief which read -

"1. Whether the appellant's challenge of the constitution of the Customary Court of Appeal, Jos in suit No. CCA/168A/88 in the court below, was a question of customary law as envisaged by section 224 of the 1979 constitution as amended.

2. Whether the appellants grounds 3 and 4 in the court below raised issues of Customary law."

For the purpose of determining this appeal, I shall adopt the issues raised in the appellants' brief which have adequately covered the two issues formulated by the respondent.

Under Issue 1 it was the contention of learned counsel for the appellant since the learned Justices of the Court of Appeal conceded that the 6th ground of appeal raised the question of jurisdiction of the Lower Court, they were wrong to have held that the said ground not being an issue of customary law was not competent in the light of S. 224 (1) of the 1979 Constitution. He submitted that what the Court of Appeal did is contrary to S. 248 of Decree 107 - Constitution (Suspension and Modification) Decree, 1993. He cited and relied on Jimoh Akinfolarin and 2 Ors. v. Solomon Oluwole Akinola (1994) 4 SCJA (PT. 1) 30 at 42; 47 and 48; Salawu Fajinmi v. The Speaker, Western House of Assembly (1962) 1 All NLR (pt. 10) 205 and Babang Golok v. Mambok Diyapwan (1990) 3 NWLR (pt. 139) 411.

On Issue 2, it was his submission that Ground 3 of the Grounds of appeal is challenging the decision of the Customary Court of Appeal

which presumed that the farmland in dispute was a gift or loan to the respondent and it therefore raised the issue of application of customary law. He cited Richard Ezenya and Ors. v. Gabriel Okeke and Ors. (1995) 4 SCNJ 60 at 85.

B As regards Issue 3 learned counsel was of the contention that the Court of Appeal was wrong in its view that ground 4 did not involve Issue of customary law. He cited Golok v. Diyalpwan (supra). He urges this Court to allow the appeal.

C In reply learned counsel for the respondent submitted that ground 6 of the grounds of appeal though weighty does not raise an issue of customary law. He contended that mere challenging the competence of the Customary Court of Appeal, does not ipso fact fall within the provision of S. 224(1) of the 1979 Constitution as amended by Decree No. D 107 of 1973. He cited and relied on Zaidan v. Mohssen (1973) 11 SC 1 and Golok v. Diyalpwan (1990) 3 NWLR (pt. 139) 411 at 418. On grounds 3 and 4 of the Ground of Appeal it was his submission that none of them raised issue of customary law. He urged us to dismiss the appeal. E

The grounds of appeal filed before the Court of Appeal and which that court ruled are incompetent having regard to the provision of S. 224 (1) of the 1979 Constitution are as follows:-

F "(1) *The judgment of the Customary court of Appeal, Jos is against the weight of evidence.*

(2) *The learned Justices of the Customary Court of Appeal, Jos misdirected itself (sic) and resolved the appeal on the basis of loan.*

Particulars of Error

G (a) *Misdirection: The claim before the trial court was centered on exchange of land between the parents of the plaintiff and defendant and not loan per se as canvassed and upheld by the Customary Court of appeal, Jos.*

H (b) *The contradictions on the basis of loan the court used in allowing the appeal did not affect the issue of exchange of the land in dispute which the court failed to direct itself on.*

(3) *The learned Justices of the Customary Court of Appeal, Jos*

erred in law when it (sic) assumed that the land in dispute was either given out as loan or gift and thus required the presence of witnesses.

Particulars of Error

(a) The decision of the court was solely based on the presumption that it is a general custom that is applicable in Nigeria based on authority of Cole v. Folami 1 FSC 66 when no such evidence was led at the trial. B

(4) The learned Justices of the Customary Court of appeal, Jos erred in law when it (sic) held that under Berom Native Law and Custom one cannot bury his dead on another's man (sic) land. C

Particulars of Error

(a) It was an error for the court to hold that the plaintiff/respondent admitted such custom and thus required no proof.

(b) There (No) was no unqualified admission of the alleged Native Law and Custom by the plaintiff/respondent at the trial court. D

(c) Native Law and Custom is an issue of fact that requires proof by the person alleging it.

(d) The judges of the trial court are presumed to know the custom and thus when they gave judgment against the defendant it means that they did not accept the such alleged custom. E

(5) The learned Justices of the Customary court of Appeal, Jos erred in law when it (sic) failed to take cognisance of the fact that it was dealing with the decision of an Area Court F

Particulars of Error

The election and usage of the word loan showed that the court did not go beyond what appeared on the face of the claim as enjoined by the Supreme Court in the case of Musa Iyayi v. Sule Eyigebe (1987) 3 NWLR (part 61) page 523 at 525. G

(6) (Additional Ground of appeal) The hearing, proceedings and judgment of the Customary Court of Appeal, Jos in appeal No. CCA/168A/88 over the judgment of Grade 1 Area, Foron in suit No. CV/59/88 H is a nullity, because the appeal court was not properly constituted in accordance with the law and thus lack (sic) jurisdiction.

Particulars of Error

(a) *From pages 57 - 68 of the record of appeal when hearing of the appeal commenced before it only 2 (two) JUDGES sat and determined the appeal.*

B (b) *By virtue of Section 248 of the Constitution (Suspension and Modification) Decree 1993 i.e. Decree No. 107 that came into effect on the 17/11/93, the Customary Court of Appeal shall be duly constituted of at least 3 (three) JUDGES of the Court."*

C By virtue of the provision of S. 247 (1) of the 1979 Constitution, a Customary Court of appeal of a State is created to entertain appeal in civil proceedings involving questions of customary law. It states as follows:-

D *"247 (1). A Customary court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law."*

E The provision of this section is restrictively qualified by S. 224(1) of the said Constitution in the sense that the right of appeal to the Court of appeal is restricted to an appeal as of right in civil proceedings involving customary law and such other matters as may be prescribed by an Act of the National Assembly. The Section provides thus -

F *"224 (1) An appeal shall lie from decisions of the Customary Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of Customary law and such other matters as may be prescribed by an Act of the National Assembly."*

G **Apart from the jurisdiction spelt out in S. 241(1) of the 1979 Constitution, no any other matter or matters have been prescribed by the National Assembly in line with S. 224(1) (supra). With this back ground I shall now proceed to examine the relevant grounds of appeal to wit: 3, 4, and 6 already reproduced in this judgment and as done by this court in Golok v. Diyalpwan (1990) 3 H NWLR (pt. 139) 411. At page 418 of the Law Report Uwais JSC [as he then was] stated the law as follows:-**

"It is clear from the provisions of subsection (1) of section 224 of the 1979 Constitution that there is only one right of appeal to the

Court of Appeal. This right pertains to a complaint on ground of appeal which raises questions of customary law alone. It does not accommodate any complaint or ground of appeal which does not raise a question of customary law."

The appellant made no complaint with respect to grounds 1, 2 and 5 which were also struck out by the Court of appeal for incompetence viz-a-viz S. 224(1) of the 1979 Constitution. B

Ground 3: This ground in substance complains of misdirection of fact by the trial court in that the farmland in dispute was given out as a loan or gift. It does not raise the question of customary law as stated by the Court of Appeal. It is incompetent. C

Ground 4: This ground with its particulars in my view raises issue of customary law in that it is part of Berom Native Law and custom to bury their dead on their own land. I hold that it is a valid ground. D

As regards grounds 6 I entirely endorse the view expressed on it by the Court of Appeal that it does not raise the question of customary law. The issue raised of improper constitution of the Customary Court of Appeal that heard the appeal and that cannot be said to have raised a question of customary law. E

The appeal is therefore only sustained by ground 4 of the grounds of appeal. Issue No. six is therefore resolved against the appellant. The cases of Jimoh Akinfolarin & Ors. v. Solomon Oluwole Akinnola, (1994) 4 SCJ (pt. 1) 30 and Salawu Fajinmi v. The Speaker, Western House of Assembly (1962) 1 All NLR (pt. 1) 205 cited in support of Issue 1 which was culled from ground 6 are of no held and relevance to the appellant's case in the present context. The consideration of S. 248 of the 1979 Constitution as amended by Decree No. 107 of 1993 therefore does not arise. F

In Joseph Ohai v. Samuel Akpoemonye (1999) 1 NWLR (pt. 588) 521. This court re-stated the law on page 528 as follows:-

"For an appeal to lie to the Court of Appeal from the judgment of the Customary court of Appeal of a State, therefore, it must relate-

(a) to a question of Customary law, and/or

(b) to such other matters as may be prescribed by an Act of the National Assembly."

Issues 1 and 2 are therefore resolved against the appellant while Issue 3 is resolved in his favour. Ground 4 of the grounds of appeal filed before the Court of Appeal is hereby sustained.

The appeal succeeds in part and it is allowed. The order striking out the appeal by the Court of Appeal for want of jurisdiction is set aside and the appeal is remitted to the Court of Appeal, JOS division for hearing by a differently constituted panel on ground 4 only.

Each party shall bear its own costs in this appeal.

D

OGWUEGBU JSC

I have had a preview of the judgment of my learned brother Wali, J.S.C. just delivered. I agree with his reasoning and conclusion that the appeal be remitted to the court below for hearing de novo on ground 4 of the notice of appeal.

The proceedings leading to this appeal originated from the Grade 1 Area Court of Foron - Fan - Heipang. The plaintiff claimed against the defendant ownership of a farmland. The Area Court entered judgment for the plaintiff. There were appeals to the Customary Court of Appeal, Jos and the Court of Appeal, Jos Division. The plaintiff who is the appellant in this court lost in the Customary Court of Appeal and the Court of Appeal. The court below struck out the appeal of the plaintiff as incompetent because the six grounds of appeal filed by the plaintiff/appellant were invalid having regard to the provisions of section 224(1) of the 1979 Constitution.

Section 224(1) of the Constitution of the Federal Republic of Nigeria, 1979 provides:

"224- (1) An appeal shall lie from decisions of the Customary Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any

question of Customary Law and such other matters as may be prescribed by an Act of the National Assembly."

The right of appeal from the Customary Court of Appeal to the Court of Appeal is as of right and must relate to any question of customary law and/or such other matters as may be prescribed by an Act of the National Assembly. It is now the National Assembly that can extend this right by providing for such other matters. Neither the Federal Military Government nor the National Assembly made such other provision as envisaged in section 224(1) of the 1979 Constitution. In the circumstance, for an appeal from the Customary Court of Appeal to the Court of Appeal to be competent, it must raise a question of customary law.

One must know what customary law means to be able to determine in an appeal whether a question of customary law is involved. In Oyewunmi v. Ogunesan (1990) 3 N.W.L.R. (pt. 137) 182 at 207, Obaseki, J.S.C. defined "customary law" as "the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people." See also Kharie Zaidan v. Fatima Khalil Mohssen (1973) 11 S.C. 1 at 21 and Ohai v. Akpoemonye (1999) 1 NWLR (pt. 588) 521.

The court below considered each of the six grounds of appeal with the above definition in mind and came to the conclusion that none of them raised an issue of customary law. Having read the grounds of appeal, I agree that grounds 1, 2, 3, 5 and 6 do not raise any question of customary law. As to ground 4, that court was in error. Ground 4 of the notice of appeal reads:

"4. The learned Justices of the Customary Court of appeal, Jos erred in law when it held that under Berom Native Law and Custom one cannot bury his dead on another's man (sic) land.

Particulars of Error:

(a) *It was an error for the court to hold that the plaintiff/respondent admitted such custom and thus required no proof.*

(b) *There no (sic) was no unqualified admission of the alleged*

Native Law and Custom by the plaintiff/respondent at the trial court.

(c) *Native Law and Custom is an issue of fact that requires proof by the person alleging it.*

(d) *The judges of the trial court are presumed to know the custom and thus when they gave judgment against the defendant it means that they did not accept the (sic) such alleged custom.'*

The ground of appeal raised the question of Berom native law and custom relating to the burial of one's dead in a parcel of land belonging to another.

It was valid and it rendered the appeal competent.

For the above reasons and the fuller reasons set out in the judgment of my learned brother Wali, J.S.C., I allow the appeal, set aside the judgment of the court below delivered on 9-12-97 and remit the appeal to the court below for hearing de novo on ground 4 by a different panel of Justices. I make no order as to costs.

E **ACHIKE JSC**

I have had a preview of the Judgment of my learned brother Wali, J.S.C. just delivered. I entirely agree with him that the appeal has merits and succeeds.

F The appeal to the lower court from the customary Court of Appeal, Jos on the sole reason that it was filed in contravention of section 224(1) of the Constitution of the Federal Republic of Nigeria 1979 in that the six grounds of appeal filed were defective as none related to question of customary law. Sub-section (1) provides:

G "224 - (1) *An appeal shall lie from decisions of the Customary Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary Law and such other matters as may be prescribed*

H *by an act of the National Assembly.*"

It may be recalled that the appeal from the Customary Court of Appeal to the Court of Appeal was anchored on six grounds of Appeal. In a brief but unanimous judgment of the Court of Appeal, as earlier noted, that

court dismissed the appeal. In the leading judgment of Oguntade, JCA, to which Edozie and Opene JJCA concurred, this is how the matter was tersely disposed of:

"None of the six grounds of appeal survives. All of them are invalid. The position is that the appellant filed a notice of appeal. The appeal is therefore defective and incompetent. See Anadi v. Okoli (1977) 7 SC 57 at 67. This appeal which is incompetent is therefore struck out."

It is against the order striking out the appeal that the present appeal is premised. The facts of this appeal have been fully set out in the leading judgment of Wali, JSC and I respectfully pray to adopt them as mine. It is enough to say that I have closely examined the six grounds of appeal which may be summarized thus: Ground 1 deals with weight of evidence; ground 2 deals with misdirection by the Customary Court of Appeal Justices; ground 3 deals with error on law in determining whether the land in dispute was given out as a loan or gift and requirement of witness in proof thereof; ground 4 questions whether under Berom Native Law and custom one cannot bury his dead in another man's land; ground 5 deals with failure of the Customary Court of Appeal to understand that it was dealing with decision of an Area Court while the 6th ground of appeal questions whether the Customary Court of appeal, Jos was properly constituted. Clearly, except for ground 4, none of the other grounds of appeal is directed to question of customary law which can sustain the appeal within the provisions of S. 224(1) of the Constitution. I am therefore of opinion that to the extent that grounds 1, 2, 3, 5 and 6 of the grounds of appeal are not matters within the purview of the Constitutional provisions under section 224(1) of the 1979 Constitution. It is necessary to reproduce ground 4, short of its particulars, for easy appreciation of its content:

"The learned Justice of the Customary Court of Appeal, Jos erred in law when it held that under Berom Native Law and Custom one cannot bury his head on another man (sic) land."

I am clearly of opinion that this ground of appeal is squarely focussed on issue of customary law as it relates to Berom Customary Law on burial of a person on another person's land. It was therefore erroneous in law

for the Court of Appeal to have oversighted that ground 4 of the grounds of appeal questions an aspect of Berom customary law and that alone is sufficient to give competence to the appeal before the Court of Appeal.

Because of the conclusion reached by me in identifying ground
 B 4 of the grounds of appeal as one raising complaint on customary law, the appeal accordingly succeeds. The same is allowed and the decision of the lower court striking the appeal out as being incompetent for lack of jurisdiction is set aside. I direct that the appeal be remitted to the
 C lower court for hearing de novo before a new panel of Justices in respect of ground 4 only of the grounds of appeal.

I order that each party bears its own costs.

D **KALGO JSC**

This is an appeal against the decision of the Court of Appeal Jos, delivered on the 9th of December, 1997. The appeal came to the Court of Appeal from Customary Court of Appeal of Plateau State Jos. In the
 E Court of Appeal, six grounds of appeal were filed. The Court of Appeal in its decision found that none of the grounds contained any issue of Customary Law laid down by Section 224 of the 1979 Constitution. It therefore struck out the appeal as being incompetent. The appellant ap-
 F pealed to this court on this finding on three grounds. His main complaint culled from the grounds of appeal was that the Court of Appeal was wrong in its decision that none of the six grounds of appeal filed before it raised any issue of customary law.

The parties filed their briefs of argument in this court and for-
 G mulated issues for determination in the appeal. The respondent in his brief also raised a preliminary objection on the competence of grounds of appeal 2 and 3 filed by the appellant in this court. At the hearing of the appeal, the respondent withdrew the preliminary objection and it is hereby
 H struck out.

My learned brother Wali, JSC in his lead judgment dealt fully and extensively with the grounds of appeal filed in the Court of Appeal and the issues for determination in the appellant's brief in this court. My Lord

was able to find, and I agree with him entirely, that only ground of appeal 4 in the Court of Appeal dealing with the Birom Native Law and Custom on whether a native can bury his dead on another person's land, raised the issue of Customary Law in this appeal. This ground therefore satisfied the requirement of Section 224 of 1979 Constitution and makes the appeal in the Court of Appeal valid and competent. See Golok v. Diyalpwan (1990) 3 NWLR (pt. 139) 411 at 418. This ground alone, is sufficient to validate the appeal and I find that the Court of Appeal was wrong to strike out the Appeal before it as being incompetent.

For the more detailed reasons given by my learned brother Wali, JSC, in his lead judgment, I find some merit in this appeal. I allow it in part and set aside the decision of the Court of Appeal striking out the appeal. I find that the appeal is competent and I hereby send it back to the Court of Appeal Jos for re-hearing by a different panel from that which heard it first. I abide by the consequential orders in the lead judgment including the order as to cost s.

AYOOLA JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother, Wali, JSC. I agree with him that this appeal be allowed and that the matter be remitted to the Court of Appeal for the appellant's appeal to be heard on ground 4 of the appellant's notice of appeal to that court.

The facts that led to this appeal have been adequately stated in the judgment of Wali, JSC. I gratefully adopt his statement of the facts.

The main question on this appeal is whether the appellant's appeal to the Court below was, in terms of section 224(1) of the Constitution, from a decision of the Customary Court of Appeal of Plateau State "with respect to any question of Customary Law." Section 224(1) of the 1979 Constitution provides:

"An appeal shall lie from decisions of the Customary Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question

of Customary Law and such other matters as may be prescribed by an Act of the National Assembly."

Leaving aside the right of appeal from the decision of the Customary Court of Appeal of a State in matters as may be prescribed by an Act of National Assembly, the plain and unambiguous meaning in section 224(1) is that where in civil proceedings the decision of the Customary Court of Appeal of a State is with respect to any question of Customary Law the appellant may appeal as of right. The question therefore is: When is a decision in respect of a question of Customary Law?

I venture to think that a decision is in respect of a question of Customary Law when the controversy involves a determination of what the relevant customary law is and the application of Customary Law so ascertained to the question in controversy. Where the parties are in agreement as to what the applicable customary law is and the Customary Court of Appeal does not need to resolve any dispute as to what the applicable customary law is, no decision as to any question of customary law arises. However, where, notwithstanding the agreement of the parties as to the applicable Customary law, there is a dispute as to the extent and manner in which such applicable customary law determines and regulates the right, obligation or relationship of the parties having regard to facts established in the case, a resolution of such dispute can, in my opinion, be regarded as a decision with respect to a question of customary law. Where the decision of the Customary Court of Appeal turns purely on facts, or on question of procedure, such decision is not with respect to a question of customary law, notwithstanding that the applicable law is customary law.

Applying the test stated above to the present case, it is evident in regard to the grounds of appeal before the Court of Appeal, that ground 1, therefore, which complains that the judgment of the Customary Court of Appeal is against the weight of evidence; grounds 2 and 3 thereof, which in substance complained of misdirection of that court in regard to the nature of transaction between the parties; ground 5 which, putting the best construction one can on it, remained meaningless, and ground 6 which raises the question of the nullity of the proceedings have regard to

the constitution of the trial court, do not at all relate to a decision of the Customary Court of Appeal in respect of any question of customary law.

In ground 4 however it was complained that:

"The Learned Justices of the Customary Court of Appeal, Jos erred in law when it held that under Berom Nature Law and Custom one cannot bury his dead on another's man (sic) land." B

The particulars of error subjoined to the ground of appeal have been fully set out in the judgment of Wali, JSC. Even though the particulars raised diffused questions relating, as they were, to the proof of customary law, it is clear that, in substance, what was challenged by that ground was the decision of the Customary Law Court of Appeal with respect to the presumption to be drawn under the applicable customary law from the burial by one party to the dispute of his dead on the land in question. Since the ground is a challenge to the decision of the Customary Court of Appeal in respect of the aspect of customary law, the appellant has a right of appeal only on that ground from the decision of that court to the Court of Appeal. C D

While the Court of Appeal was right in holding that the other grounds are not competent, it erred in regard to ground 4 which is sufficient to sustain the appellant's right of appeal. E

In the result, for these reasons and the more detailed reasons in the judgment of my learned brother, Wali, JSC, I too would allow the appeal. I abide by the consequential orders made by him. I too would order that the parties bear their costs of the appeal. F

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