

SUPREME COURT OF NIGERIA

7TH JULY, 2000. SC. 304/90

**CORAM:- U. MOHAMMED, A. I. IGUH, A. I. KATSINA-ALU,
U. A. KALGO, S. O. UWAIFO, JJSC**

MR. MICHAEL A. OMO APPELLANT
AND

1. JUDICIAL SERVICE COMMITTEE
OF DELTA STATE

2. ATTORNEY-GENERAL AND COMMISSIONER ... RESPONDENTS
FOR JUSTICE DELTA STATE

3. THE MILITARY ADMINISTRATOR OF DELTA STATE

***APPEALS** - Issue - Incompetent issue - Any issue or argument which has no ground of appeal to support it - Is not only incompetent but completely valueless.*

***APPEALS** - Issues - Function of - The issues for determination in an appeal - Accentuate the grounds of appeal in the light of the errors alleged.*

***COURTS** - Conduct of public officers - Comments on - A court is entitled to comment on the despicable conduct of public officers - To serve as a deterrent to other public officers.*

***EVIDENCE** - Unchallenged and uncontradicted evidence - Attitude of the court to such evidence.*

***EVIDENCE** - Oral evidence - Proof - Oral instruction - Given by a Chief Executive to a subordinate - Can be proved by oral evidence.*

***EVIDENCE** - Oral evidence - Hearsay evidence - Oral instruction - Oral evidence of such instruction by the receiver - Is not a hearsay evidence.*

***FAIR HEARING** - Denial of - Where counsel had an opportunity to be heard - But chose to be silent - He cannot complain that he was not given a fair hearing.*

***MASTER & SERVANT** - Compulsory retirement - Decree No. 17 of 1984 - Removal by the appropriate authority - The evidence point irresistibly to the fact that it was the military Governor - That removed the plaintiff from office.*

FACTS

In the High Court of former Bendel State (now Delta State) the plaintiff/appellant brought an action against the Judicial Service Committee (1st defendant/respondent) and the Attorney-General of Bendel State (2nd defendant/respondent) claiming inter alia, a declaration that his purported retirement as per a letter dated 21st March, 1985 is wrongful, unconstitutional, null and void and of no effect. The plaintiff was a Chief Magistrate in the then Bendel State Judiciary. By the letter dated 21st March 1985 (Exhibit "C") written by the 1st defendant, it was stated that the Military Governor had approved the removal of the plaintiff with immediate effect. The plaintiff made several efforts to be reinstated but without success, hence he brought an action claiming as aforesaid. Thereafter, the plaintiff sought and obtained an order of court to join the Military Governor of Bendel State as 3rd Defendant in the suit on the ground that the Military Governor was personally and directly responsible for his purported retirement or removal from office.

When the plaintiff filed his statement of claim, the defendants moved the court for an order dismissing the claim on the ground that the action was not maintainable by virtue of the Public Officers (Special Provisions) Decree No. 17 of 1984. In the supporting affidavit to this application it was deposed inter alia "That the Military Governor of Bendel State approved the immediate retirement of Plaintiff/Respondent in the exercise of his power as Military Governor". The plaintiff in reply admitted the Military Governor was responsible for his removal from office but that it was a wrongful exercise of his power. In his ruling the

learned trial judge refused the application to dismiss the suit and held that it has not been established that the retirement of the plaintiff was made pursuant to Decree No. 17 of 1984. The defendants thereafter filed their statement of defence and the case proceeded to trial. The plaintiff called one witness in support of his claim while the defendants called four witnesses amongst whom was the secretary to the Military Government and Head of Service (DW 4). In a reserved judgment the learned trial judge found in favour of the plaintiff. The defendants appeal to the Court of Appeal, Benin Division was allowed on the ground that the jurisdiction of the court had been ousted by Decree No. 17 of 1984. The plaintiff has now appealed to the Supreme Court raising some issues.

ISSUES FOR DETERMINATION

"(1) Whether the Court of Appeal acted properly in expunging part of the Appellants argument based on the issue as formulated, when the Court has adopted the said issue, merely on the ground that the issue was wider than the ground of appeal and without inviting arguments from Counsel before doing so?

(2) Assuming that the Court of Appeal was wrong in so expunging part of the Appellants argument, could the Appellant be said to have had a fair-hearing?

HELD (Unanimously dismissing the appeal per lead judgment of **KATSINA-ALU JSC**)

Incompetent issue

1. Issues or questions for determination in an appeal are framed from the grounds of appeal before the court. Consequently any issue, argument or other part of a brief which has no ground or grounds of appeal to support it or which is based on a ground of appeal for which no leave has been sought or obtained is not only incompetent but completely valueless. See Idika v. Lrisi (No.2) (1988) 2 NWLR (pt. 78) 563. Any such issue taken up in the brief ought to be and must be ignored by the Appellate court. See Lyayi v. Eyigebe (1987) 3 NWLR (pt. 61) 523. (p. 2636 A)

Issues - Function

2. The issues for determination in an appeal accentuate the issues in the grounds of appeal relevant to the determination of the appeal in the light of the grounds of errors alleged. It is for this reason that the issues for determination cannot and should not be at large but must fall within the purview of the grounds of appeal filed - see Olorosago v. Adebajo (1988) 4 NWLR (pt. 88) 275 at 283. (p. 2636 C)

C Fair hearing - Denial of

3. The contention that the plaintiff was denied a fair hearing before arguments on Exhibit 'F' were expunged was misconceived. This is because it is on record that the Defendants as Appellants in the Court of Appeal filed an Appellants' Reply Brief. Also in his oral submission, learned counsel for the Defendants submitted thus: "*Submits that paragraph 6 in pages 9-11 of respondents' brief dealing with the invalidity of Exhibit 'F' be expunged.*" At that stage learned counsel for the plaintiff had an opportunity to proffer oral argument in response to this issue of expunging his argument on Exhibit 'F'. Surprisingly he chose to be silent on the issue only to turn around now to complain that he was not given a fair hearing. This complaint has no merit whatsoever. (p. 2637 A/F)

F Master & Servant - Compulsory retirement

4. On the question whether the plaintiff was properly removed within Decree No. 17 of 1984 as to oust the jurisdiction of the court, it was submitted, for the plaintiff, that the ouster would apply only if the removal was done by the appropriate authority. In this case, it was said that the appropriate authority would mean the Military Governor of the State or any person authorized by him. From the facts and circumstances of this case, it is crystal clear that the plaintiff knew that it was the Military Governor that removed him from office. The plaintiff was a chief magistrate. He understood the legal implications of his admission in the course of the proceedings in this matter that the Military Governor was personally and directly responsible for his removal. The only other

body that would have removed him was the State judicial Service Committee. But the Plaintiff himself absolved them from having anything to do with his removal. The evidence of the plaintiff coupled with the testimony of DW4 points irresistibly to only one fact. That it was the Military Governor that retired the plaintiff. (p. 2638 A,G/2639 G)

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Unchallenged and uncontradicted evidence

5. Where evidence is not challenged or contradicted it ought to be accepted. Adejumo v. Ayantegbe (1989) 3 NWLR 417, 435 D-E. In my respectful view, therefore, the learned trial Judge was in error not to have accepted and acted on the evidence of DW4, the evidence not having been challenged nor contradicted. (p. 2643 A)

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Evidence - Proof

D

6. With the utmost respect to the learned trial judge, the reasons given by him for whittling down the probative value of the evidence of DW4 are untenable and unconvincing. To begin with, it would not accord with normal official relationship to expect that every instruction given by a Military Governor or Chief Executive for that matter, to the Secretary to the Military Government (as DW4 was at that material time) or other subordinates of his must of necessity be in writing to render evidence on it capable of acceptance. To hold, as the learned trial Judge did, will amount to ignoring section 75 of the Evidence Act, and section 148 (c) of the Act. The fact, therefore, that the 3rd appellant gave certain instructions to DW4 can be proved by oral evidence of either the 3rd appellant or DW4. Whether the instructions were fully carried out to the word is a different matter which also can only be resolved by evidence. (p. 2643 E)

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G

Evidence - Oral evidence

7. The learned trial Judge also said that the evidence of DW4 was 'no more than hearsay evidence', thereby insinuating that the evidence was inadmissible. I think even here too, the learned trial Judge, with respect to him, was in error. He seemed not to have adverted his mind to Section

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76(b) of the Evidence Act which provides: '76. Oral evidence must, in all cases (b) if it refers to a fact which could be heard, it must be the evidence of witness who says he heard that fact; In the light of the above Statutory provision, the evidence of DW4 could not be described as hearsay; it is very much admissible and showed convincingly that respondent's retirement was effected under Decree No. 17." (p. 2644 D)

Courts - Conduct of Public Officers

8. These comments have come under criticism by learned counsel for the plaintiff on the ground that there was no ground of appeal relating to the conduct of these officers. My short answer to this is that the court below and any court for that matter is entitled to comment on the despicable conduct of public officers to serve as a deterrent to other public officers and to avoid a repeat performance. Finally one does not need a magnifying glass to see that the comments complained of did not influence the decision of the court. (p. 2645 E)

NOTABLE POINT OF INTEREST
UWAIFO JSC

1. Difference between the words: "approve" and "authorize"

I do not think this is a strong argument. The relevant s.1 of Decree No. 17 of 1984 says that the appropriate authority, if satisfied that a public officer has been engaged in corrupt practices or that his general conduct in relation to the performance of his duties has been such that his further continued employment in the service would not be in the public interest, may at any time after 31 December, 1983, (a) dismiss or remove the public officer summarily from his office; or (b) retire or require the public officer to compulsorily retire from the public service. In other words, the Military Governor may authorize such action against an officer. The Oxford Universal Dictionary Illustrated, 3rd edition, Vol. 1, page 125, defines the word "authorize" as "to give formal approval to." I can see no difference between the words "approve" and "authorize" in the circumstances of the compulsory retirement of the appellant under Decree 17 of 1984. (p. 2650 C)

REPRESENTATION

A. A. Kayode, with Victor Ekim for the appellant
Prof. A. A. Utuama, Hon. A. G. Delta State, with G. E. Okirhinyefe D.C.
L. for the respondents B

CASES REFERRED TO

Idika v. Lrisi (No.2) (1988) 2 NWLR (pt. 78) 563
Osinupebi v. Saibu (1982) 7 SC 104 C
Lyayi v. Eyigebe (1987) 3 NWLR (pt. 61) 523
Olorosago v. Adebajo (1988) 4 NWLR (pt. 88) 275 at 283
Adejumo v. Ayantegbe (1989) 3 NWLR 417, 435 D-E
Nwabuoku v. Haddad (1973) 11 S.C. 357 D

STATUTES REFERRED TO

Public Officers (Special Provisions) Decree No. 17 of 1984, s. 1
Evidence Act; ss. 75, 76 and 148 E

LEAD JUDGMENT BY KATSINA-ALU JSC

This is an appeal from a decision of the Court of Appeal Benin Division which overturned the decision of the trial High Court, Benin-City which had earlier held first that the removal of the Plaintiff as a Chief Magistrate was not covered by decree 17 of 1984 which ousted the F jurisdiction of the Court and secondly that the removal was unlawful.

The Plaintiff Micheal A. Omo was a Chief Magistrate in the then Bendel State Judiciary. By a letter dated 21 March 1985 Exhibit 'C' written by the Defendant - Judicial Service Committee, it was stated that the Military Governor had approved the removal of the plaintiff with immediate effect. He made fruitless efforts to get the decision to retire him rescinded and be reinstated. Subsequently he brought an action against the Judicial Service Committee and the Attorney-General of Bendel State H claiming the following reliefs:

(a) A declaration that the plaintiff's purported retirement as per a letter dated 21st March, 1985 is wrongful unconstitutional, null and void

and of no effect.

(b) A declaration that the plaintiff is still in the employment of Bendel State Judicial Service.

B (c) An order that the plaintiff be reinstated to his position as Chief Magistrate Grade 1.

(d) A declaration that the plaintiff is entitled to his salaries from 21st March, 1985 till date of judgment.

C (e) An injunction restraining the Defendants and/or any agent of the Defendants from giving effect to the contents of the said letter pending the determination of this suit.

Thereafter, the plaintiff sought and obtained an order of court to join the Military Governor of Bendel State as third Defendant in the suit. In the affidavit in support of the application, he deposed, inter alia, as follows:-

E 4. That I know from my personal knowledge and correspondence with the Military Governor of Bendel State - the party sought to be joined as the 3rd Defendant that the Military Governor was personally and directly responsible for my purported retirement and or removal from office as Chief Magistrate Grade 1.

F 9. That to the best of my knowledge and belief the Military Governor - the party sought to be added as 3rd Defendant in this suit was personally and directly responsible for giving rise to the cause of action necessitating the issuance of this Writ of Summons."

G When the plaintiff filed and served his Statement of Claim, the Defendants moved the court for an order dismissing the claim on the ground that the action was not maintainable by virtue of the Public Officers (Special Provisions) Decree 1984. In the supporting affidavit to this application one Patricia Ifeoma Okoye, a State Counsel in the Ministry of Justice, Bendel State deposed, inter alia, as follows:-

H "4. *That the Military Governor of Bendel State approved the immediate retirement of plaintiff/Respondent in the exercise of his power as the Military Governor."*

In a counter-affidavit, the plaintiff deposed in paragraphs 2,3, and 6 as

follows:-

2. *That paragraphs 4 and 8 of the affidavit in support of Defendants/Applicants motion are false.*

3. *That in further reply to paragraph 4 of the Applicants affidavit that the retirement of the plaintiff/respondent by the Military Governor of Bendel State was a wrongful exercise of his power as Bendel State Military Governor.* B

.....
6. *That the Respondent herein did not apply for retirement nor was his retirement recommended by any body before the Military Governor went ahead to retire him.* C

After learned counsel for the parties had addressed the court on the application to dismiss, the learned trial judge refused the application. He held that: D

"..... it has not been established to my satisfaction that the retirement of the respondent, was made pursuant to Decree No. 17 of 1984."

The Defendants thereafter filed their Statement of Defence and the case E proceeded to trial. The plaintiff called one witness in support of his claim while the Defendants called four (4) witnesses amongst whom was the Secretary to the Military Government and Head of Service. In a reserved judgment the learned trial judge found in favour of The Plaintiff. F

The Defendants' appeal to the Court of Appeal Benin Division was allowed on the ground that the jurisdiction of the court had been ousted by Decree No. 17 of 1984.

The appeal to this court is from the decision of the Court of G Appeal Benin Division.

The plaintiff in this appeal has raised 5, issues for determination. They are:-

"(1) Whether the Court of Appeal acted properly in expunging part of the Appellants argument based on the issue as formulated, when the Court has adopted the said issue, merely on the ground that the issue was wider than the ground of appeal and without inviting arguments from Counsel before doing so?" H

(2) *Assuming that the Court of Appeal was wrong in so expunging part of the Appellants argument, could the Appellant be said to have had a fair-hearing?*

B (3) *whether the Court of Appeal was right in holding that the evidence of DW4 was not a hearsay when that evidence was tendered not merely to prove that DW4 received an instruction from the Military Governor but also to prove the truth of that instruction eventhough the maker of the statement, the Military Governor was not called as a witness and when no foundation has been laid for not calling him as a witness?*

C (4) *Whether the word 'approved' has the same meaning as the word 'authorize'?*

D (5) *Whether it was proper for the Court of Appeal to have based its decision partly upon or to have commented on the conduct of third parties when the said conduct has not been made a ground of appeal."*

The Defendants on the other hand formulated six issues which read thus:

E 1. *Whether the Court of Appeal rightly expunged the argument proffered in the Respondent's brief (now Appellant) in respect of the validity of Exhibit 'F' when there was no ground of Appeal complaining against that part of the judgment of the learned trial Judge relating to Exhibit 'F'.*

F 2. *Whether the Appellant has a fair hearing or was given an opportunity of being heard before the Court of Appeal decided to expunge that part of the Respondent's Brief (now Appellant) as it related to Exhibit 'F'.*

3. *Whether the Court of Appeal was right when it held that the evidence of DW4 is not hearsay.*

G 4. *What interpretation should be given to the word "approved" within the context it was used in Exhibit 'C' vis-a-vis the use of the word "authorized" in Decree No. 17 of 1984.*

H 5. *Whether it can be said, taking into consideration the totality of the evidence before it, that the Court of Appeal partly based its judgment on the comments on third party especially as that said conduct of the third parties has not been made a ground of appeal.*

6. *Whether the Appellant's retirement was justified in law and in*

fact."

The issues raised by the parties are identical. I shall however adopt the issues formulated by the Plaintiff in the determination of this appeal.

ISSUES 1 and 2

Learned counsel for the plaintiff argued issues 1 and 2 together in his brief of argument. Learned Counsel pointed out that the Court of Appeal in the course of its judgment held that so much of the arguments in the plaintiff's brief that related to Exhibit -'F' should be expunged and in fact expunged that portion of the argument even though the arguments arose from the issues for determination as formulated by both sides. In Ground 1 of the Grounds of Appeal in the Court of Appeal, the Defendants who were Appellants in that court complained that the decision of the learned trial judge that Decree No. 17 of 1984 did not avail the Defendants and that therefore the court had jurisdiction was wrong. In the particulars of error, the Defendants merely referred to Exhibit 'C' the letter written by the 1st Defendant. However in the issue for determination, the Defendants like the plaintiff did not restrict themselves to the complaint against the decision of the trial court that Decree No. 17 of 1984 did not avail the Defendants. Learned counsel for the Plaintiff pointed out that the Defendants formulated the issues on the jurisdiction at large thus:

1. Whether or not on the evidence before the court the plaintiff was removed by the Military Governor of Bendel State in the exercise of powers conferred on him by the Public Officers (Special Provision) Decree No. 17 of 1984.

2. If the answer to 1 is in the affirmative, whether the learned trial judge was right in entertaining the action."

The Plaintiff, it was said, also formulated the issue for determination in substantially similar terms. It states:

"Was the learned trial judge wrong to exercise jurisdiction in determining the Respondents' claim in view of the plea of ouster of the court's jurisdiction by virtue of the provisions of Decree No. 17 of 1984."

It was therefore submitted for the Plaintiff that the Court of Appeal was in error in expunging so much of the plaintiff's brief as re-

lated to Exhibit "F". This is so because the issues as formulated by both parties dealt without any qualification with the issue whether the learned trial judge was right in holding that it has jurisdiction to entertain the plaintiff's claim. The issue as formulated, it was pointed out, was not limited to a particular ground of appeal. Therefore, it was argued, it was proper for the plaintiff to rely upon and canvass argument on the basis of Exhibit 'C' and 'F'. This would be so, even if the particulars to Ground 1 of the Grounds of Appeal had been restricted to Exhibit 'C'. This is because arguments in a brief must be on the basis of the issues formulated and not on the ground of appeal. It was further submitted that once an issue for determination has been formulated, it supersedes the ground of Appeal. For this submission learned counsel relied on the case of Momodu v. Momoh (1991) 1 NWLR (pt. 213).

Finally on this issue, it was submitted that by expunging a material aspect of the Plaintiff's brief without a hearing, particularly when the Court has adopted the issue as its own amounts to a denial of fair hearing. Reliance was placed on the cases of Ukaegbu v. Ugoji (1991) 6 NWLR (pt. 196) 127; and Ariori v. Elemo (1983) NLRI.

For the Defendants it was submitted that the Court of Appeal was right when it expunged that part of the plaintiff's brief of argument relating to Exhibit 'F'. It was pointed out that there was no appeal against the ruling of the trial court invalidating Exhibit 'F'. Since there was no ground of appeal relating to exhibit 'F' it followed that no issue for determination could arise in relation thereto. It was in addition argued that the plaintiff could not make an issue out of Exhibit 'F' without filing a cross-appeal or at least a Respondent's Notice. It was the contention of the Defendants that the grounds of appeal narrowed down the issue of jurisdiction to exhibit 'C' and the evidence of D.W.4 and definitely not the conclusion reached by the learned trial judge on the validity of Exhibit 'F'. It was said that a careful look at the grounds of appeal would reveal that no mention was made of exhibit 'F' and as such in canvassing argument on the issue of jurisdiction, the plaintiff could not under any guise refer to Exhibit 'F'.

It was also the submission of the Defendants that the plaintiff

had a fair hearing before the Court of Appeal decided to expunge the said part of the plaintiff's brief of argument which dealt with Exhibit 'F'. It was pointed out that the Defendants as Appellants in the Court below filed an Appellant's Reply brief to the Plaintiff/Respondent's brief. The plaintiff however chose to be silent on the point. What is more at the hearing of the appeal on 21 June 1990. Learned Counsel for the Defendants proffered oral argument on this point. Again learned counsel for the plaintiff proffered no oral argument in response. He cannot now complain.

This case raises a number of points and I shall first consider the issue of Exhibit 'F'. It was held by the learned trial judge that Exhibit 'F' was invalid. He said:

"I also agree with the contention of learned counsel for the plaintiff that in so far as exhibit 'F' is retrospective - in effect, it is in consistent with the enabling law and therefore void Exhibit 'F' suffers from the further defect, that it is predicated on Exhibit 'C' which as I hold, is a nullity, the 3rd defendant having attempted to usurp the functions of the Code of Conduct Tribunal it follows that Exhibit 'F' cannot and having been made, as counsel for plaintiff puts it, for an inadmissible purpose

It was also argued that the court cannot pronounce on the validity of exhibit 'F' because no relief in respect of it has been claimed. The short answer to this argument is that it overlooks the import of paragraph 9 of the amended Reply to the amended Statement of defence joining issue, on the validity of the legal notice exhibit 'F'. The argument in my view is not tenable. My clear conclusion is that all the legal defences raised in defendants' pleadings and given in evidence and argued on their behalf, have failed."

I have already indicated that the learned trial judge found for the plaintiff. The Defendants appealed to the Court of Appeal. It should be noted that they did not appeal against the decision of the learned trial judge relating the Exhibit 'F'. In other words, there was no ground of appeal against the decision of the learned judge invalidating Exhibit F.

In such a situation, no issue for determination could be formu-

lated regarding Exhibit 'F'. **Issues or questions for determination in an appeal are framed from the grounds of appeal before the court. Consequently any issue, argument or other part of a brief which has no ground or grounds of appeal to support it or which is based on a ground of appeal for which no leave has been sought or obtained is not only incompetent but completely valueless. See Idika v. Lrisi (No.2) (1988) 2 NWLR (pt. 78) 563; Osinupebi v. Saibu (1982) 7 SC 104. Any such issue taken up in the brief ought to be and must be ignored by the Appellate court. See Lyayi v. Eyigebe (1987) 3 NWLR (pt. 61) 523. The issues for determination in an appeal accentuate the issues in the grounds of appeal relevant to the determination of the appeal in the light of the grounds of errors alleged. It is for this reason that the issues for determination cannot and should not be at large but must fall within the purview of the grounds of appeal filed - see Olorosago v. Adebajo (1988) 4 NWLR (pt. 88) 275 at 283.**

As I have stated earlier on in this judgment there was no appeal against that part of the trial court's decision invalidating Exhibit 'F' so that the argument in the brief touching on Exhibit 'F' is incompetent and completely valueless and must therefore be discountenanced. The court of Appeal was therefore right when it expunged that part of the Defendants' brief relating to Exhibit 'F'. I would like to add that the issue under which the plaintiff proffered arguments touching on Exhibit 'F' was not based on any particular ground of Appeal. At page 7 of the Appellant's brief it is stated thus:

"Thus the issue as formulated was not limited to a particular ground. Therefore it was proper for the Appellant to rely upon and canvass argument on the basis of Exhibits 'C' and 'F'."

I now turn to the question of fair hearing. It has been submitted for the plaintiff that by expunging a material aspect of the Plaintiff's brief without a hearing amounts to a denial of fair hearing. The Defendants contend that the plaintiff had a fair hearing. This is because they raised the issue that the argument on Exhibit 'F' be expunged in the Appellants' Reply Brief. This was also raised in the oral argument of the Defendants'

counsel at the hearing of the appeal. The plaintiff, it was said, chose to be silent on the point.

The contention that the plaintiff was denied a fair hearing before arguments on Exhibit 'F' were expunged was misconceived. This is because it is on record that the Defendants as Appellants in the Court of Appeal filed an Appellants' Reply Brief. It was filed on 17 May 1990. At page 3 of the Reply Brief Defendants' counsel submitted as follows:

"It is humbly submitted that paragraph C at pages 9 - 11 of the Respondents brief be expunged being incompetent. The validity of exhibit F does not form a ground of the appellants appeal. There is no cross - appeal or Respondent's Notice consequently no issue can be made of the said exhibit F.

The Supreme Court has held in a number of cases that any issue, argument or other part of a brief which has no ground or grounds of appeal to support it is not only incompetent but completely valueless in the appeal. See

(1) *IDIKA V. ERISI* (1988) 2 NWLR pt 78 563 at 579 - 580. E

(2) *ONIAH V. ONYIA* (1989) 1 NWLR pt 99

(3) *UGO V. OBIKWE* (1989) 1 NWLR pt 99

(4) *ATANDA V. AJANI* (1989) 3 NWLR pt 11 511 at 543 - 544.

(5) *OSINNUPEBI v. SAIBU* (1982) 7 SC 104 at 110 - 111. F

(6) *A. G. ANAMBRA STATE VS. ONUSELOGU ENTERPRISES LTD.* (1987) 4 NWLR PT 66 547."

Also in his oral submission, learned counsel for the Defendants submitted thus:

"Submits that paragraph 6 in pages 9-11 of respondents' brief dealing with the invalidity of Exhibit 'F' be expunged."

At that stage learned counsel for the plaintiff had an opportunity to proffer oral argument in response to this issue of expunging his argument on Exhibit 'F'. Surprisingly he chose to be silent on the issue only to turn around now to complain that he was not given a fair hearing. This complaint has no merit whatsoever.

ISSUE 4:

On the question whether the plaintiff was properly removed within Decree No. 17 of 1984 as to oust the jurisdiction of the court, it was submitted, for the plaintiff, that the ouster would apply only if the removal was done by the appropriate authority. In this case, it was said that the appropriate authority would mean the Military Governor of the State or any person authorized by him.

The evidence of the plaintiff was that the Military Governor merely "approved" his removal by the Bendel State Judicial Service Committee. It has been argued that the word "authorize" assumes the giving of permission prior to or ante the doing of the act. Whereas an "approval" could imply the sanctioning subsequently of an action taken. It was submitted that a legislation which seeks to remove or take away or abridge in any way the right of subject, including the access to the law court must be strictly construed.

For the Defendants, it was submitted that the word "approved" as used in Exhibit 'C' means "decided" or "resolved". The word "authorized" in the context in which it was used in Decree No. 17 of 1984 applies only when the 3rd Defendant delegated his power to his subordinates. It was contended that there was overwhelming evidence in this case to show that the 3rd Defendant did not authorize any person but rather directed the DW 4 and 1st Defendant to inform the plaintiff of his decision to remove him from office by virtue of his powers under Decree No. 17 of 1984. Counsel referred in exhibits H, H2, H4, K, K1, K2, B, C and the evidence of DW4. Counsel also referred to the affidavit of the plaintiff dated 20/10/87 wherein he stated in paragraph 4 that it was the Military Governor who was personally and directly responsible for his removal.

From the facts and circumstances of this case, it is crystal clear that the plaintiff knew that it was the Military Governor that removed him from office. Let me explain. Before pleadings were ordered the plaintiff had sought and obtained an order of court to join the Military Governor of Bendel State as the 3rd Defendant in the suit. In the affidavit he swore in support of the application he deposed, inter alia, as follows:-

"4. That I know from my personal knowledge and correspondence the Military Governor of Bendel State - the party sought to be joined as 3rd Defendant that the Military Governor was personally and directly responsible for my purported retirement and or removal from office as Chief Magistrate Grade I

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9. That to the best of my knowledge and belief the Military Governor - the party sought to be added as 3rd Defendant in this suit was personally and directly responsible for giving rise to the cause of action necessitating the issuance of this Writ of Summons"

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This was before pleadings were filed. On the filing of the Statement of Claim the Defendants brought an application for an order dismissing the Statement of Claim and Writ on the grounds that the action was not maintainable by virtue of The Public Officers (Special Provisions) Decree, 1984. Paragraph 4 of the supporting affidavit to this application read thus:

D

"4. That the Military Governor of Bendel State approved the immediate retirement of the plaintiff/Respondent in the exercise of his power as the Military Governor."

E

The plaintiff swore to a counter affidavit on 12/1/88. He deposed in paragraphs 2, 3 and 6 as follows:

"2. That paragraphs 4 and 8 of the affidavit in support of the defendants/Applicants motion are false."

F

3. That in further reply to paragraph 4 of the Applicants affidavit that the retirement of the plaintiff/respondent by the Military Governor of Bendel State was a wrongful exercise of his power as Bendel State Military Governor."

G

6. That the Respondent herein did not apply for retirement nor was his retirement recommended by anybody before the Military Governor went ahead to retire him."

The plaintiff was a chief magistrate. He understood the legal implications of his admission in the course of the proceedings in this matter that the Military Governor was personally and directly responsible for his removal. The only other body that would have removed him was the State judicial Service Committee. But the

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Plaintiff himself absolved them from having anything to do with his removal. In his evidence before the trial court, he said:

"To the best of my knowledge the 1st Defendant did not recommend my retirement."

B The evidence of the plaintiff coupled with the testimony of DW4 points irresistibly to only one fact. That it was the Military Governor that retired the plaintiff. D.W.4 Chief Patrick Isioma Goodluck Onyeobi was at the material time the Secretary to the Military Government and Head of Service Bendel State. His evidence runs thus:

C *"Some time in December, 1984, there was a report to the Military Governor, Brigadier J.T. Useni by the State Director of Security alleging cover activities by the plaintiff. I recognized and identify Exhibit H as the report from Military Governor in a minute on the report, D Exhibit H directed me to ask the Chief Judge to see him on the matter. I took action accordingly. I forwarded Exhibit 'H' to the Chief Judge and drew his attention to the minute of the Military Governor.*

Later, the Chief Judge forwarded plaintiff's reaction to the N.S.O. E report together with the Chief Judge's comments, I recognize and identify Exhibits H2 and H3 as the said comment.

On receipt of these the Military Governor directed his Military personal assistant to acknowledged receipt of the Chief Judge's letter and at the same time send a copy to the Director of the N.S.O. for his F comments. The officer was Captain Babalola. I believe and knew the directives were carried out. The State Director of the N.S.O., forwarded a more comprehensive report to the Military Governor reaffirming his earlier report. Exhibits H4 to H6 are the report. Thereafter the Military G Governor directed me to acknowledge receipt of the letter and at the same time, ask the Judicial Service Committee to look into the matter properly and report back to him. I took action accordingly. I asked the Judicial Service Committee to report back as a matter of urgency. Exhibits H K1 and K2 are my said letters dated 15/3/85. About a week later, the Military Governor summoned me to his office and asked if there has been any reaction from the Judicial Service Committee and I told him there has been none as yet. He said he has discussed further with his

State Director of the N.S.O. and that from all informations available to him has decided to exercise his powers under Decree No. 17, 1984 and has therefore approved, immediate retirement of the plaintiff. He directed that the Judicial Service Committee should be so informed that same day. Further that the retirement should be announced that same day over the radio and television. I carried out his directives, Exhibit 1 is the action I took. I did the announcement also." B

I think it was very clear to the parties concerned that it was the Military Governor who took the decision to retire the plaintiff from service. I entirely agree with the court below when it said: C

"The learned Senior Advocate had argued that the word used in exhibit 'C' is 'approved' which word connotes that someone other than the Military Governor took the decision to retire the respondent and the 3rd appellant merely approved. With profound respect to the learned Senior Advocate, his argument is merely a play on words." D

I resolve this issue also against the plaintiff.

I now turn to issue 3. The crucial point here is whether Exhibit "C" which emanated from the Judicial Service Committee was written on the instruction of the Military Governor. In other words, is there proof that the Military Governor actually directed that the Judicial Service Committee should terminate the appointment. It was contended that in the circumstances of this case, there was no proof that the Military Governor ordered the termination of the plaintiff's appointment; the evidence of DW4 was hearsay. It was urged that a distinction must be drawn (1) between the fact that the Military Governor gave an instruction to D.W.4 and (2) the evidence in proof of the truth of the content of such an instruction. On the question whether D.W.4 received instruction from the Military Governor, DW'4 evidence is direct evidence. However, it was said, that on the question of the truth or falsity of the instruction itself direct evidence must come from the giver i.e. the Military Governor. To the extent that DW4's evidence purports not merely to show that he (D.W4) received an instruction but to prove the truth of the content of the statement, it was submitted that the evidence is hearsay. Learned Counsel for the plaintiff relied on the case of Subramanian v. Public Pros- E F G H

2642 Omo v. Judicial Service Committee (2000) 7 KLR Katsina-Alu JSC
ecutor (1956) W.L.R. 966.

For the Defendants it was submitted that the Court of Appeal was right when it held that DW4's evidence was not hearsay. DE4's evidence is admissible and was given to supply the obvious lacuna. For this submission counsel relied on A. I. Wilson v. A.G. Bendel State (1985) NWLR (pt.4) 572.

It was also the contention of the Defendants that the evidence of DW4 is admissible under sections 76, 77(b) and 149(c) of the Evidence Act and has shown convincingly and unequivocally that the plaintiff's retirement was effected by the 3rd Defendant by virtue of the powers conferred on him under Decree No. 17 of 1984.

It its reaction to the submission that the evidence of DW4 was hearsay and therefore inadmissible, the court below per Ogundare JCA D (as he then was) held as follows:

"The learned trial judge gave no reason (s) for not accepting the evidence of DW4. It is not enough to say "I do not accept". It the duty was on the learned trial Judge to evaluate the DW4 before deciding whether or not to accept it see: Akibu v. Opaleye (1974) 1 ALL N.L.R. 344, 356. Had he evaluated the evidence of this witness properly he would not have refused to accept it. I can find no justification for his not accepting the evidence of the witness and acting on it more so that the evidence was supported by other evidence, mostly documentary, given in the case. True enough, an appeal court will not normally interfere with the trial court's view of credibility of witnesses. As Obaseki J.S.C. put it in Ebba v. Ogodo (1984) 4 SC 84, 90-91:

"This Court has times without number emphasized that it is no business of the appeal court to substitutes its view of the evidence for that of the learned trial judge and I find it again necessary to point out that miscarriage of justice will definitely result from adopting such a course of action when it is unwarranted. The need to ensure that justice is not miscarried should always dominate the attitude and thinking of appeal of fact. See Victor Woluchem & Ors. v. Chief Simeon Gudi & Ors. (1981) 5 S.C. 319 at 326; Akinloye v. Eyiola (1968) NMLR 92 at 95 SC.; Obisanya v. Nwoko (1974) 6 SC 69 at 80; Lawal v. Dawodu

(1972) 1 ALL NLR (part 2) 270 at 286; Kakarah v. Imonikhe (1974) 4 SC 153; Magaji v. Odofin (1978) 4 S.C. 91.

But equally so, **where evidence is not challenged or contradicted it ought to be accepted.** In Adejumo v. Ayantegbe (1989) 3 NWLR 417, 435 D-E, Nnaemeka-Agu, JSC in his lead judgment said;

'It is true, as pointed out by the Court of Appeal, that the evidence of the respondent that he had the authority and support of the whole members of that section was not challenged or contradicted. It ought therefore to be accepted, as there is nothing on the other side of the balance: See Nwabuoku v. Haddad (1973) 11 S.C. 357.

In my respectful view, therefore, the learned trial Judge was in error not to have accepted and acted on the evidence of DW4, the evidence not having been challenged nor contradicted. The learned trial Judge held the view that the probative value of the evidence of DW4 to the effect that Exhibit 'C' was issued on the instruction of the 3rd appellant exercising power vested in him by law, was not cogent enough. He gave as reasons for so holding that there is no document evidencing that instruction and that the witness did not explain why Exhibit 'C' did not spell out that it was issued on the instruction of the 3rd appellant in the exercise of the powers conferred on him by Decree No. 17. **With the utmost respect to the learned trial judge, the reasons given by him for whittling down the probative value of the evidence of DW4 are untenable and unconvincing.** To begin with, it would not accord with normal official relationship to expect that every instruction given by a Military Governor or Chief Executive for that matter, to the Secretary to the Military Government (as DW4 was at that material time) or other subordinates of his must of necessity be in writing to render evidence on it capable of acceptance. To hold, as the learned trial Judge did, will amount to ignoring section 75 of the Evidence Act which provides:

75. All facts, except the contents of documents, may be proved by oral evidence.

and section 148 (c) of the Act which too provides:

'148. The court may presume the existence of any fact which it

thinks likely to have happened, regarding being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume -

B (c) that the common course of business has been followed in particular cases;"

The fact, therefore, that the 3rd appellant gave certain instructions to DW4 can be proved by oral evidence of either the 3rd appellant or DW4. Whether the instructions were fully carried out to the

C **word is a different matter which also can only be resolved by evidence.** I have earlier hold that Exhibit 'C' need not state on its face that the act done therein was done pursuant to Decree No. 17. I need not go over that issue again.

D **The learned trial Judge also said that the evidence of DW4 was 'no more than hearsay evidence', thereby insinuating that the evidence was inadmissible. I think even here too, the learned trial Judge, with respect to him, was in error. He seemed not to have**
E **adverted his mind to Section 76(b) of the Evidence Act which provides:**

'76. Oral evidence must, in all cases (b) if it refers to a fact which could be heard, it must be the evidence of witness who says he heard that fact;

F **In the light of the above Statutory provision, the evidence of DW4 could not be described as hearsay; it is very much admissible and showed convincingly that respondent's retirement was effected under Decree No. 17."** I could not put it better myself. This is a com-

G **plete answer to this issue. The evidence of DW4 has shown convincingly and unequivocally that the Exhibit "C" was issued on the instruction of the Military Governor exercising power, vested in him by law. That explains why this witness's evidence was not and could not be chal-**
H **lenged or contradicted. The learned trial judge was clearly in grave error not to have accepted and acted on the evidence of DW4. This issue is also resolved against the plaintiff.**

ISSUE 5:

This issue relates to the comments made by the Court of Appeal on the conduct of third parties, when the said conduct was not made a ground of appeal. In the course of his judgment, Ogundare JCA (as he then was) said:

"I cannot end the judgment without commenting briefly on the conduct of the erstwhile public officers that featured in this case, First, is the ten State Attorney-General Mr. Okolo who made available to the respondent a copy of a written advice he rendered to the 3rd Appellant. His conduct was not only in breach of the ethics of the profession relating to confidentiality as between client and solicitor, it would in my humble view, be in breach of his oath of office. I cannot fathom what his motive was in behaving as he did. Perhaps I should say no more.

The second is the State Chief Judge at the relevant period. His attitude to the serious allegation made against the respondent in Exhibit H1 is to say the least, rather unfortunate. He did not see anything wrong in a serving magistrate acting as managing director to a privately owned company. Bearing in mind that he was the chairman of the 1st Appellant, it is little wonder that that body could not act with despatch when the 3rd appellant through DW4 referred the matter to it for urgent action."

These comments have come under criticism by learned counsel for the plaintiff on the ground that there was no ground of appeal relating to the conduct of these officers. My short answer to this is that the court below and any court for that matter is entitled to comment on the despicable conduct of public officers to serve as a deterrent to other public officers and to avoid a repeat performance. Finally one does not need a magnifying glass to see that the comments complained of did not influence the decision of the court.

In the result this appeal fails and it is dismissed. Accordingly I affirm the judgment of the Court of Appeal delivered on 12 July, 1990. The Defendants/Respondents are entitled to costs which I assess at N10.000.00.

MOHAMMED JSC

My Lord, Katsina-Alu, J.S.C. has permitted me to read the draft of the judgment he has just delivered and I entirely agree with him that this appeal lacks merit and ought to be dismissed.

B Issue 1 as formulated by respective counsel of both the appellant and the respondents questioned;

"Whether the Court of Appeal rightly expunged the argument proffered in the Respondent's brief (now Appellant) in respect of the validity of Exhibit 'F' when there was no ground of appeal complaining against that part of the judgment of the learned trial Judge relating to Exhibit 'F'."

D Before I consider the submission of learned counsel for the appellant on this issue I would like to refer to the decision of the court below in respect of Exhibit 'F'. In his judgment Ogundare JCA (as he then was) dealt with the issue concerning Exhibit 'F' as follows:

E "Learned Senior Advocate for the respondent in his brief proffered arguments in respect of the validity of Exhibit 'F', an order made by the 3rd appellant in the course of the proceedings in the court below and after learned trial judge had ruled that the application for dismissal of the action, brought by the appellants, was misconceived. This order was pleaded in paragraph 4 of the amended statement of defence and in the judgment the learned trial judge held that Exhibit 'F' could not stand. F There is no ground of appeal complaining against that part of the judgment of the learned trial judge relating to Exhibit 'F'. Accordingly that Exhibit and the issues relating to it do not come for consideration in this appeal. Consequently, I agree with learned state counsel in his brief and G oral argument that the arguments proffered in the respondent's brief in respect of Exhibit 'F' be expunged as being incompetent".

H Professor Adesanya, SAN, in the appellant's brief which he wrote, submitted that the learned justices of the Court of Appeal erred in law in expunging so much of the appellant's brief as related to Exhibit 'F'. The issues as formulated by both parties dealt without qualification with the issue whether the learned trial judge was right in holding that he had jurisdiction to entertain the appellant's claim. Learned SAN argued that

the issue as formulated was not limited to a particular ground. Therefore it was proper for the appellant to rely upon and canvass argument on the basis of Exhibits 'C' and 'F'. xxxxxxxxxxxxxxxxxxxxxxxxx

I need not state the obvious statement of the law that issues are formulated against a ground or grounds of appeal. If an issue raised is not related to any ground of appeal it is incompetent and ought to be ignored. See Western Steel Works Ltd. v. Iron and Steel Workers Union of Nigeria (1987) 1 NWLR (pt. 49) 284. It is abundantly clear that the respondents who were appellants at the Court of Appeal did not file any ground of appeal complaining against the decision of the learned trial judge wherein he held that "Exhibit F' could not stand.

Turning to Exhibit C Learned Counsel for the appellant queried whether there was proof that the Military Governor actually directed that the Judicial Service Committee should terminate the appointment of the appellant. Exhibit 'C' is a clear and unambiguous document. It reads:

SECRET

Telegrams: Judsercom

BENDEL STATE

JUDICIAL SERVICE COMMISSION

P. M. B, 1505 BENIN CITY

BENDEL STATE OF NIGERIA

When replying please quote

the reference No. and date of this letter.

Your ref: CP. 118/225

21st March, 1985

M.A. Omo Esq.,

u.f.s. The Chief Registrar

High Court of Justice

Benin City.

Sir,

Mr. Michael Omo-Chief Magistrate

I am directed to inform you that the Military Governor, Brigadier J.T. Useni, has approved your immediate retirement from the State Judicial Service.

2. You would please hand over Government properties in your

possession to the Chief Registrar, High Court of Justice, Benin-City.
(Sgd.)

(J. I. Edokpa)

JUDICIAL SERVICE COMMISSION.

S E C R E T"

B I cannot see any problem where the Secretary of Judicial Service Committee said that the Military Governor had "approved" the appellant's immediate retirement. The directive of the Military Governor of Bendel State in retiring the appellant from service was clearly spelt out
C in Exhibit 'C'. It is not in dispute that many public officers were dismissed or retired from service by the Military Governors through the provisions of Decree No. 17 of 1984 Viz Public Officers (Special Provisions) Decree 1984. Belgore JSC, in his contribution to the judgment in
D the case of Nwosu v. Imo State Environmental Sanitation Authority & Ors. (1990) A.N.L.R. 379 at page 410 opined thus:

*Similarly, as in military regimes, decrees of the Federal Military Government clearly oust the court's jurisdiction, there is no dancing round
E the issue to found jurisdiction that has been taken away. Lawyers trained and groomed under the notion of civil liberty frown on ouster provisions in any act of parliament; so do the judges of similar background. But it must be remembered that Armed Forces Ruling Council is not a parliament, neither does it pretend to be one. We have lived with their decrees
F (whether by Supreme Military Council or Armed Forces Ruling Council, in fact nomenclature is not relevant) for long now that there should be no doubt as to the meaning of their ouster provisions".*

I agree with the court below that in Exhibit 'C' the Secretary to
G the Judicial Service Committee need not state that the act of retirement of the appellant was done pursuant to Decree No. 17 of 1884.

xx

For these reasons and the fuller reasons in the judgment of my
H learned brother, Katsina-Alu J.S.C., this appeal has failed and it is dismissed. I affirm the decision of the Court of Appeal. I abide by all the consequential orders made in the lead judgment.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Katsina-Alu, J.S.C. and I agree entirely with the reasoning and conclusion therein. B

This appeal accordingly fails and the same is dismissed with costs as assessed in the leading judgment.

KALGO JSC

I have had the privilege of reading the leading judgment of my learned brother Katsina-Alu JSC just delivered. I agree entirely with his reasoning and conclusions in dismissing the appeal as being without merit. I also dismiss the appeal with N10,000.00 cost in favour of the appellant. D C

UWAIFO JSC

I read in advance the judgment of my learned brother Katsina-Alu JSC and I agree with him that the appeal totally lacks merit for the reasons he gives. I wish only to make comments on just one or two points. E

In fact one issue stands out which by itself alone deprived the plaintiff/appellant of the right to approach the court in respect of this matter. There is clear evidence, even as admitted by the appellant himself, that he was removed from office by the Military Governor by virtue of the Public Officers (Special Provisions) Decree NO. 17 of 1984. Under that Decree the Military Governor as the appropriate authority may direct the removal of a public officer, like the appellant, from office, or may delegate someone to do so. Once it is clear this was what happened, the court's jurisdiction to entertain any claim to contest such removal from office is completely ousted: see Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (pt. 135) 688. F G H

There was also the question whether the word "approved" used in the letter of retirement was capable of having the same effect as "au-

thorized" when talking about the action of the appropriate authority under the said Decree 17 of 1984 to remove a public officer from the service. The letter addressed to the appellant by the Secretary to the Judicial Service Committee stated in paragraph I thereof:

B *"I am directed to inform you that the Military Governor Brigadier J.T. Useni, has approved your immediate retirement from the State Judicial Service."*

The argument on behalf of the appellant is that the word "approved" meant that the Military Governor did not retire the appellant by himself or
C by any person authorized by him but approved what was done by someone else beforehand.

I do not think this is a strong argument. The relevant s.1 of Decree No. 17 of 1984 says that the appropriate authority, if satisfied
D that a public officer has been engaged in corrupt practices or that his general conduct in relation to the performance of his duties has been such that his further continued employment in the service would not be in the public interest, may at any time after 31 December, 1983, (a)
E dismiss or remove the public officer summarily from his office; or (b) retire or require the public officer to compulsorily retire from the public service. In other words, the Military Governor may authorize such action against an officer. The Oxford Universal Dictionary Illustrated, 3rd
F edition, Vol. 1, page 125, defines the word "authorize" as "to give formal approval to." I can see no difference between the words "approve" and "authorize" in the circumstances of the compulsory retirement of the appellant under Decree 17 of 1984.

For the above reasons and those fully stated by my learned brother
G Katsina-Alu JSC, I too find no merit in this appeal and dismiss it accordingly. I abide by the order for costs.

H