

SUPREME COURT OF NIGERIA

6TH APRIL, 2001. SC.292/2000

**CORAM:- M. E. OGUNDARE, E. O. OGWUEGBU, S. U. ONU,
U. A. KALGO, S. O. UWAIFO, JJSC.**

ISHAYA BAMAIYI	APPELLANT
V.		
STATE	RESPONDENT
JAMES DANBABA		
HAMZA AL-MUSTAPHA	ACCUSED
JUBRIN BALA YAKUBU		
MOHAMMED RABO LAWAL		

APPEALS - Error - Court of Appeal was in error - As to have failed to consider and pronounce upon the issues formulated by the appellant (H 4)

APPEALS - Interference - Bail - It would have been wrong for the Court of Appeal to interfere with the discretion of the learned trial judge in refusing bail - To the appellant (H 6)

APPEALS - Issues - Court should pronounce on all material issues raised - The Court of Appeal defaulting on that would depend on the facts and circumstances of each case (H 1)

APPEALS - Issues for determination - Failure to consider an issue - Did not occasion a miscarriage of justice (H 5)

APPEALS - Issues - Failure to consider all material issues - May not occasion a miscarriage of justice (H 2)

EVIDENCE - Affidavit - Extraneous paragraphs in contravention of section 87 of the Evidence Act - Should be struck out (H 3)

FACTS

The appellant is the 1st accused in a pending information in the Lagos High Court. The appellant is involved in four of the counts, two of them relate to conspiracy to murder two persons, Alex Ibru and Isaac Seiya Porbeni. One other count is attempted murder of the said Alex Ibru while another is unlawfully causing grievous harm to him.

The appellant moved for bail but the trial judge gave a considered ruling refusing bail. The appellant's appeal to the Court of Appeal, Lagos was dismissed. Still dissatisfied, the appellant has appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right when it failed to consider and pronounce upon all the issues formulated by the appellant from the grounds of appeal validly filed and thereby occasioning a grave miscarriage of justice.

2. Whether the Court of Appeal was right, in the circumstances of this case in affirming the decision of the trial court refusing appellant bail.”

HELD (Unanimously dismissing the appeal per lead judgment of **UWAIFO JSC**)

Court should pronounce on all material issues raised

1. As a matter of interest, it may be pointed out that recently this court held in *The state v. Ajie* (2000) 11 NWLR (pt.678) 434 that the requirement that a court should pronounce on all material issues properly raised before it is a correct statement of principle. However, it also held that the consequence of the Court of Appeal defaulting on that principle would depend on the facts and circumstances of each case. At page 448, Onu JSC had this to say:

“The general rule is that a court has a duty to pronounce on all material issues raised before it.... But the result of a court of appeal not complying with the general rule depends on the facts and circumstances of each case.”

I think that represents the true position of the law on such a matter.
(p. 1054 E)

Failure to consider all material issues may not occasion miscarriage of justice

2. I have already referred to the submission of the learned Attorney-General on behalf of the respondent on this point that even if it were to be accepted that the lower court did not consider the issue, the failure to do so did not occasion a miscarriage of justice. (p. 1055 A)

Evidence - Affidavit ought to be struck out

3. Therefore paras. 12, 13, 14 and 18 are extraneous being in contravention of section 87 of the Evidence Act. They ought to have been struck out. I accordingly strike them out. As for the further counter-affidavit, paras. 9, 10, 11, 12, 13 and 18 are also extraneous because they are fit for argument of counsel to persuade the court. I strike them out as well.
(p. 1061 A)

Appeals - Error

4. Having regard to my foregoing discussion of Issue No.1 in the present appeal, I must come to the conclusion that a fair answer to the said issue is that the Court of Appeal was in error to have failed to consider and pronounce upon all the issues formulated by the appellant before it. (p. 1062 G)

Appeals - Issues for determination

5. However, the failure to consider issue 2 which was one of those issues subjected to complaint in this appeal, did not, contrary to the submission of learned counsel for the appellant before this court, occasion a miscarriage of justice. I uphold the submission of the learned Attorney-General to that end. (p. 1062 H)

Appeals - Interference

6. I do not think it will be right to interfere with the decision of the

learned trial judge on the bail issue of the appellant. Upon no rational basis, looking at those facts and circumstances, can such interference be justified. In this particular case, my view is that to interfere with that decision may simply amount to taking the case out of the learned trial judge's hands and that may be as good as getting the trial aborted having regard that it is over bail, rather than a fair hearing within a reasonable time in line with the requirement of the criminal justice system and s.36 of the 1999 Constitution, that so much effort, time and concern have been dissipated. For the reasons I have given, it would have been wrong for the lower court to interfere with the discretion of the learned trial judge in refusing bail to the appellant. I accordingly answer Issue No.2 in the affirmative. (p. 1065 H)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. Bail - When it will be refused by the court

Our criminal justice system has its stipulations and safeguards for the prosecutor, the accused and the victim. In the proper operation of that system, it can be said that it is in the interest of the society, and within those safeguards, that if in an application for bail pending trial, there is good reason to believe or strongly suspect that the accused will jump bail thereby making himself unavailable to stand his trial and/or will interfere with witnesses thereby constituting an obstacle in the way of justice, the court will be acting within its undoubted discretion to refuse bail. It may be added that in such a situation, it will be desirable, as far as reasonably practicable, to accelerate the trial. (p. 1065 E)

OGWUEGBU JSC

2. Failure to consider all issues - Will not per se amount to denial of fair hearing

I agree with the submission of the appellant's counsel that the court below failed to consider and pronounce upon the second issue for determination submitted by the appellant in that court. However, I am unable to hold

that the failure to do so led to any miscarriage of justice in the circumstances of the case. There was also no denial of fair hearing as enshrined in section 33 of the 1979 Constitution. Failure to consider and pronounce on all issues submitted to a court or tribunal will not, per se, amount to a denial of a right to fair hearing having regard to the judicial decisions on the principle. In some cases, it may occasion failure of justice which amounts to denial of fair hearing and in others as is the case in the present proceedings, It will not. *See Kotoye v. Central Bank of Nigeria & Ors* (1989) 1 NWLR (Pt. 98) 419. (p. 1067 D)

C

REPRESENTATION

Mike Okoye Esq., with him O. Okoroji Esq., Y.C. Maikyau Esq., V. C. Obianoyi Esq., I.N. Okoli Esq. and C.O. Obiefuna Esq., for the appellant. Professor O. Osinbajo, Attorney-General Lagos State, with him Mrs. Morenike O. Obadina, Chief State Counsel and Miss T.K. Shitta-Bey, Principal State Counsel, for the respondent.

D

CASES REFERRED TO

E

Union Bank of Nigeria Ltd v. Nwaokolo (1995) 6 NWLR (pt.400) 127

Orji v. Zaria Industries Ltd (1992) 1 NWLR (pt.216) 124 at 151

Chinemelu v. Commissioner of police (1995) 4 NWLR (pt.390) 489

State v. Ajie (2000) 11 NWLR (pt.678) 434

F

Atono v. A.G. Bendel (1988) 2 NWLR (pt.75) 201

Kotoye v. C.B.N. (1989) 1 NWLR (pt.98) 419

Ntukidem v. Oko (1986) 5 NWLR (pt.45) 909

Adigun v. A.G Oyo State (1987) 1 NWLR (pt.53) 678

G

Salu v. Egeibon (1994) 6 NWLR (pt.348) 23

African Continental Bank PLC v. Losada (Nig.) Ltd (1995) 7 NWLR (pt.405) 26

Ayisa v. Akanji (1995) 7 NWLR (pt.406) 126

H

LEAD JUDGMENT BY UWAIFO JSC

There is pending in the Lagos High Court an Information filed on 27 January, 2000, charging offences against the appellant and four

others on six counts. The appellant who is the 1st accused in that information is involved in four of the counts. Two of them relate to conspiracy to murder two persons separately and at two different periods at Ikoyi, Lagos, namely, one Alex Ibru and one Isaac Seiya Porbeni. One other count is attempted murder of the said Alex Ibru while another is unlawfully causing grievous harm to him. The trial is on-going before Ade-Alabi, J.

The appellant moved for bail and the learned trial judge heard arguments on 7 March, 2000. on 19 May, 2000, he gave a considered ruling refusing bail. The appellant's appeal to the Court of Appeal, Lagos Division was dismissed on 11 December, 2000. Still dissatisfied, the appellant has appealed to this court and has asked that his appeal be determined on two issues, namely:

D “1. *Whether the Court of Appeal was right when it failed to consider and pronounce upon all the issues formulated by the appellant from the grounds of appeal validly filed and thereby occasioning a grave miscarriage of justice.*

E 2. *Whether the Court of Appeal was right, in the circumstances of this case in affirming the decision of the trial court refusing appellant bail.*”

The respondent in its brief of argument has made it three issues. From the grounds of appeal and the arguments on both side, I think the appeal can be resolved on the two issues formulated by the appellant. The appeal was heard by us on 15 March, 2001. I shall consider the issues raised separately. Issue No. 1

G The appellant's short contention as reflected in his brief of argument is that the court below did not make any pronouncement on issue 2 raised before it and that had it done so, “*it would have radically changed the outcome of the decision*” it arrived at. It has been argued further that the failure to consider the said issue 2 amounted to a denial of fair hearing H and resulted in a miscarriage of justice, citing a decision of this court, *Union Bank of Nigeria Ltd. v. Nwaokolo* (1995) 6 NWLR (pt.400) 127, in support.

The main thrust of the argument of the respondent's counsel,

the learned Attorney-General of Lagos State, on this issue can be summarised thus: The leading judgment of the lower court per Oguntade JCA indicated that all the issues raised by the appellant were considered together when he said:

‘The respondent’s issues are amply accommodated under the appellant’s issues. All the appellant’s issues could be conveniently considered together. I intend to do so in this judgment.’

The contention is that the said four issues were duly considered together as one. The contention goes further to say that the complaint that the depositions in the two counter-affidavits of the respondent offended against sections 85, 86 and 87 of the Evidence Act in that they contained extraneous matters such as prayer, legal argument or conclusions, was not made out. The views of Omo JSC in *Orji v. Zaria Industries Ltd* (1992) 1 NWLR (pt.216) 124 at 151 were relied on. Again, that even if this court were to strike out the paragraphs of the counter-affidavits complained of, bail would still not have been granted to the appellant upon his application based only on his affidavit in support since bail was not granted as a matter of course, citing *Chinemelu v. Commissioner of Police* (1995) 4 NWLR E (pt.390) 489. Finally, that assuming that the lower court did not make a definitive pronouncement on whether or not the said paragraphs of the counter-affidavits were not in conformity with sections 85, 86 and 87 of the Evidence Act, the failure to do so did not occasion a miscarriage of justice, citing *The State v. Ajie* (2000) 11 NWLR (pt.678) 434. F

I must now turn to the said issue 2 raised by the appellant in the court below in respect of which there is the complaint that it was not considered and resolved. The issue reads:

“Whether there are exceptional circumstances arising from the counter-affidavit and further counter-affidavit of the respondent to warrant a denial of bail to the appellant by the trial judge having regard to the clear provisions of sections 86, 87 and 88 of the Evidence Act.”

The argument canvassed on this issue in the court below was that paras. 11, 12, 13, 14, 15, 17, and 18 of the counter-affidavit and paras. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, of the further counter-affidavit which the respondent relied on to oppose the application for bail should H

be struck out being in contravention of sections 86, 87, 88 and 89 (formerly sections 85, 86, 87, and 88) of the Evidence Act. His contention was that para. 11 of the said counter-affidavit contained, opinion and conclusion; para. 12 contained opinion; para.13 opinion and conclusion
 B as well as made success in life a crime contrary to section 4 of the Criminal Code and section 11 of the Criminal Code Schedule; paras 14, 15 and 16 opinions, findings and conclusions; para.17 deliberate falsehood; and para.18 legal argument, finding and conclusion.

C As regards the further counter-affidavit, paras.5 and 6 were said to be in contravention of sections 88 and 89 of the Evidence Act, the source of information therein not having been disclosed; para.7 misleading and prejudicial since the appellant was not facing any other charge in any court; para.8 argument and legal conclusion as to the guilt of the appellant; para.
 D 9 opinion as well as misleading; para.10 argument, assumption, opinion and conclusion; paras.11, 12, 13 and 17 opinions, arguments, findings and conclusions as well as being speculative; and paras. 14, 15 and 16 contravened sections 87, 88 and 89 of the Evidence Act.

E From the point of view of the appellant it was important to consider these matters and determine the issue raised thereby. His contention is that if the paragraphs so identified had been struck out, there would be no facts and circumstances on which to base the respondent's opposition
 F to his bail. I think the appellant deserved to have the issue so raised resolved. The first question is, was the issue considered and resolved by the lower court. I have examined the judgment and can find nowhere this was done although the paragraphs of the two counter-affidavits complained of were reproduced without a word about their propriety. It appears to me
 G that the lower court considered that there was only one question for determination when in the course of concluding its judgment, it observed:

*"The issues in the instant case had been simple and straightforward not involving any complicated question of law. The appellant had
 H sought bail thus submitting himself to the exercise by the trial judge of the discretion to grant bail or not. There was deposed to an affidavit in support of the application which stated facts why the appellant should be granted bail. The respondent on the other hand deposed to two counter-*

affidavits why the appellant, though an eminent citizen of this country should not in the particular circumstances of this case be granted bail. It was deposed to inter alia that some of the witnesses for the prosecution were persons who had served under the appellant when he was Chief of Army Staff of the Nigerian Army. This created a chance that those witnesses could be intimidated or interfered with. The circumstances under which the appellant, a former Chief of Army Staff came to be arraigned on the offences brought against him were unusual. In the history of this country, there had been only very few trials like it. The trial judge is a Nigerian residing in the Nigerian environment. He is not a somnambulist or a visitor from the moon. He is not to allow anything he hears or sees outside the court hall or any opinion he holds outside a case to influence his decision. But he is a judge because of his learning in law and presumed experience in the affairs of the society he lives in. The judge in his wisdom decided to exercise his discretion to refuse bail."

This observation, with due respect, mostly begs the question as to the quality and propriety of the depositions in the two counter-affidavits. The issue of the proper exercise of discretion will, I think, be settled by taking those depositions into consideration. But going by the issue raised that they offended against the Evidence Act that must first be resolved. Besides, the peroration introduced into the observation derives from no evidence before the court and would seem on the whole to be unhelpful.

The second question concerns what the appellant in the present appeal says was the consequence of the failure of the lower court to consider that issue 2. As already said, his contention is that if that issue had been considered the judgment would have been different. He adds to that by saying that there was consequently a denial of fair hearing resulting in a miscarriage of justice. He relied entirely on *Union Bank of Nigeria Ltd v Nwaokolo* (supra). The reason for that is because of some of the pronouncement made therein by Onu JSC at pages 149-150 in reliance on Nnaemeka-Agu JSC's observation in a case which dealt with issue of lack of fair hearing.

In the *Nwaokolo* case, a complaint similar to the present issue under consideration was raised. Perhaps I should reproduce the relevant

pronouncements of Onu JSC which I believe will make the comparison plain. At page 148 he said:

B *“The appellants, as clearly depicted on the Record and in the brief of argument they filed, had identified three issues for the consideration of the court below. It is also on record that appellants argued fully all three issues and by implication, the eight grounds, to which they related. At the hearing of the appeal by the court below, it is common ground that the appellants adopted their brief of argument. However, without justification the majority judgment of that court now assailed*
C *before this court, failed to pronounce on grounds 4, 5 and 6 covered by appellants’ issues 2 and 3 thereat, both of which have prompted ground 2 in the appeal to this court which incidentally, is covered by issue 2 now under consideration.*

D *The judgment of the majority in the court below neither adverted to nor pronounced on these grounds (4, 5 and 6 respectively).”*

E After considering the purport of the said grounds 4, 5 and 6 and expressing the view that the appellants would have succeeded in their appeal had those grounds been resolved, as they ought to, by the lower court, the learned Justice observed further at pages 149-150 (and this is what the appellant seems to hang his issue 1 on) as follows:

F *“Having considered the grounds (4, 5 and 6) which the court below failed to consider or pronounce upon, the next logical question to ask is, what are the consequences of such a failure? Failure to consider grounds of appeal, it is now established by decisions of this court, amount to lack of fair hearing and a miscarriage of justice. See Atano v. A.G. Bendel (1988) 2 NWLR (pt.75) 201. See also Kotoye v. C.B.N. (1989) 1*
G *NWLR (pt.98) 419 where Nnaemka- Agu, JSC. Held at page 448 of the Report thus:*

H *‘For the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether a party entitled to be heard before deciding had in fact been given an opportunity of hearing. Once an Appellate Court comes to the conclusion that the party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing the order/judgment thus entered is bound to be set aside.’*

Fair hearing within the meaning of section 33(1) of the 1979 Constitution means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties vide Ntukidem v. Oko (1986) 5 NWLR (pt.45) 909.”

In the end, that issue 2 was resolved by Onu JSC by saying that as a result of what he had said on it, *I take the firm view that had grounds 4, 5 and 6 been considered, they could have tilted the appeal in the court below in appellant’s favour.*” Actually, what he did was to consider the merit of those grounds which the court below failed to consider and determine. The appeal eventually succeeded and the plaintiff/respondent’s claim was dismissed because those grounds were resolved in the appellants’ favour. It did not succeed upon the mere fact that the appellants were a party ‘entitled to be heard before a decision was reached but was not given the opportunity of a hearing’ amounting to “lack of fair hearing and a miscarriage of justice” so that the “order/judgment thus entered is bound to be set aside.” it must be recognised that if such a scenario were to present itself, it would be that the proceedings ended in a nullity as if no judgment or order had been made therein. The proceedings along with the judgment would simply be struck out without anything being said about or done to the claim except, where appropriate, to order a retrial before another judge or panel of justices: see *Adigun v. A-G Oyo State* (1987) 1 NWLR (pt.53) 678; *Salu v. Egeibon* (1994) 6 NWLR (pt.348) 23; *African Continental Bank PLC v. Losada (Nig) Ltd* (1995) 7 NWLR (pt.405) 26; *Ayisa v. Akanji* (1995) 6 NWLR (pt. 406) 126.

It comes to this, therefore, that the failure by the lower court to consider the said issue 2 in the present case would not *ipso facto* be taken as the type of lack of fair hearing under natural justice or section 33(1) of the 1979 Constitution to which reference was made in the *Nwaokolo* case with the consequence that a miscarriage of justice would be conclusively presumed, or even inferred at all, without more. It has to be demonstrated that such a failure, which in essence may be nothing more than inadequate consideration of the appeal presented by the appellant before the lower court, was in a particular case a fundamental vice associated with lack of a fair hearing. Such was the case in *Kotoye v. C.B.N.* (supra). In that case

there was a large-scale dispute as to the management/share-holding arrangement of a bank. The Central Bank of Nigeria (CBN) waded in by giving certain directives. The plaintiff/appellant who did not like the directives filed an action in court against the CBN and another shareholder.

- B He immediately sought some order by an *ex parte* motion. The trial court gave far-reaching orders against the defendants/appellants both prohibitory and mandatory in nature upon that *ex parte* motion even at a time when no motion on notice had been filed. There was an appeal against the order. The basis was that the trial court made absolute orders, or what could be made only as interlocutory orders, upon an *ex parte* motion. The Court of Appeal declared the orders a nullity as they were made without giving the defendants the opportunity of a fair hearing. That was an issue of a fundamental vice. It was on further appeal to this court that Nnaemeka-Agu made the observation relating to the consequences of that kind lack of a fair hearing.

- It follows, in my respectful view, that the introduction of Nnaemeka-Agu JSC's observation in *Kotoye case* was unnecessary for reaching a decision in the *Nwaokolo case*. That also goes for the whole gamut of the observation of Onu JSC which, I think, should be regarded as mere *obiter* in the circumstances. The present appellant cannot rely on and derive any benefit from that *obiter*. **As a matter of interest, it may be pointed out that recently this court held in *The state v. Ajie* (2000) 11 NWLR (pt.678) 434 that the requirement that a court should pronounce on all material issues properly raised before it is a correct statement of principle. However, it also held that the consequence of the Court of Appeal defaulting on that principle would depend on the facts and circumstances of each case. At page 448, Onu JSC had this to say:**

- "The general rule is that a court has a duty to pronounce on all material issues raised before it... But the result of a court of appeal not complying with the general rule depends on the facts and circumstances of each case."***

I think that represents the true position of the law on such a matter.

The next question is, whether indeed the failure to consider that

issue upon the facts available in the present case on its merits, had it been considered, occasioned a miscarriage of justice as argued by learned counsel for the appellant. **I have already referred to the submission of the learned Attorney-General on behalf of the respondent on this point that even if it were to be accepted that the lower court did not consider the issue, the failure to do so did not occasion a miscarriage of justice.** I think the issue can now be examined by this court by virtue of section 22 of the Supreme Court Act, 1960. It does not require any further evidence. The existence of the depositions is not in dispute. Indeed, the nature of the depositions is open to interpretation only. The exercise therefore becomes a matter of law alone: see *Orji v. Zaria Industries Ltd.* (1992) 1 NWLR (pt.216) 124 at 141 where a similar exercise carried out by the Court of Appeal when the trial court failed to do so was approved by this court. See also *National Bank of Nigeria Ltd v. Guthrie (Nig.) Ltd* (1993) 3 NWLR (pt.284) 643 at 659-660; *Katto v. Central Bank of Nigeria* (1999) 6 NWLR (pt.607) 390 at 407-408.

It has become necessary to set out the relevant depositions and examine them. For it would be plainly baseless to talk of a discretion judicially and judiciously exercised unless there were facts and circumstances upon which such exercise was founded. That is at the heart of the appellant's contention that his denial of bail was arbitrary if the depositions in the affidavit evidence of the respondent were inadmissible. In the counter-affidavit sworn on 17 December, 1999 by Olakunle Ligali, a Legal officer in the Attorney-General's Chambers of the Lagos State Ministry of Justice, he deposed that he had the authority of the Attorney-General to swear the affidavit and that by virtue of his schedule of duties he was conversant with the facts of this case. He then stated as follows: "11. *That the offences for which the applicant stands charged are grave indeed.* 12. *That if the accused/applicant is granted bail, it is not likely that he would appear for his trial.* 13. *That if the accused/applicant is granted bail, there is likelihood that he would intimidate and tamper with witnesses for the prosecution in view of his social status and professional training especially in security matters.* 14. *That there is good and compelling evidence against the accused/applicant for the offence for which he is charged.* 15.

That by the statements of proposed witnesses attached to the information, the accused/applicant procured the weapons used to commit the act constituting the offence. 16. That in fact statements of the proposed witnesses indicate/disclose that the directive to commit the act constituting the offence issued from the accused/applicant. 17. That in fact the accused/applicant admitted in his statement that there was an ‘assassination list’ at the time the offence was committed. 18. That by procuring those who committed the act and assisting them by providing logistic support, the accused/applicant became liable as a principal offender.”

Similarly, in the further counter-affidavit sworn on 21 December, 1999, he deposed as follows: 4. That further to the Counter Affidavit dated 17 December 1999 deposed to by Olakunle Ligalu (Esq.) I hereby aver further as follows. 5. That there were a series of assassinations planned by the applicant and other top ranking members of the General Sani Abacha regime. 6. That these assassinations from all available security reports were designed to eliminate perceived enemies of the said regime. 7. That the conspiracies have led to criminal proceedings in Suit No. ID/43C/99 against Hamza Al-Mustapha and Rabo Lawal who along with the applicant have also been charged in another information before this honourable court for offences arising from the conspiracy. 8. That the applicant and the persons named in paragraph (6) [sic: paragraph (7)] above, in terms of their alleged involvement (in) the attempted murder carried out in pursuance of the conspiracy are inextricably interwoven in all the murders and other offences carried out during the period referred to in paragraph (4) above. 9. That the release of any of the applicants will have serious negative consequences in the prosecution of this and other offences with which the applicants are currently charged. 10. That all of the witnesses are subordinate to the applicant in the Military hierarchy and given the strict authoritarian/hierarchical control in the Armed Forces, there is a great likelihood that the applicant will constitute a threat both implicitly and explicitly to the witnesses. 11. That considering the status of the applicant and his connection in the Military security and law enforcement system of the country and the seriousness of the charge and the severity of the punishment if convicted, there is a reasonable likeli-

hood that the applicant will tamper with the evidence/witnesses essential to the prosecution of the offences. 12. That having regard to the fact that the applicant has for the most part of his professional life acquired a high prestige and status in the Nigerian society and served at the highest level of government, the possibility of conviction for life for the offence of attempted murder is sufficient to cause the applicant to abscond from the country. 13. That there is a strong likelihood that the applicant if released, will compromise and intimidate witnesses and investigators by virtue of his former post and status vis-à-vis these witnesses. 14. That in fact some of the witnesses have expressed great fears on account of threats received through different sources connected with the accused persons both in this trial and that referred to in paragraph 7 above. 15. That already an intended key witness in this case the armourer of the Lagos State Police Command, Insp. Joseph Oboh has been shot dead by assassins. 16. That neither the car that the said Insp. Oboh was driving nor any of his property was removed by the killers. 17. That the applicant's release at this stage will be highly prejudicial to the successful prosecution of these cases and have serious security implications for the witnesses and police investigators."

I think the two affidavits must now be read as one since the one later in time was sworn in furtherance of the earlier. It must not be forgotten that the deponent, Olakunle Ligali, deposed that by virtue of his schedule of duties he became conversant with the facts of this case. To be conversant with, is to have knowledge of the matter. Even so, the law requires a deponent of his type to confine himself to facts and circumstances. An affidavit meant for use in court stands as evidence and must as near as possible conform to oral evidence admissible in court. Section 86 and 87 of the Evidence Act provide as follows:

"86. Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.

87. An affidavit shall not contain extraneous matter, by way of objection, or prayer, or legal argument or conclusion." These provisions

have received the consideration of this court in *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (pt. 18) 621; *Orji v. Zaria Industries Ltd* (1992) 1 NWLR (pt. 216) 124; and more recently *Josien Holdings Ltd v. Lornamead Ltd* (1995) 1 NWLR (pt.371) 254.

B What are facts and circumstances in contradistinction to deposi-
 tions enveloping legal argument, or prayer or conclusion may sometimes be
 a question of drawing a thin line. I think *Orji v. Zaria Industries Ltd* (supra)
 and *Josien Holdings Ltd v. Lornamead Ltd* (supra) illustrate this. In the
 C *Orji case*, nine paragraphs of an affidavit were objected to. They were as
 follows: “11. That the board which purportedly took a decision on the
 above matter neither raised the above as a charge against me nor did they
 invite me to appear before them and give an account of what I knew about
 allegations, in short, I was denied a fair hearing. 18. That the 2nd
 D respondent has in these proceedings acted maliciously against me as no
 good cause exists for my termination. 21. That I have worked with the 1st
 defendant for over 12 years without blemish and to terminate my
 appointment unlawfully at this stage will create hardship for me in
 E securing a future employment in the same cadre. 22. That the letter exhibit
 ‘A’ concluded that I was grossly negligent which is a slur on my records.
 23. That from the letter exhibit ‘A’ it will be difficult for me to secure any
 future employment. 24. That if the defendant is allowed to enforce the
 F directives in the letter of termination I shall suffer irreparable damage as
 my office would have been filled, my house and official vehicle allocated
 to someone else should the court find in my favour. 25. That it will not
 inconvenience the respondents to keep me in service pending the outcome
 of this suit. 27. That my children all go to school in Zaria and the period
 G will occasion substantial difficulty for them. 28. That I bring this applica-
 tion in good faith.”

The objection was that para. 11 was legal argument and that the
 other paras. were conclusions. By a majority decision of this court (4 to 1),
 H it was held that the objection had merit except in regard to para. 28. It was
 only Omo JSC who dissented by saying at page 151 that apart from para.22,
 the other paras, did not offend against S.86 (now S.87) of the Evidence Act,
 adding “It is my view that a mere conclusion, which is a statement of fact,

within the knowledge of a deponent, does not offend against section 86 of the Evidence Act. It is offensive if it is a legal argument or a legal conclusion." (Omo JSC's emphasis). In his argument before us in the present case, the learned Attorney-General prefers the view expressed by Omo JSC that for a conclusion in a deposition to contravene S.87 of the Evidence Act, it must be a legal conclusion and not "*a mere conclusion which is a statement of fact.*" Let me say that Omo JSC's view is a dissent and cannot be presented in submission by counsel in preference to the decision of the majority on the point. Besides, I do not think that view has any merit either by way of the interpretation of the said S.87 of the Evidence Act or by looking broadly at the word '*conclusion*' which covers any conclusion based on fact or law as a result of a process of reasoning. It is the same process by which opinion or deduction is arrived at or inference drawn. Therefore to say that the conclusion meant under s.87 is legal conclusion is restrictive and misleading.

I shall now turn to the depositions in *Josien Holdings Ltd v. Lornamead Ltd* (supra) to which objection was raised. They read: "17. *From my personal knowledge of the Nigerian market, I believe that the value of the said goods runs into at least 10 million naira within the controlled and uncontrolled or known and unknown distribution channels.* 19. *I believe that the obliteration of the marks on and the destruction of the appellants/applicants good affected by the rights or to the trade marks in issue will render the appeal nugatory if the appellants succeed on appeal.* 20. *I am informed by my counsel and I have also confirmed from my reading of the judgment that the learned trial judge did not consider amongst other facts the issue of first user of the trade marks in Nigeria.* 21. *That the evidence of Emmanuel Okonkwo was clear on the fact. That he was our distributor before Joe Aisien Ogbemor was appointed to succeed him* 22. *I also discovered that the learned trial judge did not consider the relationship between goodwill and the party whose name is on the product as it affects the parties.* 23. *The learned trial judge also did not treat the trade marks separately.* 24. *I know as a fact that all the goods claimed by the plaintiffs belong to defendants and the plaintiffs/respondents witness. Sylvester Chinemelu confirmed this in his oral*

testimony on 17/1/80. 26. I am informed by our counsel and I believe him that this is the first time that dispute over proprietary rights in a trade mark between a local distributor and a foreign manufacturer has arisen before this Honourable Court." These paragraphs were struck out by the Court of Appeal on the basis that they contravened s. 87 of the Evidence Act. But this court unanimously held that they were wrongly struck out because on a careful reading the deposition contained in each of those paragraphs was a statement of facts and circumstances to which the deponent swore "*either of his personal knowledge or from information which he believes to be true.*"

I think the legal position is clear that in any affidavit used in the court, the law requires, as provided in sections 86 and 87 of the Evidence Act, that it shall contain only a statement of facts and circumstances derived from the personal knowledge of the deponent or from information which he believes to be true, and shall not contain extraneous matter by way of objection, or prayer, or legal argument or conclusion. The problem is sometimes how to discern any particular extraneous matter. The test for doing this, in my view, is to examine each of the paragraphs deposed to in the affidavit to ascertain whether it is fit only as a submission which counsel ought to urge upon the court. If it is, then it is likely to be either an objection or legal argument which ought to be pressed in oral argument; or it may be conclusion upon an issue which ought to be left to the discretion of the court either to make a finding or to reach a decision upon through its process of reasoning. But if it is in the form of evidence which a witness may be entitled to place before the court in his testimony on oath and is legally receivable to prove or disprove some fact in dispute, then it qualifies as a statement of facts and circumstances which may be deposed to in an affidavit. It therefore means that prayers, objections and legal arguments are matters that may be pressed by counsel in court and are not fit for a witness either in oral testimony or in affidavit evidence; while conclusions should not be drawn by witnesses but left for the court to reach.

Looking at the counter-affidavit, paras. 12, 13 and 14 are fit for counsel to urge upon the court by way of submission and, if there are facts and circumstances presented in support, the court may consider the submis-

sion attractive enough to dissuade it from granting the bail sought. Para 18 contains a conclusion which ought to be left to the court to reach. **Therefore paras. 12, 13, 14 and 18 are extraneous being in contravention of section 87 of the Evidence Act. They ought to have been struck out. I accordingly strike them out. As for the further counter-affidavit, paras. 9, 10, 11, 12, 13 and 18 are also extraneous because they are fit for argument of counsel to persuade the court. I strike them out as well.**

In the result, the subsisting paragraphs (slightly re-arranged) of the two counter-affidavits taken together, derived from the personal knowledge of the deponent by virtue of his schedule of duties which makes him conversant with the facts of this case, are as follows:

“5. That there are a series of assassinations planned by the applicant and other top ranking members of the General Sani Abacha regime.

6. That these assassinations from all available security reports were designed to eliminate perceived enemies of the said regime.

7. That the conspiracies have led to criminal proceedings in Suit No. ID/43C/99 against Hamza Al-Mustapha and Rabo Lawal who along with the applicant have also been charged in another information before this honourable court for offences arising from the conspiracy.

8. That the applicant and the persons named in paragraph (6) [sic: paragraph (7)] above, in terms of their alleged involvement (in) the attempted murder carried out in pursuance of the conspiracy are inextricably interwoven in all the murders and other offences carried out...

9. That the offences for which applicant stands charged are grave indeed.

10. That by the statements of proposed witnesses attached to the information, the accused/applicant procured the weapons used to commit the act constituting the offence.

11. That in fact statements of the proposed witnesses indicate/ disclose that the directive to commit the act constituting the offence issued from the accused/applicant.

12. That in fact the accused/applicant admitted in his statement

that there was an ‘assassination list’ at the time the offence was committed.

13. *That in fact some of the witnesses have expressed great fears on account of threats received through different sources connected with the accused persons both in this trial and that referred to in paragraph 7 above.*

14. *That already an intended key witness in this case the armourer of Lagos State Police Command, Insp. Joseph Oboh has been shot dead by assassins.*

15. *That neither the car that the said Insp. Oboh was driving nor any of his property was removed by the killers.”*

Thus, this was the nature of the statement of facts and circumstances in the two counter-affidavits before the two courts below. The lower court, as already indicated, failed to consider the issue raised in regard to those affidavits as to whether there were exceptional circumstances arising from them to warrant a denial of bail to the appellant by the trial judge in view of the provisions of sections 86, 87 and 88 of the Evidence Act. I have already considered ss. 86 and 87. Section 88 says that when a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief. None of the paragraphs of the counter-affidavits recited above really fails with the said s.88 judging from the connection of the deponent with the facts and circumstances of this case by virtue of his schedule of duties. It is beyond any doubt in my mind that if the court below had considered the said issue 2 raised before it, it would have come to no other decision than that those paragraphs contained a statement of facts and circumstances fit as affidavit evidence. From that premise, it would be inconceivable that it would have answered the said issue other than in the affirmative. **Having regard to my foregoing discussion of Issue No.1 in the present appeal, I must come to the conclusion that a fair answer to the said issue is that the Court of Appeal was in error to have failed to consider and pronounce upon all the issues formulated by the appellant before it. However, the failure to consider issue 2 which was one of those issues subjected to complaint in this appeal, did not, contrary to the submission of learned**

counsel for the appellant before this court, occasion a miscarriage of justice. I uphold the submission of the learned Attorney-General to that end.

Issue No.2

The decision of the trial court was based on the consideration of two factors, namely, (1) the possibility that the appellant would interfere with prospective witnesses and (2) whether he would make himself available to stand his trial if released on bail. The learned trial judge was inclined to believe that the possibility of the appellant interfering with prospective prosecution witnesses was not remote if admitted to bail. He was also inclined to believe that if admitted to bail the appellant would contrive to avoid the trial altogether. Learned counsel for the appellant has picked on the learned trial judge's reasoning before reaching his decision. He says the trial court set out guiding principles of law upon which bail pending trial could be granted but failed to go by those principles when it refused bail. He contends that the exercise of the discretion denying bail was arbitrary, citing the dictum of Nnaemeka-Agu JSC in *Oyeyemi v. Irewole Local Government* (1993) 1 NWLR (pt.270) 462 at 477 in support. He therefore submits that the Court of Appeal was in grave error to have held that the appellant failed to show that the discretion exercised by the trial court was on wrong principles. In the said *Oyeyemi case*, the issue turned on whether the exercise of the court's discretion in granting an order of interlocutory injunction pending appeal was properly performed. In the course of considering this, Nnaemeka-Agu JSC observed at p.477:

"... once the court made a statement of its guiding principles, it was bound to follow them for, by such a statement of guiding principles, the court had set for itself a yardstick of measurement for its correct exercise of its discretion. Having set those criteria and standards for itself, for it to turn, as it were, somersault and decide on how to exercise its discretion without using them as acid tests for the correctness, or otherwise, of the exercise was to decide arbitrarily."

The learned trial judge listed out a number of factors or criteria that may be taken into consideration by a judge in granting or refusing bail pending trial. These include (1) the evidence available against the ac-

B cused, (2) availability of the accused to stand trial, (3) the nature and gravity
 of the offence, (4) the likelihood of the accused committing another of-
 fence while on bail, (5) the likelihood of the accused interfering with the
 course of justice, (6) the criminal antecedents of the accused person, (7)
 the likelihood of further charge being brought against the accused, (8) the
 probability of guilt, (9) detention for the protection of the accused, (10) the
 necessity to procure medical or social report pending final disposal of the
 case. Generally, these are some of the factors that may be taken into con-
 sideration. It is by no means expected that all will be relevant in every
 C case. I do not also think they are exhaustive. It may well be any one or
 others may be applied to determine the question of bail in a particular
 case. The learned trial judge realised this when he said: *"The bailability
 of an accused depends largely upon the weight a judge attached to one
 D or several of the criteria open to him in any given case."* This is emi-
 nently a correct view. The learned trial judge said further: *"The determi-
 nation of the criteria is very important because the liberty of the indi-
 vidual stands or falls by the decision of a judge in performing the func-
 E tion. A judge wields discretionary power which, like all other discretion-
 ary powers, must be exercised judiciously and judicially. In exercising
 the discretion, a judge is bound to examine the evidence before him with-
 out considering any extraneous matter."* This is also correct.

F It is the essence of the matter that the evidence available (usually
 by the proofs of evidence) filed by the prosecution in court be examined
 when considering bail. Further facts and circumstances may be brought
 forward by way of affidavit evidence. It could well be that it is the likeli-
 hood of the accused making himself available, to stand his trial in any
 G given case that may be of paramount concern. There is authority for say-
 ing that it is a proper and useful test whether bail should be granted or
 refused to consider the probability that the accused will appear in court to
 take his trial: see *R. v. Robinson* (1854) 23 L.J.Q.B 286; *Mamuda Dantata*
 H *v. Police* (1958) NRNLR 3. In that regard it is proper to consider the
 nature of the offence, the nature of the evidence in support of it, and the
 severity of the punishment which conviction will entail. The learned trial
 judge took this critical factor as to availability to stand trial into consider-

ation. He added another crucial one, namely, the likelihood that witnesses may be tampered with, harassed or put at risk if bail was granted having regard, I think, to the affidavit evidence. I have already set out the statement of facts and circumstances contained in the affidavit evidence. It is no exaggeration to say that some of the facts are, to say the least, ominous B or at any rate thoroughly disturbing. For instance, there are paras. 5, 6, 7, 8 and 17 which talk of assassination plan, assassination list which the appellant admitted in his statement, the on-going proceedings connected with such assassination conspiracies, the involvement of the appellant C in those crimes. There are paras. 10, 11, 18, 19 and 20 which also tend to implicate the appellant as to the procurement of weapons used for committing some of the crimes, the foreboding in the sudden killing in suspicious circumstances of the armourer who was a vital witness, and how proposed witnesses are now afraid of their safety. These are not matters that should D be glossed over. Some of them may not be admissible as evidence in the main trial but they are certainly worthy to be taken into account in an application for bail pending trial. That does not necessarily prejudice the presumed innocence of the appellant of the charge brought against him E until the contrary is proved, but it at least tries to ensure avoidable interruptions of the trial.

Our criminal justice system has its stipulations and safeguards for the prosecutor, the accused and the victim. In the proper operation of F that system, it can be said that it is in the interest of the society, and within those safeguards, that if in an application for bail pending trial, there is good reason to believe or strongly suspect that the accused will jump bail thereby making himself unavailable to stand his trial and/or will interfere G with witnesses thereby constituting an obstacle in the way of justice, the court will be acting within its undoubted discretion to refuse bail. It may be added that in such a situation, it will be desirable, as far as reasonably practicable, to accelerate the trial.

I do not think it will be right to interfere with the decision of H the learned trial judge on the bail issue of the appellant. Upon no rational basis, looking at those facts and circumstances, can such interference be justified. In this particular case, my view is that to

interfere with that decision may simply amount to taking the case out of the learned trial judge's hands and that may be as good as getting the trial aborted having regard that it is over bail, rather than a fair hearing within a reasonable time in line with the requirement of the criminal justice system and s.36 of the 1999 Constitution, that so much effort, time and concern have been dissipated. For the reasons I have given, it would have been wrong for the lower court to interfere with the discretion of the learned trial judge in refusing bail to the appellant. I accordingly answer Issue No.2 in the affirmative.

In the result, I find no merit in this appeal and therefore dismiss it.

D OGUNDARE JSC

I have read in advance the judgment of my learned brother Uwaifo JSC just delivered. I agree with him that this appeal deserves to be dismissed. I too dismiss it.

True enough, the Court below failed to pronounce on Issue (2) placed before it which issue was of paramount importance to the appeal before the Court. Having regard, however, to the conclusion reached by my learned brother, Uwaifo JSC after a painstaking consideration of the said Issue (2) which conclusion I am in agreement with, I am of the view that the failure of the Court below to determine Issue (2) has not occasioned a miscarriage of justice.

I need, however, to reiterate that the failure of the Court below to determine Issue (2) before it is not a case of denial of fair hearing in the circumstances of this case but one of dereliction of duty which may, or may not, be fatal to a Court's decision depending on whether a miscarriage of justice is occasioned thereby. In the case on hand there was no such miscarriage of justice. After expunging the offensive paragraphs of the counter-affidavit before the trial court, there was still enough case made out by the respondent on which the learned trial Judge could exercise his discretion judicially and judiciously as he appeared to have done. In effect, he did not act capriciously as submitted by learned counsel for the

appellant.

The Court of Appeal was eminently right in refusing to interfere with the trial court's exercise of its discretion in this matter. I too see no reason to interfere and will accordingly dismiss the appeal.

The issue of bail having now been laid to rest, I hope that in the interest of the accused persons and in the overall interest of the administration of criminal justice in this country, learned counsel on all sides will co-operate with the trial Court to bring the on going trial which commenced about a year ago to a speedy end.

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OGWUEGBU JSC

I have had the privilege of a preview in draft of the judgment of my learned brother, Uwaifo, JSC. I agree that the appeal must fail and I hereby dismiss it.

On whether the court below was right when it failed to consider and pronounce upon all the issues submitted to it by the appellant for its determination, I agree with the submission of the appellant's counsel that the court below failed to consider and pronounce upon the second issue for determination submitted by the appellant in that court. However, I am unable to hold that the failure to do so led to any miscarriage of justice in the circumstances of the case. There was also no denial of fair hearing as enshrined in section 33 of the 1979 Constitution. Failure to consider and pronounce on all issues submitted to a court or tribunal will not, per se, amount to a denial of a right to fair hearing having regard to the judicial decisions on the principle. In some cases, it may occasion failure of justice which amounts to denial of fair hearing and in others as is the case in the present proceedings, it will not. *See Kotoye v. Central Bank of Nigeria & Ors* (1989) 1 NWLR (Pt. 98) 419.

When the offending paragraphs of the counter-affidavit and further counter-affidavit are expunged, there are still sufficient facts which the learned trial judge relied upon in exercising his discretion against the grant of bail. These paragraphs include various assassinations planned by the appellant and other influential members of the military regime of late

General Abacha to get rid of persons believed to be on the way of the General succeeding himself, criminal proceedings against the appellant and others for offences of conspiracy to murder and attempted murder, the gravity of the offences charged, procurement by the appellant of weapons used in committing the offences as revealed in written statements made by possible witnesses, the admissions by the appellant of the existence of “*assassination list*”, that the offences were committed and the existence of fear and insecurity of the witnesses instilled in them by persons close to the appellant.

The court has in most cases, discretion to admit an accused person to bail pending trial, but, in the exercise of the discretion, the nature of the charge, the evidence by which it is supported, the sentence which by law may be passed in the event of a conviction, the probability that the appellant will appear to take his trial, are the most important ingredients for the guidance of the court and where these are weighty, an appellate court will not interfere. See *in the matter of Etienne Barronet and Admond Allian IE and BI*; (1852) *Dears* 51; 118 *E.R. K.B.* 337 and *Re Robinson* (1854) 23 *L.J.Q.B.* 286.

The learned trial judge was alive to his duty when he exercised his discretion against admitting the appellant to bail and he took all the ingredients into account. It was a discretion judicially and judiciously exercised. The court below was in the circumstances right in affirming the decision of the learned trial judge. I too see no justification in interfering with the decision of the courts below.

In conclusion, I see no merit in the appeal and I hereby dismiss it.

ONU JSC

Having been privileged to read before now the leading judgment of my learned brother Uwaifo, JSC I am in full agreement with him that the appeal lacks merit and it accordingly fails. I dismiss it.

I need only add on the perceived failure of the court below to consider issue No. 2, that such a failure if any (in the face of treatment given to both issues considered together in the judgment of the court

below) has not occasioned a miscarriage of justice.

KALGO JSC

I have had the privilege of reading in advance the judgment just B
delivered by my learned brother Uwaifo JSC in this appeal. In the judg-
ment, he has in great detail dealt with all the issues raised by the appellant
and argued in the briefs of the learned counsel for the parties. I entirely
agree with the reasoning and conclusions reached in the judgment and I C
have nothing useful to add. In the result, I also find no merit in the appeal
and I dismiss it accordingly.

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