

SUPREME COURT OF NIGERIA
20TH APRIL, 2001. SC. 139/1995
CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, O. ACHIKE, S. O. UWAIFO, JJSC.

RAYMOND S. DONGTOE APPLICANT/APPELLANT
AND
1. CIVIL SERVICE COMMISSION,
PLATEAU STATE
2. BOARD OF INTERNAL REVENUE,
PLATEAU STATE RESPONDENTS
3. ATTORNEY-GENERAL,
PLATEAU STATE

ADMINISTRATIVE LAW - Disciplinary action - Commission of offence
- Admission of guilt - Jurisdiction of the court - An administrative body
which acts on the admission of guilt by the accused - Has not usurped the
constitutional jurisdiction of the court (H 6)

APPEALS - Concurrent findings of facts - Attitude of Supreme Court to
such findings - Is not to interfere - Save where perverse (H 9)

APPEALS - Grounds of appeal - Reason not forming part of the deci-
sion in a judgment - Cannot be relied on to challenge its validity (H 8)

CRIMINAL PROCEDURE - Burden of proof - Admission of guilt - Where
there is an admission of guilt - The question of establishing the legal
burden of proof no longer arises (H 5)

FUNDAMENTAL RIGHTS - Enforcement - Application for leave -
Exercise of discretion - Applicant who seeks the exercise of the court's
discretion - Has the burden of presenting all the material facts necessary
for the exercise of the discretion (H 7)

FUNDAMENTAL RIGHTS - Enforcement procedure - Principal claim

- Where a breach of the provisions of chapter IV is the principal claim - The procedure can be invoked even though other claims are made (H 4)

JURISDICTION - *Importance of - Existence or absence of jurisdiction in the court - Goes to the root of the matter - And sustains or modifies the decision of the court in respect of the relevant subject matter (H 1)*

PRACTICE & PROCEDURE - *Fundamental Rights - Enforcement procedure - The relief which may be claimed by means of the procedure - Is limited to any of the provisions of Chapter IV of the Constitution (H 2)*

PRACTICE & PROCEDURE - *Special procedure - Non compliance with - Where a special procedure is prescribed for the enforcement of a particular right or remedy - Non Compliance with such a procedure is fatal to the enforcement of the remedy (H 3)*

FACTS

In the Plateau State High Court holden in Jos, the Applicant/Appellant sought for leave to apply for an order pursuant to order 1 Rules 2(2) and (3) of the Fundamental Rights (Enforcement Procedure) Rules 1979 enforcing his fundamental rights by a declaration that the purported termination of his appointment in a letter dated 8th January, 1992 was null and void and of no effect whatsoever; an order of reinstatement into his previous position of employment with all attached benefits; and for an injunction restraining the respondents from interfering with his employment. The appointment of Appellant, a permanent and pensionable employee of the Plateau State Government service was terminated by the 1st Respondent vide Exhibit E. Appellant was until the termination of his appointment an Acting Director in the State Civil Service. In August, 1991, Appellant with others, was accused of stealing the sum of N10,984.12, property of his employers, the Plateau State Government. He was issued a query (Exhibit D) by the 2nd Respondent to explain why disciplinary action should not be taken against him for his gross act of misconduct.

Appellant replied to Exhibit D. The 2nd Respondent was not satisfied with the explanation by Appellant in his answer to the query and consequently terminated his appointment. Hence, the Appellant commenced this action. The learned trial judge dismissed the application of the Appellant because of the failure of the Appellant to disclose a material fact essential to the exercise of his discretion. The material fact in issue being the omission of the Appellant to depose to his reply to the query issued him accusing him of the commission of the offences of conspiracy and theft. The Appellant's appeal to the Court of Appeal, Jos Division was dismissed. He has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the learned Justices of the Court of Appeal were right in upholding the opinion of the learned trial Judge that the applicant/appellant needed no trial on an allegation bordering on crime before disciplinary measures can apply?”

“(2) Whether the learned Justices of the Court of Appeal were right in finding that the learned trial Judge did not speculate on the contents of the Appellant's reply to the query?”

“(3) Whether the learned Justices of the Court of Appeal were right in upholding the decision of the learned trial Judge that the applicant/appellant by not producing the reply to the query concealed a material fact?”

“Whether the Appellant was right in commencing the proceedings leading to this appeal by an application under the Fundamental Rights (Enforcement Procedure) Rules Cap.62 Laws of the Federation 1990, when the main or principal claim is one for wrongful dismissal or termination of appointment.”

HELD (Unanimously striking out the appeal per lead judgment of **KARIBI-WHYTE JSC**)

Jurisdiction - Importance of

1. The existence or absence of jurisdiction in the court goes to the root of the matter and sustains or nullifies the decision of the court in respect of the relevant subject matter. This is why it is allowed to raise the issue

of jurisdiction at any time or stage in the proceedings or on appeal as a substantive issue of law. (p. 1253 D)

Practice & Procedure - Fundamental Rights

- B 2. A proper construction of the scope and amplitude of the remedy provided by the procedure relied upon demands reference to S.42(1), (2) and (3) of the Constitution 1979 and the Rules of the Fundamental Rights (Procedure) Rules 1979 under which the application was brought. It is clear therefore from the ipsissima verba of this section that the relief which may be claimed by means of this procedure is limited and confined to any of the provisions of Chapter IV of the Constitution. Any exercise of jurisdiction in respect of subject matters outside Chapter IV is without jurisdiction, unconstitutional and void. This procedure must be adhered to strictly. (pp. 1255 C & 1256 C)

Practice & procedure - Special procedure

- E 3. Where a special procedure is prescribed for the enforcement of a particular right or remedy, non-compliance with or departure from such a procedure is fatal to the enforcement of the remedy. The remedy provided by the statute must be followed. (p. 1256 E)

F ***Fundamental rights - Enforcement procedure***

- G 4. Where a breach of the provisions of Chapter IV is the principal claim, the procedure can be invoked even though other claims are made. In the instant case none of the principal claims which Appellant seeks to enforce before the learned trial Judge can be brought within the provisions of Chapter IV. Accordingly, the procedure not being available, the learned trial Judge had no vires to exercise jurisdiction. (p. 1257 A)

Criminal procedure - Admission of guilt

- H 5. Where there is an admission of guilt, the question of establishing the legal burden of proof no longer arises, and no burden of proof rests on the accuser, the burden of proof having been discharged by the admission of the accused. (p. 1264 E)

Administrative law - Disciplinary action

6. An administrative body which acts on the admission of guilt by the accused has not tried the accused, has not violated the provisions of the Constitution, and cannot be said to have usurped the Constitutional jurisdiction of the Court. (p. 1265 A) B

Enforcement - Application for leave

7. An application for leave to grant the enforcement of his fundamental rights involves the exercise of the discretion of the learned judge who is to grant the application. It is therefore essential to the exercise of the discretion, which is not gratuitous, for the applicant to place before the learned Judge all the material facts necessary for the exercise of the discretion. Applicant who seeks the exercise of the courts discretion has the burden of presenting all the material facts necessary for the exercise of the discretion. The Application of the Applicant will fail where such materials are absent. (p. 1269 C & 1270 C) C D E

Appeals - Grounds of appeal

8. It is therefore not appropriate to rely on a reason not forming part of the decision in a judgment for challenging its validity as learned Counsel to the Appellant has done in this case. The question of the propriety *vel non* of the admission of the Appellant of commission of the offences alleged against him was not one of the grounds of appeal before us against the judgment of the Court of Appeal. (p. 1270 G) F

Appeals - Concurrent findings G

9. It is well settled that where there are concurrent findings of facts of the courts below on an issue, the Appellant challenging such findings must show that there was no basis for the finding and that it was perverse. Appellant has not succeeded in showing that there was no basis for the finding that there was insufficient material on which the learned trial Judge could exercise his discretion. This court cannot therefore interfere with the findings so made. (p. 1271 A) H

NOTABLE POINTS OF INTEREST

KARIBI-WHYTE JSC

1. The case of Denen Tofi was not correctly decided

- B The case of Denen Tofi v. Ushe Uba & Anor. (1987) 3 NWLR. 707 which decided that the citizen may approach the court for the enforcement of his right in the manner in which he may deem convenient in any given circumstances and that these include prerogative orders, originating summons, or declaratory reliefs or by any simple but clear and precise application or by any convenient combination of these cannot be correct. (p. 1256 F)

2. Disciplinary Jurisdiction of an Administrative body

- D It seems to me preposterous to suggest that the administrative body should stay the exercise of its disciplinary jurisdiction over a person who had admitted the commission of criminal offences. The inevitable inference is that criminal prosecution should be pursued thereafter before disciplinary proceedings should be taken. I do not think the provision of the law and effective administration contemplates or admits the exercise of such a circuitous route to the discipline of admitted wrongdoings. (p. 1266 D)

F *3. Appropriate remedy for wrongful dismissal*

- The action brought by Appellant under the Fundamental Rights (Enforcement Procedure) Rules, 1979 against the Respondents is inappropriate. Appellant ought to have brought an action for the Tort of wrongful dismissal from his employment which was the appropriate action for the wrong complained of. (p. 1271 D)

REPRESENTATION

- H Appellant absent and not represented.
S. M. Shuaibu, Director, Civil Litigation, Ministry of Justice, Plateau State, with him J. Giwa, Principal State Counsel, for the respondent.

CASES REFERRED TO

Obikoya v. Registrar of Companies (1975) 4 SC.31 at p.3

Nwafia v. Ububa (1966) NMLR.219

Madukolu v. Nkemdilim (1962) 2 SCNLR.341

Onye v. Oputa (1987) 3 NWLR (pt.60) 259

B

Adefulu v. Okulaja (1998) 5 NWLR (pt.550) 435

Okotie-Eboh v. Okotie-Eboh (1986) 1 NWLR (pt.16) 264

Garba v. University of Maiduguri (1986) 1 NWLR (pt.18) 550

Onagoruwa v. State (1993) 7 NWLR (pt.303) 49

C

STATUTES & RULES REFERRED TO

Fundamental Rights (Enforcement Procedure) Rules 1971, O.1 r. 2

Constitution of Nigeria, 1979, ss. 33 (1) and (4), 42 (1), (2) and (3)

Evidence Act ss. 137 (1), 138 (1)

D

Criminal Procedure Act, s. 218

LEAD JUDGMENT BY KARIBI-WHYTE JSC

The appeal in this case is again one of the now familiar cases in which the aggrieved resorts to the procedure for seeking relief under fundamental rights provisions of the Constitution for wrongs where the breach of the Constitutional provision is not applicable, and stricto sensu merely ancillary, See Ndigwe v. Ibekendu (1998) 7 NWLR (pt.558) 486 Osazuwa v. Edo State CSC (1999) 10 NWLR (pt. 622) 290 SC. UNTHMB v. Nnoli (1994) 8 NWLR (pt.363) 374 Nnamdi Azikiwe University v. Nwafor (1999) 1 NWLR 116. The principal claim and all the reliefs claimed in this case relate to dismissal of the appellant from his employment. None of the reliefs is within the provisions of Chapter IV of the Constitution. The claim was by motion on behalf of the Applicant praying this court for an order or orders:-

1. Granting the applicant leave to apply for an order enforcing his fundamental rights against (1) PLATEAU STATE CIVIL SERVICE COMMISSION, (2) BOARD OF INTERNAL REVENUE PLATEAU STATE, (3) THE ATTORNEY-GENERAL AND COMMISSIONER FOR JUSTICE PLATEAU STATE in terms of the reliefs set out below:-

- (a) A declaration that the letter reference No.S/RE/397/Vol.1/291 dated the 8th day of January, 1992, signed by S.G. Gokum (for Adminsitrator of Internal Revenue), and addressed to the applicant purportedly terminating the appointment of the Applicant from the service of Plateau State Civil Commission is null, void and of no effect whatsoever in that it contravenes the rights guaranteed the applicant by section 33 of the 1979 Constitution of Nigeria.
- (b) A declaration that the applicant is still in the employment of the Board of Internal Revenue, Plateau State.
- (c) An order directing the Plateau State Civil Service Commission and the Board of Internal Revenue Plateau State, their agents servants, and other representatives however called, to reinstate the applicant to his status as civil servant without prejudice to his entitlements and promotions which might have accrued to him during the period of his termination.
- (d) An injunction restraining the Plateau State Civil Service Commission and Board of Internal Revenue their agents, servants, and other such representatives however called from further interfering with the applicant's performance of his duties as a civil servant.

There was also a prayer for further order or orders as this Honourable Court may Deem fit to make in the circumstance.”

This appeal is against the decision of the Jos Division of the Court of Appeal, which had on the 8th December, 1994, dismissed the appeal against the decision of the Plateau State High Court. Appellant as I have stated had claimed before the High Court for leave for an order pursuant to Order 1 Rules 2 (2) and (3) of the Fundamental Rights (Enforcement Procedure) Rules 1979 enforcing his fundamental human rights and seeking a declaration that the purported termination of his appointment in a letter dated 8th January, 1992 was null and void and of no effect whatsoever.

A Summary of the facts

The appointment of Appellant, a permanent and pensionable employee of the Plateau State Government service was terminated by the 1st Respondent on behalf of his employers on the 8th January, 1992 in a letter reference No.S/RE/397/Vol.1/29 dated 8th January, 1992, and Exhibit E in

these proceedings. Appellant started his working career with the Plateau State Government as a Community Development Assistant with the Ministry of Local Government on the 15th January, 1968. He was subsequently posted to the Board of Internal Revenue as a Senior Inspector of Taxes. On the 23rd January, 1987, he was promoted to the post of Principal Inspector of Taxes. In July, 1989 he was appointed Acting Director in the State Civil Service. B

In August, 1991, Appellant, with others, was accused of stealing the sum of N10,984.12k, property of his employers, the Plateau State Government. He was accordingly accused by the 2nd Respondent on behalf of his employers formally demanding explanation in a letter of the commission of criminal offences, namely, of conspiracy and theft. Appellant replied the query issued him by the 2nd Respondent to explain why disciplinary action should not be taken against him for his gross act of misconduct. The query is Exhibit D in these proceedings and is letter Ref. No.S/DIR/102/Vol.1 dated 19th August, 1991. Appellant replied to the letter of 2nd Respondent. The 2nd Respondent was not satisfied with the explanation by Appellant in his answer to the query and consequently terminated his appointment. The reaction of Appellant to the termination of his appointment was the proceedings described above in the Jos High Court seeking leave to enforce his fundamental right by the nullification of the letter of termination of his appointment, and an order of reinstatement into his previous position of employment with all attached benefits and for an injunctive order restraining the Respondents from interfering with his employment. D E F

The learned trial Judge dismissed the application for the enforcement of the fundamental right of the Appellant. The learned trial Judge declined the exercise of his discretion to grant leave in favour of the Appellant to enforce the rights claimed, because of the failure of the Appellant to disclose a material fact essential to the exercise of his discretion. The material fact in issue being the omission of the Appellant to depose to his reply to the query issued him accusing his of the commission of the offences of conspiracy and theft. G H
The learned trial Judge concluded as follows-

“He conceded (sic) a material fact as to recovery of a sum of money from him on the allegation of the theft. It will be inequitable to grant the application in the circumstances. It is for this reason that I dismiss the application.” (See p.29 of the record of proceedings).

B Dissatisfied with this decision, Appellant appealed to the Court below alleging five grounds of appeal which are stated without particulars as follows –

"GROUNDS OF APPEAL

C *1. The learned trial Judge erred in law by holding that the Appellant's Failure to depose in his affidavit that a certain sum of money was Recovered from him disentitles him to the reliefs sought by him.*

D *2. The Learned trial Judge misdirected himself in law by holding that “it is an erroneous impression of the law to assume that once an employee is accused of a misconduct amounting to a crime he must always first be tried and found guilty by a court of law before his dismissal of service or the termination of his employment. This requirement may be dispensed with if and when there is an admission of the alleged crime by the employee in his representation.”*

E *3. The Learned trial Judge erred in law by holding that the appellant's failure to disclose his reply (purportedly dated 20/8/91) to the query given to him by the 2nd Respondent amounts to a material concealment of facts.*

F *4. Having held that “Strange enough the Respondents did not file a counter affidavit” the Learned trial Judge erred in Law by holding that the appellant “did not play his game with all his cards open on the game table. He concealed a material fact as to recovery of a sum of money*
G *from him based on the allegation of the theft. It will be inequitable to grant the application in the circumstances. It is for this reason that I dismiss the application.”*

H *5. The decision of the Learned trial court is unreasonable, unwarranted and cannot be supported regards to the unchallenged and uncontradicted affidavit evidence before the court.”*

In the Court of Appeal

The Court of Appeal dismissed the appeal, and affirmed the de-

cision of the learned trial Judge. In affirming the learned trial Judge, the Court of Appeal stated the issues for determination as follows –

“(i) *Whether the trial Court was justified in holding that even though the complaint against the appellant amounted to an allegation of crime he was not entitled to be tried in a Court of law before being subjected to disciplinary proceedings?*” B

(ii) *Whether the trial Court was right in importing into the case Extraneous matters which were not before it and deciding the Case on the basis of such matters?*

(iii) *Whether the findings of the trial Court are perverse?”* C

On the first issue which rests on the general principle that where a person is accused of the commission of a criminal offence there cannot be disciplinary proceedings unless there is a prior prosecution of the alleged offence in a court or tribunal, the Court of Appeal accepted the general D principle but held that there were exceptions to the principle where the person accused accepts involvement in the commission of the offence. The Court below relied on the opinion of Eso, JSC, in F.C.S.C. v. Laoye (1989) 2 NWLR (pt. 106) 652 at p.679. E

The Court of Appeal therefore held that the learned trial Judge stated the law correctly when he stated that –

“*It is an erroneous impression of law to assume that once an employee is accused of a misconduct amounting to a crime he must always first be tried and found guilty by a court of law before his dismissal of service or the termination of his employment. This requirement may be dispensed with if and when there is an admission of the alleged crime by the employee in his representation. See F.C.S.C v. Laoye (1989) 2 NWLR (pt. 106) 652.*” F G

The Court of Appeal stated the facts, and the allegation that Appellant’s share in the theft and conspiracy of the sum of N10,984.12k due to the Plateau State Government, through his connivance was recovered from him. A query Ref. No.S/BIR/102/Vol.1/213 dated 19th August, 1991 and Exhibit D, was issued to the Appellant to explain within 24 hours why disciplinary action should not be taken against him. Appellant’s reply to the query was found to be unsatisfactory; hence the H

termination of his appointment in Exhibit E.

The Court of Appeal observed that the Appellant’s reply to the query, Exhibit D was very crucial to the determination of the application. This was because Exhibit D alleged that Appellant’s share in the offence committed had been recovered from him. The inevitable inference drawn by the Court of Appeal was that Appellant had admitted commission of the offence and had refunded his share.

The Court of Appeal also observed that the Appellant did not in his supporting affidavit deny the commission of the offence. Agreeing with the learned trial Judge, the Court of Appeal held, (at p.64 lines 5-16),

“The affidavit evidence before the learned trial Judge, without the Appellant’s reply to the query, in my opinion is not sufficient to enable the trial Judge to exercise his discretion judiciously.” It is the duty of the appellant to show that the circumstances are such that it is just and equitable that the application should be granted and he could only do that by replacing (sic) all the material facts before the Court.”

X X X X X
E *“The trial Judge, refused the application because not all the material facts have been placed before him, which in my opinion he is entitled to do.”*

The Court of Appeal also rejected the contentions that the learned trial Judge made out a case different from that advanced by the parties and that he indulged in speculation.

In This Court

GROUND OF APPEAL

G Appellant appealed against the judgment of the Court of Appeal dismissing his appeal against the judgment of the learned trial Judge. He relied on the following five grounds, which are stated as follows -

“(i) The learned justices of the Court of Appeal (per Muhammad J.C.A.) erred in dismissing the Appeal by holding:

H *“In the light of the above, it is my considered opinion that the learned trial judge stated the law correctly when he stated that:*

“It is erroneous impression of law to assume that once an employee is accused of a misconduct amounting to a crime by a court he

must first be tried and found guilty by a court of law before his dismissal from service, or the termination of his employment. This requirement may be dispensed with if and when there is an admission of the alleged crime of the employee in his representation, see F.C.S.C v. LAOYE (1989) 2 NWLR (pt.106) 652.”

2. *The learned justices of the Court of Appeal erred in law (per Muhammad J.C.A.) in dismissing the Appeal by holding that:*

“This reply in my opinion is very crucial to the determination of the application. This is more so considering the fact it was alleged that the appellant share has been recovered from him. If that is true, this means that the appellant has admitted committing the offence and has refunded his share... The affidavit evidence before the trial judge without the appellant’s reply to the query, in my opinion is not sufficient to enable the trial judge exercise his discretion judiciously.”

3. *The learned justices of the Court of Appeal erred in law (per Muhammad JCA)*

“The appellant was accused of stealing certain amount of money is an offence under S.96 and S.286 of the Penal Code... It could from Exhibits D & E that the appellant was accused of theft stated that his own share has been recovered from him. He was requested to explain why disciplinary action should not be taken against him. From Exhibit E it is apparent that the appellant did reply query. His reply to the query and his verbal representation satisfy the Disciplinary Commission. So his appointment was terminated.”

4. *The learned justices of the Court of Appeal erred in law in holding (per Muhammad JCA)*

“the trial judge also did not speculate. In fact all he did was to say the appellant concealed a material fact.”

5. *The judgment is against the weight of Evidence.”*

ISSUES FOR DETERMINATION

Learned Counsel for the Appellant has formulated the following three issues for determination –

“(1) Whether the learned Justices of the Court of Appeal were right in upholding the opinion of the learned trial Judge that the appli-

cant/appellant needed no trial on an allegation bordering on crime before disciplinary measures can apply?

(2) *Whether the learned Justices of the Court of Appeal were right in finding that the learned trial Judge did not speculate on the contents of the Appellant's reply to the query?*

(3) *Whether the learned Justices of the Court of Appeal were right in upholding the decision of the learned trial Judge that the applicant/appellant by not producing the reply to the query concealed a material fact?*

FRESH ISSUE FOR DETERMINATION BY THE RESPONDENT

Learned Counsel for the Respondents adopted the above issues formulated by the Appellants. He also sought to raise a fresh issue not raised in the two courts below. This issue, as learned counsel suggested, concerns the mode or procedure by which the proceedings leading to this appeal was initiated, and is an issue crucial to the determination of this appeal. Learned Counsel for the Respondents formulated the issue as follows –

“Whether the Appellant was right in commencing the proceedings leading to this appeal by an application under the Fundamental Rights (Enforcement Procedure) Rules Cap.62 Laws of the Federation 1990, when the main or principal claim is one for wrongful dismissal or termination of appointment.”

A motion on notice to the Appellant by Respondents dated 31/1/2000 and filed on the 6/11/2000 praying for the same relief was withdrawn by Counsel to the Respondents and was struck out. This was because Respondents have not filed a cross-appeal to the decision of the Court of Appeal and has no ground of appeal on which the issue formulated could be based. It is true the resolution of the issue is crucial to the determination of the appeal. Notwithstanding the issue must be formulated and brought by due process of law.

H The Issue of Jurisdiction

However, since this issue raised is one which concerns the jurisdiction of the Court to hear the action, the point can be taken suo motu in the interest of the proper determination of the appeal before us. The

Court accordingly invited counsel to the parties for argument on the issue of the jurisdiction of the trial court to enforce the claim of the Appellant. Respondents' counsel responded to the invitation. The Appellant did not. On the 29th March when the appeal was fixed for further argument, learned counsel to the Respondents adopted his further brief of argument. He submitted that the action having not been in compliance with due process of law should be struck out. B

It is important to observe that the principal issue before the court below was whether the learned trial Judge was right to refuse to enforce the application for fundamental rights of the Appellant on the ground that Appellant omitted to disclose a material fact essential to the exercise of his discretion. C

It is well settled law that the question of the validity vel non of the jurisdiction of the court touches on the competence of the court to hear and determine a cause or matter before it, and is fundamental to its exercise of jurisdiction and of adjudication and determination of the cause before it. D
The existence or absence of jurisdiction in the court goes to the root of the matter and sustains or nullifies the decision of the court in respect of the relevant subject matter – This is why it is allowed to raise the issue of jurisdiction at any time or stage in the proceedings or on appeal as a substantive issue of law – See Bronik Motors Ltd. v. Wema Bank (1983) 1 SCNLR 296 Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Onyema v. Oputa (1987) 3 NWLR. (pt. 60) 259. E F

It is important to point out at once that the absence of jurisdiction accentuates the want of legal capacity and competence in the court to hear and determine the subject matter before it, and does not raise at this stage, any issue as to the rights of parties in the subject matter of the action. In the absence of jurisdiction, there is no competence to exercise the judicial powers vested in the courts by section 6(6)(b) of the Constitution. It has been frequently stated, and is now well settled that any such exercise of jurisdiction, which is an obvious futility is a nullity and the proceedings and judgment relating thereto null and void – See Timitimi v. Amabebe 14 WACA. 374, Sule v. Nigerian Cotton Board (1985) 2 G H

NWLR (pt.5) 17, Western Steel Works Ltd. v. Iron & Steel Workers Union (1986)3 NWLR (PT.30) 617. Sken-Consult (Nig.) Ltd. v. Sekondy-Ukey (1981) 1 SC.6 – See also Adefulu v. Okulaja (1998) 5 NWLR (pt.550) 435. Jurisdiction being a statute enabling requirement, cannot be acquired or conferred on the court by consent of the parties, or because the court was oblivious or mistaken as to the defect in its jurisdiction – See Okotie-Eboh v. Okotie-Eboh (1986) 1 NWLR (pt.16) 264.

I have already at the beginning of this judgment set out verbatim the claims of the Appellant before the High Court of Plateau State in Jos. I have also stated the procedure relied upon by the Appellant for seeking relief. It is therefore essential in the determination of this appeal to consider whether the trial High Court had the jurisdiction to hear and determine the reliefs claimed by the Appellant. A proper determination of the issue necessitates a discussion of the scope and amplitude of the procedure adopted by the Appellant. Appellant as I have stated brought an application to enforce his fundamental rights under the Fundamental Rights (Procedure) Rules 1979. For ease of reference, and at the risk of tedious repetition, I reproduce the claims relied upon by the Appellant.

“Applicant was praying this court for an order or orders:-

1. Granting the applicant leave to apply for an order enforcing his Fundamental rights against (1) PLATEAU STATE CIVIL SERVICE COMMISSION, (2) BOARD OF INTERNAL REVENUE PLATEAU STATE, (3) THE ATTORNEY-GENERAL AND COMMISSIONER FOR JUSTICE PLATEAU STATE in terms of the Reliefs set out below:-

(a) A declaration that the letter reference No. S/RE/397/Vol.1/291 dated the 8th day of January, 1992, signed by S.G. Gokum (for Administrator of Internal Revenue), and addressed to the applicant purportedly terminating the appointment of the Applicant from the service of Plateau State Civil Commission is null, void and of no effect whatsoever in that it contravenes the rights guaranteed the applicant by section 33 of the 1979 Constitution of Nigeria.

(b) A declaration that the applicant is still in the employment of the Board of Internal Revenue, Plateau State.

(c) An order directing the Plateau State Civil Commission and the Board

of Internal Revenue Plateau State, their agents, servants, and other representatives however called, to reinstate the applicant to his status as civil servant without prejudice to his entitlements and promotions which might have accrued to him during the period of his termination.

(d) An injunction restraining the Plateau State Civil Service Commission and Board of Internal Revenue Plateau State, their agents, servants, and other such representatives however called from further interfering with the applicant's performance of his duties as a civil servant.

AND for such further order or orders as this Honourable Court may deem fit to make in the circumstances."

A proper construction of the scope and amplitude of the remedy provided by the procedure relied upon demands reference to S.42(1), (2) and (3) of the Constitution 1979 and the Rules of the Fundamental Rights (Procedure) Rules 1979 under which the application was brought.

The relevant provisions are as follows –

"42.- (1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this Chapter.

(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section."

"2.- (1) Any person who alleges that any of the Fundamental Rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may apply to the Court in the State where the infringement occurs or is likely to occur, for redress.

(2) No application for an order enforcing or securing the en-

forcement within that State of any such Rights shall be made unless leave therefore has been granted in accordance with this rule.

(3) *An application for such leave must be made ex parte to the appropriate Court and must be supported by a statement setting out and description of the applicant, the relief sought, and the grounds on which it is sought, and by an affidavit verifying the facts relied on."*

Whilst S.42(1) speaks of any of the provisions of this chapter, i.e. Chapter IV, S.42(2) speaks of enforcing the provisions of this chapter, i.e. Chapter IV. S.42(3) vests in the Chief Justice the power to make rules for the purposes of this section. **It is clear therefore from the ipsissima verba of this section** and particularly the expression underlined which

are clear and unambiguous **that the relief which may be claimed by means of this procedure is limited and confined to any of the provisions of Chapter IV of the Constitution. Any exercise of jurisdiction in respect of subject matters outside Chapter IV is without jurisdiction, unconstitutional and void. – Ransome Kuti v. AG of the Federation (1985) 2 NWLR. 211, Maria David-Osuagwu v. AG. Anambra State & Ors. (1993) 4 NWLR 13 CA. This procedure must be adhered to strictly – See Saude v. Abdullahi (1989) 4 NWLR (pt. 116) 387 SC.**

It is a well settled principle that **where a special procedure is prescribed for the enforcement of a particular right or remedy, non-compliance with or departure from such a procedure is fatal to the enforcement of the remedy. – See Barraclough v. Brown (1897) AC.615. The remedy provided by the statute must be followed.** The case of Denen Tofi v. Ushe Uba & Anor. (1987) 3 NWLR. 707 which decided that the citizen may approach the court for the enforcement of his right in the manner in which he may deem convenient in any given circumstances and that these include prerogative orders, originating summons, or declaratory reliefs or by any simple but clear and precise application or by any convenient combination of these cannot be correct. The claim of the Appellant was for an order enforcing his fundamental right against (1) Plateau State Civil Service Commission (2) Board of Internal Revenue, Plateau State (3) Attorney-General of Plateau State, in

terms of the reliefs set out in the motion. None of the reliefs claimed by the Appellant falls within any of the specific rights enumerated in Chapter IV. **Where a breach of the provisions of Chapter IV is the principal claim, the procedure can be invoked even though other claims are made – Din v. A-G of the Federation (1988) 4 NWLR (pt. 87) 147 SC. – See Borno Radio Television Corporation v. Basil Egbuonu (1991) 2 NWLR 81 at 89 CA. In the instant case none of the principal claims which Appellant seeks to enforce before the learned trial Judge can be brought within the provisions of Chapter IV. Accordingly, the procedure not being available, the learned trial Judge had no vires to exercise jurisdiction.**

The learned trial Judge should have struck out the application on that ground. Even if the application of the applicant was to be considered on its merits, it is obvious from the material before the learned trial Judge that the application *ex facie* did not disclose that any right under the provisions of Chapter IV of the Constitution 1979 was breached or threatened to be violated. On that ground alone leave should not have been granted applicant to bring the application to enforce a non-existent right, the Court having no jurisdiction. The Court of Appeal therefore lacked jurisdiction to hear and determine the appeal before it, when there was no appeal properly before the court. This appeal can be dismissed on this ground alone.

I now turn to the grounds of appeal filed before the Court. I do so in the interest of completeness and to consider the issues contested even if at this stage they are of mere academic interest. Since there is no jurisdiction to bring the application, there are no issues *stricto sensu* properly before the Court.

Both parties filed their briefs of argument. Appellant has applied to this court for leave to receive/or admit or use the reply of the Appellant to the Respondents' query in evidence and for an order compelling the Respondents to produce the reply of the Appellant to the said query. It was argued that this was in the interest of justice following comments in the courts below that it was a material omission. Unfortunately this application was not pursued. The reply to Exhibit D was never before the Court. Arguing the first issue which related to the first ground of

appeal, learned Counsel in the Appellants' brief of argument submitted that the Court of Appeal stated the law correctly at page 61, lines 15-19 of the Record when R.D. Muhammad JCA, said,

"The appellant was accused of stealing certain amount of money.

B Theft is an offence under sections 96 and 286 of the Penal Code which is applicable in Plateau State."

It was however, further submitted that the court was wrong to have relied on the decision of the Supreme Court in FCSC v. Laoye (1989) 2 NWLR (pt.106) 652 to hold that the Respondents acted properly in dispensing with trial in a court before exercising their disciplinary powers. It was learned Counsel's contention that the dictum of Eso JSC in FCSC v. Laoye (supra) relied upon was *obiter* and was not the *ratio decidendi* in FCSC v. Laoye (supra). The decisions in Onagoruwa v. State (1993) D 7 NWLR (pt. 303) 49 per Tobi JCA, UTC (Nig) Ltd. v. Pamotei (1989) 2 NWLR (pt.103) 244 at p.253 and the dictum of Karibi-Whyte, JSC in FCSC v. Laoye (supra) were relied upon for the submission.

Learned Counsel argued that the courts have been consistent in E holding that criminal allegations are matters for adjudication by courts vested with judicial powers by S.6 of the Constitution and not administrative or investigative panels, and that the court did not concede to shirking its responsibilities once criminal allegations have been raised. The decisions of Denloye v. Medical and Dental Practitioners Disciplinary Committee (1968) 1 All NLR 306; Sofekun v. Akinyemi (1980) 5-7 SC.1. F Garba v. University of Maiduguri (1986) 1 NWLR (pt.18) 550. Were cited and relied upon.

It was submitted that Laoye's Case was a re-enforcement of the G view expressed in the decisions of courts that where the indiscipline complained of constituted crimes under the criminal or penal code, only the courts set up under the Constitution can exercise jurisdiction. Reference was made to the dictum of Oputa JSC in Laoye's Case at p.707. It was H further submitted in the instant case that there was not in existence a body to whom the admission/representation was made. There was no-body qualified to dispense with the required element of judicial trial. It was contended that it seems plausible that every act or conduct irrespec-

tive of their criminal elements could be entertained by the disciplinary body. Learned Counsel argued that the fact that a disciplinary body assumes jurisdiction and sits to determine allegations actually committed, is a usurpation of the judicial powers of the Courts. The fact that there is an admission by the servant made no difference. Garba v. University of Maiduguri (1986) 1 NWLR (pt.18) 550. The dictum of Obaseki JSC at p.576 was cited and relied upon.

Learned Counsel referred to the fact of the instant case and argued that in issuing Exhibit D, the Respondents assumed jurisdiction over acts of conspiracy and theft contrary to sections 96 and 286 of the Penal Code. He submitted that the very fact that the Respondents tried the Appellant for these offences even if for the purpose of ascertaining his admission and decided not to inflict punishment under the Penal Code, but to terminate his employment for these crimes, is a contravention of section 33 of the 1979 Constitution, a breach of the Appellant's right to fair hearing. It was finally submitted on this point that it is irrelevant how very well the Respondents conducted the proceedings leading to Exhibit E.

Analysing Exhibits D & E, learned Counsel questioned the standard of proof relied upon by Respondents. He submitted that there was no burden of proof on the Appellant to prove his innocence. Citing and relying on Sofekun v. Akinyemi & 3 ors. (1980) 5-7 SC. 1, it was submitted that to satisfy the quantum of proof approved by the Constitution, the body empowered to assess responsibility must be constitutionally established UNTHMB v. Nnoli (1994) 8 NWLR (pt.363) 376 was cited.

Learned Counsel to the Respondents in his brief of argument submitted on the first issue that Appellants were importing into the decision of the court below extraneous matters which were not basis of or reasons for the decision. It was submitted that neither the trial Judge nor the Court below held that a trial was not necessary in respect of the Appellant who was alleged to have committed criminal offences before disciplinary proceedings can be taken against him. There is nothing on the record to support such a conclusion.

Learned Counsel submitted that both the learned trial Judge and the Court of Appeal followed the well settled principle that criminal alle-

gations are matters for adjudication by courts vested with judicial powers by the Constitution. There is nothing in the decision of the Court of Appeal to suggest that the Court held the view that administrative or disciplinary inquiry can lawfully replace judicial inquiry in matters where
 B allegations of the commission of criminal offences have been made. The Court of Appeal has not departed from the principle enunciated in Denloye v. Medical and Dental Practitioners Disciplinary Committee (1968) 1 All NLR. 306, Sofekun v. Akinyemi (1980) 5-7 SC.1 and Garba v. University of Maiduguri (1986) 1 NWLR (part 18) 550.

C Finally on this issue, learned Counsel submitted that Appellant is required to attack or fault the basis of the decision challenged. He submitted that the issue discussed does not form the basis of the decision. Since the Court of Appeal did not decide in this appeal that an Appellant alleged
 D to have committed criminal offences did not require a trial before disciplinary measures can apply, the arguments of the Appellant on the issue should be discountenanced.

I have set out above a summary of the submissions of learned
 E Counsel on the first issue. It is clear from their submission that they are ad idem on the general principle enshrined in the Constitution and decided by our courts, that where there is an allegation of criminal wrongs against a person, the jurisdiction to determine the allegations is vested in the courts
 F and the exercise of such jurisdiction cannot be usurped by an administrative tribunal. It is common ground too and obvious from the submissions of learned Counsel on both sides that they have also accepted the judicial decisions which have enunciated this principle as binding on the courts. In my opinion they seem to differ on the ground that learned Counsel for
 G the Appellant contends that the dictum of Eso JSC in FCSC v Laoye (1989) 2 NWLR (pt. 106) 652 at p.679 relied upon by the courts below was made obiter, and was not necessary for the decision where it was made. It was therefore not binding. Learned Counsel for the Respon-
 H dent disagrees.

Again, it is obvious from the judgments of the learned trial Judge and the Court of Appeal that the courts below were not concerned with the consideration of finding of guilt against a person disputing an accusa-

tion of the commission of criminal offences. They were concerned with the disciplinary proceedings against a person who has admitted allegations of the commission of criminal offences. It is true that a decision is authority for what is actually decides; and judgments should be read in the light of the facts on which they were decided. The question whether an administrative tribunal can act on the admission of guilt by a person accused of commission of criminal offences, without establishing guilt in a court established by law was not decided in R. v. Laoye (supra). However, the situation is the converse of the ratio in R. v. Laoye and other cases, and is a valid legal proposition.

The constitutional requirement was very clearly stated by Fatayi – Williams CJN in Sofekun v. Akinyemi & 3 Ors. (1980) 5-7 SC. Where he said,

“Once a person is accused of a criminal offence, he must be tried in a court of law where the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair trial.”

In obvious reference to the importance of a prior judicial trial before further disciplinary action where there is an allegation of the commission of criminal offences, Oputa JSC said at pp.706-707 in FCSC v. Laoye (supra).

“Our system arrogates to the Court the burdensome duty of pronouncing this guilt in an open court, where the facts are subjected to the acid test of effective cross-examination. To do otherwise will constitute an unwarranted attack on our system of criminal justice, the only answer to this embarrassing question could have been trial in open court. It is still true that the court is the temple of justice, and the objective is the attainment of justice. Now justice is only reached through the ascertainment of the truth and the instrument which our law presents to us for the ascertainment of truth or falsehood of a criminous charge is trial in open court.”

This approach was also adopted by Oputa JSC in Garba v. University of Maiduguri (1986) 1 NWLR (pt. 18) 550 at 707 on the question of fair hearing where the learned Justice of the Supreme Court stated the law as follows –

“It is in the interest of justice that the truth of the entire transaction be known and that he and all the culprits should be brought to justice and if the Plaintiff really committed the offences charged that he should be imprisoned. After conviction or during or after serving his sentence, the 1st defendant could then dismiss him. That is justice... when anyone is accused of a criminal offence, he should in his own interest and in the interest of truth and justice, be tried by the ordinary courts of the land...”

In Garba v. University of Maiduguri (supra) at p.576, Obaseki JSC had stated the reasons further as follows –

“These are all serious offences which carry heavy punishment under the penal code. All person found guilty of any of them will have his reputation and name tarnished and stigmatised for life. It is therefore clear why the right to fair hearing within a reasonable time by a court or tribunal is given to any person charged... Without subjecting any criminal allegation against any student to the machinery provided by the state for ascertaining the truth of the allegation, a very painful denial of fundamental right is inflicted on the student however laudable or sympathetic the intention of the authorities might be...”

There is one common feature and the golden thread in all the cases cited and relied upon by Counsel; and that is, there is an allegation of the commission of criminal offences against the accused which has been denied by the accused. In such situations, the Respondent making the accusation of the commission of criminal offences must satisfy the constitutional requirement by establishing the guilt of the accused according to law.

Section 33(1) and (4) of the Constitution 1979 cumulatively read provide that a person charged with a criminal offence which normally involves a determination of his civil rights and obligations shall, unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a court or tribunal established by law and constituted in such a manner as to secure its independence and impartiality. The Courts have relied on this provision to insist that every proceedings leading to disciplinary sanctions against persons accused of criminal offences and disputing the accusation must be predicated by a formal trial of such persons in the

ordinary courts of the land established for the purpose – See Sofekun v. Akinyemi (1980) 5-7 SC.1 Denloye’s case (1968) 1 All NLR.306.

In Garba v. University of Maiduguri (supra) Obaseki, JSC stating the reason for this approach, declared at p.582,

“There is under our law no sliding scale of elements of satisfaction as to the guilt of a person of an offence. The appearance of guilt is not a delusory appearance of guilt which can satisfy this section is measured by the quantum of proof as laid down by law. It is for this reason that guilt in criminal matters is left for the ascertainment of courts of law, or other tribunal before it is acted upon by Administrative tribunals.”

It is clear from the above dictum that reference was being made to the establishment of the burden of proof, which differs as between civil and criminal trials. Section 138(1) of the Evidence Act provides,

(1) *“If the Commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.”*

This requirement is strict and different from the requirement of proof in civil cases – See Section 137(1) of the Evidence Act.

It is pertinent to observe that a crucial finding in the instant case is the admission even if by inference of the commission of the offences alleged against the Appellant. It is relevant to reproduce the part of the judgment of the court appealed against, it reads -.

“It could be seen from Exhibits D and E that the appellant was accused of theft. It was stated that his own share has been recovered from him. He was then requested to explain why disciplinary action should not be taken against him. From Exhibit E, it is apparent that the appellant did reply to the query. His reply to the query and his verbal representation did not satisfy the Disciplinary Committee. So his appointment was terminated. The appellant’s reply to the query was not exhibited. This reply in my opinion is very crucial to the determination of the application. This is more so considering the fact that it was alleged that the appellant’s share has been recovered from him. If that is true, this means that the appellant has admitted committing the offence

and has refunded his share. The appellant did not deny committing the offence in the supporting affidavit. The affidavit evidence before the trial Judge, without the appellant's reply to the query, in my opinion is not sufficient to enable the trial Judge to exercise his discretion judiciously. It is the duty of the appellant to show that the circumstances are such that it is just and equitable that the application should be granted and he could only do that by placing all the material facts before the court. A court may refuse to grant an application for failure to disclose a material fact. The trial Judge refused the application because not all the material facts have been placed before him, which in my opinion he is entitled to do". (See p.63 lines 35 to p.64 lines 1-16).

The inference that Appellant admitted he committed the offences is inescapable from the evidence before the Court and it is a legitimate inference in the circumstances from the facts. Our law has prescribed the requirement of burden of proof in criminal trials. It is well settled that where there is an accusation of the commission of criminal offences, the burden of proof to be established by the accuser before a criminal tribunal established by law is that the commission of the offence has been proved beyond reasonable doubt. There is no doubt that an administrative body cannot usurp the constitutional function of the courts by making a finding of guilt in such cases. However, **where there is an admission of guilt, the question of establishing the legal burden of proof no longer arises, and no burden of proof rests on the accuser, the burden of proof having been discharged by the admission of the accused.**

In U.N.T.M.B v. Nnoli (1994) 8 NWLR (pt. 363) 376 Onu JSC reading the leading judgment stated thus:-

"In the instant case the onus lay on the appellant to establish their assertion that the Respondents admitted dereliction of duty... The dictum of this Court in Federal Civil Service Commission v. Laoye (1989) 2 NWLR (pt.106) 652 at 679 does not relieve the appellants in the instant case of the burden of satisfying this court, aside from the concurrent findings referred to above, that there was an admission of fault on the part of the Respondent."

It is important to distinguish between a finding to be made on an allegation of criminal offences from a finding on an admission of the commission of criminal offences. Whereas the former involves a trial, the latter does not. **An administrative body which acts on the admission of guilt by the accused has not tried the accused, has not violated the provisions of the Constitution, and cannot be said to have usurped the Constitutional jurisdiction of the Court.** In the instant case the finding of the Court of Appeal is that the Respondents merely acted on the admission of the Appellant. I think such a finding on the facts is correct.’

Learned Counsel to the Appellant’s submission is that Respondents violated the provisions of the Constitution relating to fair hearing by terminating Appellant’s appointment after trial on his admission of the commission of the offences of conspiracy and theft alleged against him. This view is not only a misrepresentation of the facts as stated on the record but a misconception of the true factual and legal position. For instance, there was no trial of any kind of the allegations against the accused. Respondents called for explanations from the accused in writing of the allegations against him, and this he did. As Muhammad JCA, said in the judgment of the Court below at p.63 lines 39-43,

“From Exhibit E, it is apparent that the appellant did reply the query and his verbal representation did not satisfy the Disciplinary Committee. So his appointment was terminated.”

It is important to appreciate that the Respondent did not conduct and was not conducting a criminal prosecution. They were making an administrative inquiry similar to an investigation whether Appellant engaged in the activities alleged against him which amounted to the commission of criminal offences. The purpose of Exhibit D, the query, was to elicit the reaction of the Appellant to the allegations against him. It seems obvious from Exhibit E, that the reaction of the Appellant was unsatisfactory, hence his appointment was terminated.

The contention of the Appellants is that even on the facts Respondents should have waited for the criminal prosecution of the Appellant before taking any disciplinary action arising from the criminal of-

fences alleged against him. The decisions of FCSC v. Laoye (supra); Garba v. University of Maiduguri (supra) UNTHMB v. Nnoli (1994) 8 NMLR. (pt.363) 376 were cited and relied upon. These are decisions where the allegations of the commission of criminal offences have been denied and disputed. In such cases the burden rests on the accuser to prove the commission of the alleged criminal offences beyond reasonable doubt. This burden can only be discharged by a court established by law and constitutionally vested with powers to exercise criminal jurisdiction. The decisions have not considered and have not decided the situation where the Administrative body has proceeded to exercise its jurisdiction to impose sanctions where the person accused has admitted the commission of criminal offences.

It cannot be disputed that where there is an admission of the commission of the criminal offences alleged the question of establishing the burden on the accuser to establish the commission of the offence does not arise. Accordingly, the question of violating the rights of the accused is not an issue. It seems to me preposterous to suggest that the administrative body should stay the exercise of its disciplinary jurisdiction over a person who had admitted the commission of criminal offences. The inevitable inference is that criminal prosecution should be pursued thereafter before disciplinary proceedings should be taken. I do not think the provision of the law and effective administration contemplates or admits the exercise of such a circuitous route to the discipline of admitted wrongdoings. It is established law that after a plea of guilty by the accused before the court exercising jurisdiction in respect of criminal offences, the court must formally proceed to conviction without calling upon the accuser to prove the commission of the offence by establishing the burden of proof required by law – See S.218 of the Criminal Procedure Act. See also R. v. Wilson (1959) 4 FCSC. 175. This is because the admission of guilt on the part of the accused had satisfied the required burden of proof.

In the instant case there is nothing precluding the Respondents from resorting to the relevant necessary administrative machinery and of imposing the appropriate applicable sanctions after the admission of the Appellant of the commission of the offences of conspiracy and theft

alleged against him had been established.

Arguing the other two issues together learned Counsel to the Appellant challenged the finding of the concurrent findings of facts of the courts below. It was submitted relying on Abeno v. Abeno (1989) 2 NWLR (pt.106) 773, at 777 that Appellant relied on affidavit evidence B which stood uncontroverted and therefore remained unchallenged. Nevertheless the trial court found and the Court of Appeal agreed that Appellant did not disclose material facts on which the discretion to grant the application could have been based. Learned Counsel for the Appellant C described the finding as perverse and invited us to set it aside.

Appellant argued that the failure of the Respondents who had the reply to Exhibit D to file an counter affidavit was prejudicial to their case since they were in possession of the reply to Exhibit D. The courts below misapplied the provisions of Section 149(d) of the Evidence Act 1990 when D they proceeded to hold that Appellant withheld material evidence. The courts below were entitled to presume against Respondents who withheld the reply to Exhibit D that evidence which could be and was not produced would if produced be unfavourable to them – Sanusi v. Ameyogun E (1992) 4 NWLR.527. It was submitted that the Courts below in so finding acted on instinct/speculation on the likely contents of Appellant’s reply to Exhibit “D” without legal justification – Katto v. C.B.N. (1991) 9 NWLR (pt.214) 125, Okon v. The State (1991) 8 NWLR (pt.210) 424. F Without seeing the reply to Exhibit D, the Courts below relied heavily on it as the basis for finding that Appellant concealed a material fact as to the recovery of a certain sum.

Learned Counsel submitted that the finding amounts to shifting of the proof on the Appellant because the principle is that “*he who asserts must prove*” – S.135 Evidence Act. It was contended that issues of an admission are governed by section 19-26 of the Evidence Act, and an admission by section 19 could only be by a statement oral or documentary. There was nothing in the entire proceedings which could be regarded as an admission. The existence or otherwise of the purported admission was based on a probability, hence the use of the word “if” by the trial Judge. (See p.64 lines 1-2). G H

An admission, it was submitted, can only have evidential probative value where the court's attention was drawn to it and was duly addressed – Nwakwo v. Nwankwo (1995) 5 NWLR (pt.394) 153 at p.171 and Udo v. Okupa (1991) 5 NWLR (pt.191) 365. The reliance placed on the admission amount to a miscarriage of justice and a misapplication of section 19 of the Evidence Act. The admission was raised by the Court *suo motu* and the parties were not invited contrary to the principle of fair hearing to address the learned trial Judge on the issue. Iri v. Erburhobara (1991) 2 NWLR (pt.173) 252.

The Court and the parties are bound by the evidence – Nwobodo v. Nwobodo (1995) 1 NWLR (pt.370) 203.

In his reply to the above arguments learned Counsel in the Respondents' brief of argument stated the ground on which Appellants application was dismissed; namely failure to place before the court all material facts necessary for a just and proper determination of the application. It was submitted that material facts concealed by Appellant was the reply to Exhibit D, the query issued him. The depositions in the affidavit in support of his application were completely silent on his reply to Exhibit D. It was submitted that the Court of Appeal was right in affirming in the judgment of the learned trial Judge.

Learned Counsel to the Respondents submitted that the content of Appellant's reply to the Query, Exhibit D is in the circumstances of this case a relevant and material fact which must be disclosed for a just and proper determination of the application. Exhibit D, the Query alleged that the Appellant's share of the money allegedly stolen was found on him and recovered. This is a grave allegation to which Appellant was expected naturally to react by placing before the court all material evidence. Citing the decision of this Court in Ukpe Ibodo & Ors. v. Iguasi Enarofia & Ors. (1980) 5-7 SC 42, it was submitted that an applicant seeking the exercise of the court's discretion in his favour has a duty to exhibit before the Court all the documents which will be necessary for the court to rely in order to determine the issue in the application. Accordingly, in the instant case the court will need to know the content of the reply to Exhibit D, the query, in order to exercise its discretion in the application of the Appellant

before it.

Finally, learned Counsel submitted that neither the trial Judge, nor the Court of Appeal speculated on the content of Appellant's reply to Exhibit D, or made out a case different from that made by the parties. All the learned trial Judge did, which the Court of Appeal affirmed, was to hold that the materials placed before the court were not sufficient for the exercise of its discretion.

The gravamen of the submissions of learned Counsel to the Appellant on issues 2 and 3 were in respect of the failure of Appellant to disclose material facts on which the learned trial Judge could base the exercise of his discretion in respect of the application before him. Learned Counsel is not disputing the fact that **an application for leave to grant the enforcement of his fundamental rights involves the exercise of the discretion of the learned judge who is to grant the application.** See Hart v. T.S.K.J. (Nig) Ltd. (1998) 12 NWLR (pt.578) 372 Echaka Cattle Ranch Ltd. v. NACB Ltd. (1998) 4 NWLR (pt. 547) 426. It is therefore essential to the exercise of the discretion, which is not gratuitous, for the applicant to place before the learned Judge all the material facts necessary for the exercise of the discretion – See N.N.B. Plc v. IBW Ent. (Nig) Ltd. (1998) 6 NWLR (PT.554) 446.

I agree with learned Counsel to the Respondents, and Appellant's Counsel is not disputing the fact that the omission complained of is the failure of Appellant/Applicant to disclose to the learned trial Judge, the reply to Exhibit D, the Query, which if disclosed would have been the material on which the learned trial Judge would have founded the exercise of his discretion. The contention of learned Counsel for the Appellant that the trial Court relied on the content of the reply of Exhibit D is erroneous. The content of reply to Exhibit D is undoubtedly crucial and material to the exercise of discretion. This is because the reply to Exhibit D will enable the trial Judge to determine whether the accusation of the commission of criminal offences against the Appellant was admitted or disputed. If it is disputed, there was before the trial Judge an accusation of commission of criminal offences which must be established in the appropriate court before jurisdiction can be exercised in respect of disci-

pline, arising from the offences – See Sofekun v. Akinyemi (1980) 5-7 SC.1; Where it is admitted the question does not arise. What was under consideration and an issue was the omission or failure to provide the material on which the learned trial Judge could have acted. Certainly, it is not the content of the reply.

B Learned Counsel to the Appellant referred to and relied on the presumption in section 148 of the Evidence Act, to contend that the relevant evidence being with the Respondents, the onus was on them to produce the reply to Exhibit D. I am afraid this is a complete misapprehension of the facts and the legal effect of section 148(d) relied upon. **Applicant who seeks the exercise of the courts discretion has the burden of presenting all the material facts necessary for the exercise of the discretion – See Moronkeji v. Osun State Polytechnic (1998) 11 NWLR (pt.572) 145. The Application of the Applicant will fail where such materials are absent. See Akpoku v. Ilombu (1998) 8 NWLR.283.** It is erroneous to assume that the Respondent has any responsibility to supply any omission in the facts supplied by an applicant and on which the court could exercise discretion. The burden is on the Appellant/Applicant who is seeking the exercise of the discretion of the Court. – See Hart v. Igbi (1998) 10 NWLR (pt.568) 28.

F Learned Counsel has argued that the courts below relied on the purported admission of Appellant based on the failure to file his reply to Exhibit D in dismissing the application. It seems to me quite clear from the judgments of the Courts below that the application for the enforcement of Appellant's fundamental rights was dismissed because of the omission to disclose material facts necessary for the exercise of the court's discretion, but not because of the admission inferred from the facts before the court. The admission of the commission of the offences alleged, though a legitimate inference from the facts was not a reason given by the trial Judge or the Court of Appeal. **It is therefore not appropriate to rely on a reason not forming part of the decision in a judgment for challenging its validity as learned Counsel to the Appellant has done in this case. The question of the propriety *vel non* of the admission of the Appellant of commission of the offences alleged**

against him was not one of the grounds of appeal before us against the judgment of the Court of Appeal. – See Yakubu v. Omailboje (1998) 7 NWLR (pt. 559) 708.

Finally, it is well settled that where there are concurrent findings of facts of the courts below on an issue, the Appellant challenging such findings must show that there was no basis for the finding and that it was perverse. – See Omoborinola II v. Military Governor, Ondo State (1998) 14 NWLR (pt.584) 89 SC. Appellant has not succeeded in showing that there was no basis for the finding that there was insufficient material on which the learned trial Judge could exercise his discretion. This court cannot therefore interfere with the findings so made. Issues 2 and 3 are also resolved against the Appellant.

This appeal fails in its entirety. The action brought by Appellant under the Fundamental Rights (Enforcement Procedure) Rules, 1979 against the Respondents is inappropriate. Appellant ought to have brought an action for the Tort of wrongful dismissal from his employment which was the appropriate action for the wrong complained of. The appeal is accordingly struck out. Appellant shall pay N10,000 as costs to the Respondents.

OGUNDARE JSC

I have had the privilege of a preview of the judgment of my learned brother, Karibi-Whyte, JSC just delivered. I agree with him that the procedure by which the Appellant sought to enforce his claims was incompetent. The proceedings before the lower Courts were, therefore, incompetent, null and void. They are hereby struck out.

With this conclusion, I find no need to go into the issues placed before us in this appeal.

The appeal is struck out with costs as assessed by my learned brother, Karibi-Whyte, JSC.

ONU JSC

I have been privileged to have a preview of the judgment of my learned brother, Karibi-Whyte, JSC just read. I am in complete agreement with him that the procedure by which the Appellant initiated his action and pursued same through the two courts below namely, under the Fundamental Rights (Enforcement Procedure) Rules, 1979 is incompetent.

The proceedings before the two lower courts being incompetent, the appeals based on them are declared incompetent, null and void.

I too strike out the appeal as ordered by my learned brother Karibi-Whyte, JSC in the leading judgment and abide by the consequential orders inclusive of costs awarded therein.

D

ACHIKE JSC

I have had the privilege of reading, in draft, the judgment of my learned brother, Karibi-Whyte, JSC. I am entirely in agreement with his reasoning and conclusion. The action was incompetently brought by the applicant/appellant under the special and elaborate procedure for enforcement of rights – the Fundamental Rights (Enforcement Procedure) Rules 1979 – whereas the pith of the appellant’s grievance against the respondents is predicated on his wrongful dismissal. The act of the respondents is essentially tortuous for which the action in respect thereof can be initiated by a writ of summons. Accordingly, the appeal is struck out. The appellant will pay the respondents N10,000.00 costs.

G

UWAIFO JSC

I read in advance the judgment of my learned brother Karibi-Whyte JSC. I fully agree with him that the appeal must fail since the action was inappropriately brought by the appellant under the Fundamental Rights (Enforcement Procedure) Rules 1979 for a cause of action founded on wrongful dismissal. I award N10,000.00 costs to the respondents against the appellant.