

SUPREME COURT OF NIGERIA
FRIDAY 12TH JULY 2002, SC. 362/2001
CORAM:- M. E. OGUNDARE, U. MOHAMMED,
U. A. KALGO, S. O. UWAIFO, A. O. EJIWUNMI, JJSC

THE NIGERIAN AIR FORCE APPELLANT
AND
WING COMMANDER T. L. A. SHEKETE RESPONDENT

APPEALS - Parties - Preliminary objection - Sustainability - Respondent is estopped from contending - That appellant was not a party to the proceedings in Court of Appeal - Having made appellant a party thereto (H1)

APPEALS - Right of appeal - By s.202 of Armed Forces Decree No 105 - Aggrieved party to proceedings in Court of Appeal - Can appeal to Supreme Court (H2)

LEGAL PRACTITIONERS - Submissions - Made without authority - Fate - Such submission is rejected - Since no authority supports contention - That appellant cannot appeal against acquittal order by Court of Appeal (H3)

FACTS

Appellant brought this application before Supreme Court praying the court for inter alia, an order of extension of time to seek leave to appeal on grounds other than grounds of law against the judgment of Court of Appeal. On being served with the motion papers, respondent's counsel filed a Notice of preliminary objection to the effect that the appeal is incompetent and should be struck out for want of jurisdiction. The objection was based on the grounds amongst others that the Nigerian Air Force i.e. appellant was neither a party to the proceedings at the General Court Martial nor at the Court of Appeal.

Furthermore, that there is no right of appeal conferred on appellant and/or the Attorney-General of the Federation either by the Armed Forces Decree No. 105 of 1993 or Constitution of Federal Republic of Nigeria in respect of matters relating to a trial by a

Court Martial. The motion was supported with an affidavit sworn to by the respondent. There was a counter-affidavit sworn to by a legal practitioner in the legal unit of the Ministry of Defence. Both parties have filed and exchanged briefs of argument in respect of the preliminary objection.

HELD (Unanimously dismissing the preliminary objec-

tion per **OGUNDARE JSC**)

APPEALS - Parties - Preliminary objection - Sustainability

1. Questioned by the Court, learned counsel conceded it that the NAF was, on the Notice of Appeal from the Court Martial to the Court of Appeal, named as the respondent and that NAF was referred to throughout the proceedings in the Court below as the Respondent. Learned counsel further conceded it that on the record of appeal now before this Court, the NAF was a party to the proceedings in the Court of Appeal. He also conceded that by section 202 of the Armed Forces Decree No. 105 of 1993 (as amended by the Armed Forces (Amendment) Decree No.15 of 1997) there is a right of appeal from the Court of Appeal to the Supreme Court in court martial cases.

The concessions made by learned counsel, and they are rightly made, have knocked the bottom off this first reason for the preliminary objection. The caption of the proceedings in the Court Appeal reads thus;

***“Wing Commander T.L.A. Shekete Appellant
Vs***

Nigerian Air Force Respondent”

This puts it beyond doubt that the NAF was a party to the proceedings in the Court below. I need not say anything more on it other than that the Respondent is estopped from now contending that the NAF was not a party to the proceedings in the Court of Appeal; the Respondent by his notice of appeal to that Court made the NAF a party. (p. 2354 E)

APPEALS - Right of appeal

2. With the provisions of the above sections of the Decree and the Constitution as they stand I can find no merit whatsoever in the arguments advanced in support of this ground for the preliminary objection. It is beyond dispute that the NAF was a party (respondent) to the proceedings before the Court of Appeal. In my respectful view any party to the proceedings who was aggrieved by the decision of that Court could exercise the right of appeal to this Court conferred by section 202 of the Decree. In any event, section 233(2), (3) and (5) of the Constitution empowers the NAF to bring an appeal, being dissatisfied with the judgment of the Court of Appeal. I agree with Mr. Agbabiaka that section 190 only empowers the Attorney-General of the Federation to appear to defend the decision of the Court Martial before the Court of Appeal. I cannot read into that section that it takes away the right of the NAF to appeal to this Court. Certainly, section 190 does not empower the Attorney-General to take over the proceedings; the power of the Attorney-General to take over criminal proceedings is to be found in section 174(1) of the Constitution. It has not been shown that the Attorney-General has, at any stage in the Court of Appeal nor thereafter, taken over the proceedings in that Court as to deprive the NAF of further participation in it as a party. (p. 2356 E)

LEGAL PRACTITIONERS - Submissions - Made without authority

3. That there is no right of appeal either by the Attorney-General or the NAF against an order of acquittal made by the Court of Appeal. We have not been referred to any authority in support of this submission. Nor do I find that upon a communal reading of various sections of the Decree referred to in the brief filed by Mr. Kejawa, particularly, sections 152, 183, 187, 190 and 202 and section 233(5) of the Constitution, such a conclusion as submitted can be reached. I have no hesitation in rejecting this submission. (p. 2357 D)

REPRESENTATION

A. Agbabiaka, Esq. with J.A. Adamu, S.L. O. Fed. Ministry of Justice,

for Appellant/Applicant

A. kejawa, Esq., for the Respondent

CASES REFERRED TO

Akinbiyi v. Adelabu (1956) SCNLR 109

B Barkono v. Commissioner of Police (1971) ANLR 505

STATUTES REFERRED TO

Armed Forces Decree No 105 of 1993 (as amended by the Armed Forces (Amendment) Decree No 15 of 1997), ss. 202, 190

C Constitution of the Federal Republic of Nigeria, ss. 233(3)(5), 174(1)

LEAD JUDGMENT BY OGUNDARE JSC

D The Appellant herein brought an application praying the Court for the following specific orders.

“1. *An Order of extension of time to seek leave to appeal on grounds other than grounds of law against the judgment of the Court of Appeal delivered on the 28th of September, 2000.*

E 2. *An Order for leave to appeal on grounds other than grounds of law.*

3. *An Order for extension of time to appeal on grounds other than grounds of law particularly in respect of the ground iv.*

F 4. *Leave to amend the Notice of Appeal dated the 27th day of October, 2000 by substituting the proposed Amended Notice of Appeal dated the 27th of October, 2000 (sic).*

5. *An Order deeming the Amended Notice of Appeal dated the 1st day of November, 2001 (sic) as having been duly and properly amended and duly filed and served.”*

G On being served with the motion papers the Respondent, through his counsel, A. Kejawa Esq. filed a Notice of Preliminary Objection to the effect that-

H “... *the appeal filed by the Nigerian Air Force, herein the appellant/respondent is incompetent and should be struck out for want of jurisdiction.* “

The grounds upon which the objection was raised are:

“(a) *that there is no right of appeal conferred on the appellant/respondent and/or the Attorney-General of the Federation either by statute or Constitution in respect of matters relating to a trial by a*

court-martial.

(b) that the Nigerian Air Force, herein the appellant was neither a party to the proceedings at the general court-martial nor at the Court of Appeal.

(c) that the Nigerian Air Force, herein the appellant, the Attorney-General of the Federation lacks the competence to bring this appeal. B

(d) that by reasons of sub-paragraphs (a) - (c) above, this appeal is incompetent and should be struck out for want of jurisdiction."

The Notice was supported with an affidavit sworn to by the Respondent in which he deposed, inter alia as follows: C

"2. That I was a serving officer with the Nigerian Air Force in the rank of a Wing Commander until the 21st day of October, 1996 when I was purportedly tried and convicted for sundry offences along with eight (8) other officers by a general court-martial purportedly convened by the then Chief of Air Staff.

3. That having been dissatisfied with my trial, conviction, and sentence by the said general court-martial I appealed to the Court of Appeal (Lagos Division) against same. E

4. That the Court of Appeal in a unanimous judgment delivered on Thursday the 28th day of September, 2000 allowed my appeal and discharged and acquitted me on all the counts.

5. That I know as a fact that the appeal was defended by one I.T. Abdulsallam attached to the Legal Department of the Ministry of Defence from the office of the Attorney-General of the Federation. F

8. That I know as a fact that the Nigerian Air Force herein the appellant was not a party to the proceedings either at the general court-martial or at the Court of Appeal." G

There is a counter-affidavit sworn to by Jimoh Abdulkadir Adamu, a legal practitioner in the Legal Unit of the Ministry of Defence and, incidentally, junior counsel for the Appellant in these proceedings. He deposed in paragraph 10 of the said counter-affidavit thus: H

"10. That the Nigerian Air Force was the Respondent in the Appeal before the Court of Appeal, Lagos filed by the Respondent (then Appellant) against the decision of the General Court Martial."

Both parties filed and exchanged briefs of arguments in re-

spect of the Preliminary Objection and at the oral hearing of both the Appellant's application and the Respondent's preliminary objection, proffered arguments.

Mr. Kejawa, for the Respondent indicated that subject to the Court's nailing on his preliminary objection, he was not opposing the Appellant's application.

After listening to submissions by learned counsel, I overruled the preliminary objection and granted the Appellant's application as prayed. I indicated then that I would give my reasons for overruling the objection. Today here now are my reasons.

Mr. Kejawa both in his brief and in oral argument based the objection to the appeal on -

1. That the Nigerian Air Force (hereinafter is referred to as NAF) not being a party to the proceedings in the Court of Appeal, could not appeal to this Court. He relied on *Akinbiyi v. Adelabu* [1956] SCNLR. 109. It is learned counsel's submission that the NAF has no locus standi to appeal in this matter as there is no right of appeal conferred on it by either the Constitution or any statute, to appeal from a decision of the General Court Martial (Court Martial for short).

Questioned by the Court, learned counsel conceded it that the NAF was, on the Notice of Appeal from the Court Martial to the Court of Appeal, named as the respondent and that NAF was referred to throughout the proceedings in the Court below as the Respondent. Learned counsel further conceded it that on the record of appeal now before this Court, the NAF was a party to the proceedings in the Court of Appeal. He also conceded that by section 202 of the Armed Forces Decree No. 105 of 1993 (as amended by the Armed Forces (Amendment) Decree No.15 of 1997) there is a right of appeal from the Court of Appeal to the Supreme Court in court martial cases.

The concessions made by learned counsel, and they are rightly made, have knocked the bottom off this first reason for the preliminary objection. The caption of the proceedings in the Court Appeal reads thus;

***"Wing Commander T.L.A. Shekete Appellant
Vs***

Nigerian Air Force Respondent

This puts it beyond doubt that the NAF was a party to the proceedings in the Court below. I need not say anything more on it other than that the Respondent is estopped from now contending that the NAF was not a party to the proceedings in the Court of Appeal; the Respondent by his notice of appeal to that Court made the NAF a party.

2. That by section 190 of the Armed Forces Decree (as amended) the Attorney-General of the Federation is the respondent in an appeal from the Court Martial to the Court of Appeal. *Barkono v. Commissioner of Police* [1971] ANLR. 505 was cited in support. It is further submitted that the Attorney-General having stepped into the case, the NAF ceased to be a party; it has become a mere complainant and could therefore not appeal. Learned counsel submitted that by section 190 of the Decree read along with section 202, it is the Attorney-General that could undertake the defence of an appeal to this court. It is finally submitted that it is only the Attorney-General that could appeal from the Court of Appeal to this Court in court martial cases. Mr. Agbabiaka, learned leading counsel for the Appellant submitted that the above submissions of Mr. Kejawa were misconceived. It is submitted that reading sections 187 and 202 of the Decree together, there was an unfettered right of appeal conferred on any party against any decision of the Court of Appeal. Counsel referred to section 233(5) of the Constitution of the Federal Republic of Nigeria, 1999 and submitted that it empowered the NAF to bring this appeal. It is further submitted that section 190 of the Decree only empowered the Attorney-General or any of his officers to appear for the respondent in an appeal to the Court of Appeal from the Court Martial. I will at this stage set out the provisions of relevant sections of the Armed Forces Decree 1993 (as amended) and section 233(5) of the Constitution.

“183. Subject to the following provisions of this Part, an appeal shall lie from decisions of a court-martial to the Court of Appeal with the leave of the Court of Appeal:

Provided that an appeal as aforesaid shall lie as of right without the leave of the Court of Appeal from any decision of a court-martial involving a sentence of death.”

“187. The determination by the Court of Appeal of any ap-

peal or other matter which it has power to determine, under the provisions of this Part of this Decree shall not be final."

"190. It shall be the duty of the Attorney-General of the Federation on an appeal against a decision of a court-martial to undertake the defence of the appeal."

B *"202. Subject to the provisions of this Decree, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court of Nigeria."*

Section 233(5) of the Constitution:

C *"Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this section shall be exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter, and in*
D *the case of criminal proceedings at the instance of an accused person, or subject to the provisions of this Constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney-General of a State to take over and continue or to discontinue such proceedings, at the instance of such other authorities or*
E *persons as may be prescribed."*

With the provisions of the above sections of the Decree and the Constitution as they stand I can find no merit whatsoever in the arguments advanced in support of this ground for the preliminary objection. It is beyond dispute that the NAF
F ***was a party (respondent) to the proceedings before the Court of Appeal. In my respectful view any party to the proceedings who was aggrieved by the decision of that Court could exercise the right of appeal to this Court conferred by section 202***
G ***of the Decree. In any event, section 233(2), (3) and (5) of the Constitution empowers the NAF to bring an appeal, being dissatisfied with the judgment of the Court of Appeal. I agree with Mr. Agbabiaka that section 190 only empowers the Attorney-General of the Federation to appear to defend the***
H ***decision of the Court Martial before the Court of Appeal. I cannot read into that section that it takes away the right of the NAF to appeal to this Court. Certainly, section 190 does not empower the Attorney-General to take over the proceedings; the power of the Attorney-General to take over criminal pro-***

ceedings is to be found in section 174(1) of the Constitution. It has not been shown that the Attorney-General has, at any stage in the Court of Appeal nor thereafter, taken over the proceedings in that Court as to deprive the NAF of further participation in it as a party.

Barkono v. Commissioner of Police (supra) relied upon by learned counsel for the Respondent does not, therefore, apply. In that case, the Director of Public Prosecutions took over the proceedings after conviction in the trial court and it was held that counsel for the private prosecutor who initiated the proceedings could no longer be heard as the complainant/private prosecutor had ceased to be a party to the proceedings from the moment the Director of Public Prosecutions took over the proceedings, even though at the appeal stage in the High Court. C

3. That there is no right of appeal either by the Attorney-General or the NAF against an order of acquittal made by the Court of Appeal. We have not been referred to any authority in support of this submission. Nor do I find that upon a communal reading of various sections of the Decree referred to in the brief filed by Mr. Kejawa, particularly, sections 152,183,187, 190 and 202 and section 233(5) of the Constitution, such a conclusion as submitted can be reached. I have no hesitation in rejecting this submission. D E

It is for the reasons given above that I came to the conclusion on 13th June, 2002 overruling the preliminary objection. F

As briefs have now being filed and exchanged, I fix hearing of this appeal for 3rd October, 2002.

MOHAMMED JSC

On the 13th of June, 2002, when we heard the application of the Nigerian Air Force seeking for an order of extension of time to seek leave to appeal on the grounds other than grounds of law from the judgment of the Court of Appeal, leave to appeal and extension of time to appeal we considered a Notice of Preliminary objection against the application. After listening to both sides in respect of the grounds for the preliminary objection I overruled the objection and granted the applications of the Nigerian Air Force as prayed. I then G H

2358 Nigerian Air Force v. Shekete (2002) 7 KLR Mohammed JSC
reserved my reasons for overruling the preliminary objection to 12th
July 2002.

After I have gone through the reasons given by my learned
brother, Ogundare, J.S.C. I agree to adopt those reasons as mine. I
do not have anything to add to the reasons given in the lead ruling.

B

KALGO JSC

The respondent in this appeal raised a preliminary objection
on the competence of the appeal filed by the appellant. On the 13th
of June, 2002, after listening to the submissions of both counsel for
the parties in the appeal, and looking at the record before me on the
matter, I decided to over rule the preliminary objection and prom-
ised to give my reasons for the decision today.

I have had the privilege of reading in draft the reasons for
overruling the preliminary objection just delivered by my learned
brother, Ogundare. J.S.C. I entirely agree with his reasons and adopt
them as mine. I do not have anything useful to add. I also abide by
the order made by Ogundare.: J.S.C. in the said reasons.

E

UWAIFO JSC

On 13th June, 2002, I overruled peremptorily the preliminary
objection raised by the respondent to the competence of the appeal
filed by the appellant after listening to the submissions of both coun-
sel. I reserved my reasons till today. I have had the opportunity to
read in advance the reasons for overruling the preliminary objection
as stated by my learned brother. Ogundare, J.S.C. They are in, ac-
cord with mine.

I however wish to say a few words of my own. The grounds upon
which' the preliminary objection was based are:

*“(a) that there is no right of appeal conferred on the appellant/
respondent and/or the Attorney-General of the Federation either by
statute or Constitution in respect of matters relating to a trial by a
court-martial.*

*(b) that the Nigerian Air Force, herein the appellant was nei-
ther a party to the proceedings at the general court-martial nor at the
Court of Appeal.*

(c) that the Nigerian Air Force, herein the appellant, and/or its counsel having not obtained the fiat of the Attorney-General of the Federation lacks the competence to bring this appeal.

(d) that by reasons of sub-paragraphs (a) - (c) above, this appeal is incompetent and should be struck out for want of jurisdiction."

A reading together of sections 183, 187 and 202 of the Armed Forces Decree No. 105 of 1993 (as amended), leaves me in no doubt that there is a right of appeal by either party to a court-martial proceedings at every stage right to the Supreme Court albeit with leave except that it is as of right in any decision involving a sentence of death.

The Nigerian Air Force was obviously a party (being the respondent) to the proceeding in the Court of Appeal, having been so made by the present respondent who was then the appellant. The judgment of the Court of Appeal having been against the said Nigerian Air Force, it is entitled to appeal in person from the judgment to this court as it did.

Accordingly, it is plain that all the four grounds upon which the respondent based his preliminary objection are without substance. It was for the above reasons and those stated by my learned brother, Ogundare, J.S.C., that I overruled the objection on 13 June, 2002. I abide by the order made by Ogundare, J.S.C.

EJIWUNMI JSC

On the 13 of June, 2002, I overruled the preliminary objection raised in this matter by the learned counsel for the respondent, A. Kejawa Esq. I have since then been privileged to have read the reasons given by my learned brother, Ogundare, J.S.C. for also overruling the objection. As I agree with the reasons given for overruling the objection, I adopt them as my own. The briefs of argument having been filed and exchanged, the hearing is hereby fixed for the 3rd October, 2002.