

**SUPREME COURT OF NIGERIA**  
THURSDAY 12TH DECEMBER, 2002. SC. 363/2001  
**CORAM:- I. L. KUTIGI, U. MOHAMMED, S. U. ONU,**  
**U. A. KALGO, A. O. EJIWUNMI, JJSC**

THE NIGERIAN AIR FORCE ..... APPELLANT  
AND  
EX-WING COMMANDER  
L. D. JAMES ..... RESPONDENT

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COURT MARTIAL - Convening of - Power - By s.131(3) Armed Forces Decree - An appropriate superior authority can authorize senior officer - To order a court martial in special circumstances (H1)

DOCUMENTS - Official acts - Regularity of - Confirmation of the authorization to convene court martial in writing - Raises presumption of regularity - In absence of evidence to the contrary (H2)

COURT MARTIAL - Charges - Amendment - Effect - Since trial began within three months as required - Amendment of the charge is of no effect (H3)

CRIMINAL LAW - Forgery - Proof - Exhibits 9A-C were demonstrated to be false representations - With the intention to defraud on the part of the conspirators (H4)

EVIDENCE - Crime - Proof - From findings of the court martial - Appellant clearly proved that N10m was stolen by accused - Inclusive of respondent who aided and abetted the forgery (H5)

EVIDENCE - Burden of proof - By Evidence Act s.141(1) - Since respondent introduced the issue of approval of funds - Onus is on him to satisfactorily prove same (H6)

APPEALS - Issues - Suo motu determination - Propriety - Since respondent's statement in Exhibit 61 was never raised as an issue in Court of Appeal - The court was wrong to have considered same suo motu (H7)

APPEALS - Orders of court - Discharge & acquittal - Propriety - Court of Appeal wrongly gave the order - As there is no legal basis for so deciding (H8)

ORDERS OF COURT - Restitution - Instance - Armed Forces Decree s. 174 - Permits invocation of restitution against person - Who has been found guilty of an offence (H9)

### ***FACTS***

Accused/respondent was one of the nine pay officers who held financial appointment at the headquarters of the Nigerian Air Force (N.A.F) in Lagos. According to the prosecution/appellant, the nine pay officers either jointly or severally conspired, stole and accepted large sums of money belonging to the N.A.F. On one occasion, one of the officers had raised requisitions for cash to the tune of N10m and respondent as the officer who had responsibility of recommending payments of money did recommend the requisitions for payment as money needed for "short payment of salary," TS /packing" etc. In actual fact, there was no such need at the material time. The N10m was collected and shared among the officers, including the Respondent.

Subsequently, respondent was discharged from the N.A.F and was arraigned with the 8 other officers before the General Court Martial (GCM) on 5 counts charge of stealing, corrupt enrichment, unlawful possession of a pistol and disobedience to standing orders. Later on, the 5 counts were substituted with 12 counts. The G.C.M was convened by one Air commodore Ajobena under the authority of the Chief of Air Staff vide a letter. Joint trial of the accused was thus conducted by the G.C.M. In its judgment, the G.C.M found respondent guilty on all 12 counts and sentenced him to 50 years imprisonment as well as ordered him to refund the sum of N4, 402, 500.00 with interest as restitution for the various offences. Respondent appealed to the Court of Appeal which declared the orders made by the G.C.M as nullities on the ground of absence of jurisdiction. The court also held that only counts 9 and 10 of the charge were proved against respondent but went on to discharge and acquit respondent. Being dissatisfied, appellant filed appeal at Supreme Court.

### ***ISSUES FOR DETERMINATION***

*1. Whether the Court of Appeal was right in holding that the General Court Martial lacked jurisdiction to adjudicate or try the Respondent before it (GCM).*

*2. Whether the Court of Appeal was right in holding that there was no evidence in proof of counts 1 to 5 of the charges brought against the Respondent.*

*3. Whether the burden is on the prosecution to call Wg. Cdr. Iyen and the retired Chief of Air Staff as witnesses in order to prove that the said Chief of Air Staff had or had not made the order that the sum of N10 Million belonging to the Nigerian Air Force be withdrawn and expended by the Accused person, Respondent inclusive, as a welfare gift.*

*4. Whether the Court of Appeal was right in holding that there was insufficient evidence to ground a conviction against the Respondent in respect of counts 7 and 8.*

*5. Was the Court of Appeal right in discharging and acquitting the Respondent on all counts against him after having found that:*

*a. The Respondent was correctly found guilty for unlawful possession of Fire Arms and*

*b. The proceedings of the General Court Martial were a nullity in the absence of jurisdiction?*

*6. Having regard to the fact that the Respondent was sentence to 15 years imprisonment on counts 9 and 10, was the Court of Appeal right in discharging and acquitting the Respondent of these same counts he had served "some years" in prison?*

*7. Was the Court of Appeal right in discharging and acquitting the Respondent on count 12 on the ground that the offence committed more than 11 (Eleven) years ago was unsupported by any evidence?*

*8. Whether the Court of Appeal was right in setting aside the orders of restitution made against the Respondent to pay the sum of N4,402,500.00.*

**HELD** (Unanimously allowing the appeal per **ONU JSC**)

*COURTS MARTIAL - Convening of - Power*

**1. I am of the view that the GCM was properly constituted,**

**could validly and did validly assume jurisdiction in this matter. My treatment of this is two pronged, viz.**

**(i) Section 131 of the AFD no. 105 of 1993**

**The Court below held that the power to convene a GCM resided in the Officers listed in Section 131(2) of the Decree and there was nothing in this section that enabled the officers so listed to delegate that power (to issue a convening (order) to Air Cdr. Ajobena in the instant case. By a reading of Section 131(2), parties are agreed that the Chief of Air Staff can convene a GCM, However, by virtue of Section 131(3) of the same Decree, the Chief of Air Staff had every power to delegate his power to issue convening order for a GCM to Air Cdr. Ajobena.**

**Section 131(3) provides as follows:**

***“The senior officer of a detached unit, establishment or squadron may be authorized by the appropriate superior authority to order a court martial in special circumstances.”***

**In the instant appeal, the CAS by Exhibit A.1 and its attachment duly authorized Air Cdr. Ajobena to sign the convening order for a GCM, which he did.**

**I hold the view that the subsection empowers an appropriate superior authority to authorise a senior officer to order a court martial in special circumstances. By Section 128(1) of the Decree, an appropriate superior authority in relation to a person charged with an offence include (a) a commanding officer, and (b) any officer of the rank of Brigadier or above or officer of corresponding rank or those directed to so act under whose command the person is for the time being. I am of the firm view that the CAS qualifies as an appropriate superior officer under the subsection. See the case of *Madukolu v. Nkemdilim* (1962) 1 All NLR (Pt.4) wherein it was stated at page 595 that where all three conditions for the exercise of the courts jurisdiction set out therein exist, such a court is said to have competence and jurisdiction.**

**I am not persuaded by the learned counsel for Respondent’s submission to hold that the letter attached to Exhibit A1 is not a delegation of power but rather an abdication of power. (p. 3305 A/H)**

*DOCUMENTS - Official acts - Regularity of*

**2. It is clear from the wording of the above document that the power to convene a GCM was delegated to Air Cdr. Ajobena. The document raises a presumption of regularity. Thus, even though in paragraph 2 of Exhibit A1, AVM Eduok said that directives are verbal, he nevertheless confirmed the authorizations in writing. A presumption of regularity applies, as in the case in hand, where there is no evidence to the contrary and things are presumed to have been rightly and properly done. This is expressed in the common law maxim in the Latin phrase – omnia praesumuntur rite esse acta. This type of presumption is very commonly resorted to and applied especially with respect to official acts. (p. 3306 F)**

*COURT MARTIAL - Charges - Amendment - Effect*

**3. By the due interpretation of the sections set out above while it is conceded by the appellant that unless trial is begun within three months after a person ceases to be subject to service law, any trial otherwise conducted is a nullity.**

**In the instant appeal, the GCM arraigned the Respondent on 5 counts within three months after he became subject to service law. The Court below more or less recognized this but went further to hold that by striking out the counts and bringing fresh charges (a period after 3 months had elapsed) and so Section 169(2) of the Decree had been violated. With due respect, the court below failed to properly appreciate how the proceedings of the GCM or Criminal law and procedure are invoked as they relate to substitution of charges. In the case of *Nosiru Attah v. State* (1993) 7 NWLR (Pt. 305) 257 this Court at page 273, paragraph A, (per Mohammed, JSC., held, whilst dealing with the issue of taking fresh pleas after amendment, that “the amendment may be through alteration by substitution of new counts for the original ones or addition of new counts to the charge.” The dictum of Karibi-Whyte, JSC., in the above case being a minority decision, would in my respectful view, not avail the Respondent.**

**Be that as it may, where at page 286, paragraph H of**

*the Report Karibi-Whyte, JSC., in his dissenting judgment, (not on this issue) held that “subsection (4) of Section 164 C.P.A. renders an amendment retrospective to the date of the filing of the charge” cannot, in my opinion, be faulted. Be it emphasised therefore that the only criterion laid down by*  
 B *Section 169(2) (ibid) is that the Respondent’s trial is “begun within three months.” I share the Appellant’s view in its entirety that it cannot clearly be the intention of that section to exclude amendments by alteration, substitution, addition*  
 C *or subtraction in an action like the one culminating in this appeal, brought as it were within three months as the Decree enjoins.*

*In conclusion, I hold that despite the proceedings of the 6<sup>th</sup> of August 1996, there was still a valid trial before the GCM.*  
 D *Thus, the court below was wrong to declare the trial a nullity on the ground it did. (pp. 3307 E/3308 A)*

*DOCUMENTS - Forgery - Proof*

*4. On the point that the money was shared contrary to the*  
 E *express intention of Exhibits 9A – C, the court below had this to say:*

*“The problem arose when funds approved for a particular purpose were applied for another allegedly on the instruction of the retired CAS. There was therefore no forgery of any*  
 F *kind involved here. If, for instance, the Funds had been applied for the purposes stated on Exhibits 9A, 9B and 9C, no one would have suggested that the forms were forged.”*

*With utmost due respect, the above finding of fact cannot be correct because, firstly, it was not the case of the Respondent nor of any of the other accused that the retired CAS instructed them to convert money meant for short salaries to another purpose. Secondly, the Respondent’s defence was*  
 G *that the retired CAS has approved the sum of N10 Million to the accused persons as a welfare gift. Thirdly, the court below failed to take cognisance of the fact that the expressed purpose for Exhibits 9A – C did not exist as no finding was*  
 H *made on this. Fourthly, contrary to the speculative findings of the court below, the reality of the matter is that Exhibits 9A –*

**C were demonstrated to be false representations with the intention to defraud on the part of all the conspirators. It is irrelevant to contend as done by the Respondent, that because the forms were prepared by the officers whose duty it was to prepare them in the ordinary course of duty, there could be no offence committed. As each document was in itself telling a lie about itself and the lie was exposed and confirmed, thus culminating in the sharing of the money by the accused persons, the Respondent inclusive, what further proof of forgery was needed?** (p. 3309 E) B

*EVIDENCE - Crime - Proof*

**5. It was next submitted by the appellant and I am in entire agreement therewith that the Court below arrived at the wrong conclusion without a proper appreciation of the GCM's reasonings when it held:** D

***"Firstly, the GCM took judicial notice of Air Force Manuals inclusive of their service knowledge. The address of the Judge Advocate (J.A.) for a proper appreciation of the financial regulations and manuals that the GCM took judicial notice of, (see pages 196 to 198, Volume 5 of the Records), before making the above findings. That cannot, in my view, amount to hearsay but an application of rules and service knowledge to the issue at hand. The first two findings quoted above are therefore clearly in order to show that the order attributed to CAS, whether made or not, would be outside his powers.*** E

***Secondly, the GCM was entitled to make the 3<sup>rd</sup> and 4<sup>th</sup> findings of fact because upon consideration of the evidence before it, there was no proof that the retired CAS made such an order. As a matter of fact, the only evidence before the GCM was hearsay because none of the accused persons, Respondent inclusive, or any other witness gave direct evidence of the order purportedly made by the retired CAS.*** F

***Thirdly, relying on the above submissions, the conclusion arrived at by the Court below on "manifest illegality/excess of powers" vis-à-vis the application of the above rules and regulations, are unknown to law. See the case of Pius Nwaoga***

*v. The State (1972) All NLR 153 where it was held, inter alia, that “a Soldier is responsible by Military and Civil Law and it is monstrous to suppose that a Soldier could be protected when the Order is grossly and manifestly illegal. Of course, there is the other proposition that a Soldier is only bound to obey lawful orders and is responsible if he obeys an orders and is responsible if he obeys an order not strictly lawful.”*

In the light of the foregoing, the Appellant had clearly proven that the sum of N10m was stolen and shared by the accused persons, Respondent inclusive, and that he aided and abetted the forgery that led to the theft of the money contained in the indictment.

In the result, I will answer Issue 2 in the negative and hold that there was sufficient evidence to prove counts 1 to 5.

(p. 3311 A/3312 A)

*EVIDENCE - Burden of proof*

6. The Court below at page 121 vol. 6 of the Records set out the prosecution’s case as the defence, it was never the Appellant’s case that the retired CAS approved or did not approve some funds. This issue, as can clearly be seen from the records, was introduced by the defence. It is therefore pertinent to point out that the burden rests solely on the Respondent to prove that the order was so made. This could have been done by him producing the said order in proof of his defence or calling Wg. Cdr. Iyen, the retired CAS or any other material witness to so prove. It is indisputable that Wg. Cdr. Iyen has been at all material times at large and if found, would have also been prosecuted. See page 44, Volume 1 of the Records. On the other hand, there was no excuse for the defence not to have called the retired CAS, See Section 141(1) of the Evidence Act, Cap. 113, Laws of the Federation of Nigeria which provides:

“14(1) Where a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any exception or exception from or qualification to, the operation of the law creating the offence with which he is charged is upon such person. (p. 3312 D)



*APPEALS - Issues - Suo motu determination - Propriety*

**7. The above body of evidence was sufficient from which the purpose the said sums was procured could be inferred. See the address of the judge Advocate (J.A.) at pages 210 – 212 in Volume 5 of the Records and statements made in Exhibit 61 by the Respondent. In that Exhibit, the court below held that such statements “did not amount to statements under caution as and could be relied upon by the prosecution as confessional statements by the Appellant.”**

**As this was never an issue raised in the court below by the Respondent, the Court was wrong, in my view, to have considered it suo motu. My answer to this issue is rendered in the negative.** (p. 3313 G)

*Orders of court - Discharge & acquittal - Propriety*

**8. The court below on appeal also noted that the Respondent was correctly found guilty on these counts (five and six). The only reason the court below did not confirm these findings of the GCM was the so-called absence of jurisdiction. Having come to the conclusion elsewhere in this judgment that the GCM was competent to try the Respondent, his conviction, ipso facto is confirmed. The GCM has at the same page sentenced the Respondent to 15 years imprisonment upon conviction. The court below, however, at page 131, Vol. 6 of the Records discharged and acquitted the Respondent because, to put it in its own words, he had served “some years in prison.” This manifest error on the part of the court below to have discharged and acquitted the Respondent, is palpably wrong as there is no legal basis for so deciding. In the event, the sentence imposed on these two counts ought to be restored.** (p. 3314 B)

*ORDERS OF COURT - Restitution - Instance*

**9. As I have resolved issues 1 – 7 in favour of the Appellant it goes without saying that the GCM was therefore right in making the orders as to restitution. Be it noted that Section 174 of the AFD No. 105 of 1993 permits the invocation of**

***restitution against a person who had been properly found guilty of an offence and SAVE for the order of restitution in respect of Count 6 (supra); monthly sharing to the tune of N120,000.00 which the Appellant has not appealed against, the order for restitution is, in my view, unimpeachable and should be confirmed.***

***I have no hesitation therefore in answering this issue in the affirmative.*** (p. 3315 D/3316 A)

## C NOTABLE POINTS OF INTEREST

### **ONU JSC**

#### ***1. Lack of jurisdiction is no reason to discharge and acquit accused***

Having erroneously found that the proceedings of the GCM were a nullity in the absence of jurisdiction the court below ought not to have discharged the Respondent and acquitted him as it did, the moreso, as it found that the Respondent was correctly convicted on counts 9 and 10. (p. 3314 F)

### E **KALGO JSC**

#### ***2. Confirmation letter retroactively confirmed everything done prior to it***

It is significant to observe that the Court of Appeal did not advert its thoughts to the provisions of S.131(3); it only examined S. 131(2) of AFD, and the letter, Exhibit A1, signed by the Chief of Air Staff confirming that he gave verbal authority to Air Commodore Ajobena to sign the covering order. In this case, even though the letter was written 14 days after the GCM was convened, it had the effect of confirming what was done earlier and there was nothing to discredit or challenge it. It is also my respectful view that what made the circumstance of this case special, is the decision of the Chief of Air Staff to delegate his power to convene a court martial for the trial of his own staff. (p. 3318 F)

#### ***3. Alteration to charge includes framing of new charge***

I have no doubt in my mind that what happened on 6/8/96 was a “substitution” of counts as opposed to a simple “amendment”.

What then is the difference in law? S.162 and S. 163 of the Criminal Procedure Act speak of framing a new charge or adding to or altering the original charge. In the case of *Okwechime v. I.G.P.* (1956) FSC 73, it was held that the alteration of a charge under Section 162 and 163 of the Act includes the framing of a new charge in place of the original charge. There the Federal Supreme Court held at page 74 of the report that-

*“The learned trial judge was of the opinion that the word “alter” in the context means more than “amend” and includes “substitute”, with this view we respectfully agree. In view of the fact that new charges could, under the section, be added to the original one, it would be unreasonable to hold that alteration of the charge cannot be extended to the framing of new charge in place of the original one”.*

Therefore substitution will have the same meaning and effect with alteration. And according to S. 164 of the said Act, where a charge or count is altered all that is required to be done is to read the new charge or count to the accused and record his or her plea thereto. The proceedings are deemed to be continued and not disturbed as a result of the alteration. This, in my view, is the correct position in the instant appeal immediately after the original counts were struck out. (p. 3319 F)

### **REPRESENTATION**

Patrick Okoh, Esq, for the Appellant  
S. C. Obi, Esq, with C. Kakson Esq, and Patrick Akan, Esq), for the Respondent

### **CASES REFERRED TO**

*Onagoruwa v. I.G.P.* (1991) 5 NWLR (Pt. 193) 563  
*Madukolu v. Nkemdilim* (1962) 1 All NLR (Pt. 4)  
*Ogbuanyinya v. Okudo* (No. 2) (1990) 4 NWLR (Pt. 146) 551  
*Nosiru Attah v. State* (1993) 7 NWLR (Pt. 305) 257  
*Babalola v. The State* (1989) 7 S.C. (Pt. 1) 94  
*Pius Nwaoga v. The State* (1972) All NLR 153  
*Saidu v. State* (1982) 4 S.C. 41  
*Raphael v. Commissioner of Police* (1971) NNLR 16  
*Rex v. George Kuree* 7 WACA 175

Gusau v. Police (1968) NMLR 329

David Uso v. Commissioner of Police (1972) 11 S.C. 37

Achineku v. Isagbola (1988) 4 NWLR (Pt. 89) 411

Akingbola v. Plisson Fisco Nig Ltd (1988) 4 NWLR (Pt. 88) 335

Madukolu v. Nkemdilim (1962) 1 All NLR 587

<sup>B</sup> Saude v. Abdullahi (1989) 7 S. C. (Pt. 11) 11b

**STATUTES REFERRED TO**

Armed Forces Decree No 105 of 1993, ss. 131 (1),(2) and (3), 168 (1),169 (2) and 174

<sup>C</sup> Criminal procedure Act, ss. 162, 163 and 164

EVIDENCE Act, cap 113, LFN 1990, s. 144 (1)

**LEAD JUDGMENT BY ONU JSC**

<sup>D</sup> This appeal concerns in the main, the interpretation of how and when a General Court Martial (GCM for short), is constituted in the trial of criminal offences under the Armed Forces Decree No. 105 of 1993, (as amended) vis-à-vis the trial of and concerning members of the Armed Forces for criminal offences under our criminal law and  
<sup>E</sup> the concomitant jurisdiction and competence thereof.

It emanates from the Court of Appeal, Lagos Division and is sequel to the trial of the Respondent, who was 1<sup>st</sup> accused and one of nine pay officers who held financial appointment at the Headquarters of the Pay and Accounting Group (PAG for short),  
<sup>F</sup> and Director of Finance and Accounts (DFA) of the Nigerian Air force (NAF). In a joint trial which was commenced on 26<sup>th</sup> July, 1996, by the GCM aforementioned convened pursuant to a convening order signed by one Air Commodore F. O. Ajobena, a Director of Personnel  
<sup>G</sup> (DOP) who purported to act on behalf of the Chief of Air Staff (CAS), was premised on 12 counts of Conspiracy, Stealing, Receiving Stolen Property, Aiding and Abetting, Forgery, Illegal Possession of Firearms and Disobedience of Standing Order.

In the judgment delivered by the GCM of 21<sup>st</sup> October, 1996,  
<sup>H</sup> the Respondent was convicted and sentenced to 50 years imprisonment. He was, in addition, ordered by the GCM to refund the sum of N4,402,500.00 with interest as restitution for the various offences committed by him.

Dissatisfied with the said judgment, the Respondent appealed

to the Court below which in its judgment of the 28<sup>th</sup>, September, 2000, hereinbefore referred to, allowed the appeal, set aside the judgment of the GCM and made an order discharging and acquitting the Respondent on all the counts brought against him.

The facts of the case may be briefly stated as follows:

The Respondent was one of nine pay officers who held financial appointment at the Headquarters of the Pay and Accounting Group (PAG as Director of Finance and Accounts (DFA) of the Nigerian Air Force (NAF) both in Lagos. It was the prosecution's case that up to April, 1996, all the 9 pay officers, Respondent inclusive, either jointly or severally conspired, stole, and accepted large sums of money to the tune of N63 Million (Sixty Three Million Naira) belonging to the Nigerian Air Force (NAF). It was also alleged by the prosecution that one of the officers accused along with the Respondent raised requisitions for cash, to wit: Exhibits 9A – 9C to the tune of N10,000,000.00 (Ten Million Naira). The Respondent was Staff Officer 1 (SO1) Finance at the Headquarters NAF DFA with the responsibility of recommending payments of money and it was he who recommended Exhibits 9A-9C for payment. These requisitions, it was shown, were raised and proved for "short payment of salary," "T5/Packing" and "printing of forms and repairs of Addressograph Machines" and the amount therefrom was withdrawn from the bank account of the Nigerian Air Force and eventually shared between the officers including the Respondent herein whose share was to the tune of N750,000.00.

In his written statement, Exhibit 10, the Respondent's defence was that he recommended Exhibits 9A – 9C on the instructions of Wing Commander Iyen in spite of his search for further clarifications. The Respondent's explanation thereupon to Wing Commander Iyen some two days after, was how he (Respondent) was accused of having recommended the forms for payment that the outgoing CAS had approved the expenditure of Ten Million Naira to these officers including himself as a welfare gift. That he (Respondent) was further accused of being in illegal possession of one Sundance Industries Valencia CA USA Pistol with live ammunition (Exhibit 19) and one Anti Riot Irritant Grenade. It was further stated that in his Statement (Exhibit 10 supra), he (Respondent) acknowledged by endorsing thereon that these firearms were indeed found in his house at No. 3

Sawyer Street, Anthony Village, Lagos. Also, that he, (Respondent), conspired with Squadron Leader Yakassai (7<sup>th</sup> accused before the GCM) to defraud the NFA on or about October, 1985. The prosecution in proof of this tendered a letter found at the Respondent's house and written by the said Yakassai to him (Respondent) vide B Exhibit 17, which showed that figures meant for a certain purpose were inflated. Whilst Squadron Leader Yakassai was shown as having collected N1.5 Million being part of the difference of the inflated amount, the Respondent herein received N5,022.20 for "travelling claim".

C The Respondent was further accused of engaging in private business contrary to Section 57 of the Armed Forces Decree (AFD) No. 105 of 1993. In its quest to prove this, the prosecution tendered Form CAC 10, Forms of Annual Return of a company having a share D capital dated 30<sup>th</sup> June, 1995 depicting Respondent as a shareholder holding N54,000 shares in Excel Insurance Brokers. A further allegation was to the effect that sums of money were being shared on a monthly basis between December, 1995, and March, 1996, and that the Respondent was accused of receiving the sum of N120,000.00 E in December, 1995, out of these sums. The prosecution relied on the evidence, amongst others of P.W. 12 to prove this. The Respondent also, based on his statements, Exhibit 10 and Exhibit 61, was accused of procuring sums totalling about N85,000.00 in order to corrupt F officials of the Federal Ministry of Finance, Abuja, and the auditor General of the Federation.

On the 27<sup>th</sup> of April, 1996 the Respondent was discharged from the NAF (see Exhibit 66A-67) and on 26<sup>th</sup> July, 1996, the Respondent, along with the 8 other persons, were arraigned before G the GCM where he was charged with 5 counts of stealing, corrupt enrichment, unlawful possession of a pistol and disobedience of standing orders, i.e. engaging in private business.

On the 6<sup>th</sup> of August, 1996, the five counts above mentioned were substituted with twelve counts of the various offences H hereinbefore referred to in this judgment.

Be it noted, firstly, that Air Commodore Ajobena earlier referred to signed the convening order for the GCM under the authority of the CAS vide Exhibit A1. Secondly, the GCM conducted a joint trial of all 9 accused persons, the Respondent inclusive, as provided under

Section 132(1) of the Armed Forces Decree No. 105 of 1993. A total of twenty-seven witnesses were called consisting of fourteen for the prosecution, twelve for the defence and one by the court.

In its judgment delivered on 27<sup>th</sup> September, 1996 and confirmed on the 21<sup>st</sup> October, 1996, the GCM found that the prosecution proved its case beyond reasonable doubt and found the Respondent guilty on all twelve counts as charged and sentence him to 50 years imprisonment. In respect of the 9<sup>th</sup> and 10<sup>th</sup> counts for unlawful possession of firearms, the Respondent was sentenced to 15 years imprisonment though the recommendation award was eventually reduced to 10 years.

The Court of Appeal, (hereinafter in this judgment referred to as the court below), in its own judgment declared the orders made by the GCM as nullities (and in the absence of jurisdiction) on the following grounds:

1. *There was nothing in Section 131(1) of the AFD No. 105 of 1993, which enables the person to whom the power to issue a convening order for GCM is vested to delegate that power. In that circumstance therefore, Air Commodore Ajobena was not a person qualified to convene a GCM, as he did not hold any of the offices listed in Section 131(2) thereof.*

2. *By virtue of Sections 168(1) and 169(2) of the AFD No. 105 1993, (ibid) the Respondent ceased to be subject to service law, when on the 6<sup>th</sup> of August, 1996, a period of 3 months after he was retired from service, the charges against him were substituted for 12 new ones, said the Court: "The striking out of the offences filed against the Appellant completely brought the case as against the Appellant on the charge sheet filed on 26/7/96 to an end on 6/8/96 when it was struck out."*

On counts 1-5, which dealt with the theft of N10 Million of which the Respondent's share was put at N750,000.00, the Court below held that there was no evidence to support these counts on the following grounds:

1. It was not shown that the sum of N10 Million was stolen, as it was demonstrated that the outgoing CAS had not made the order that the sum of N10 Million be shared as a welfare gift.

2. The outgoing CAS, who gave the alleged order and Wing Commander Iyen who relayed it, were not called as witnesses.

3. The GCM's findings at page 235-236 of Volume 5 of the Records were held to amount to hearsay.

On Count 6, which is that of receiving the sum of N120,000.00 in December, 1995, knowing that it was stolen, the court held that there was no evidence in support thereof on the following grounds:

B 1. *"The only amount that the prosecution alleged was stolen and shared by accused persons, was the N10 Million said to have been stolen between 1<sup>st</sup> and 4<sup>th</sup> April, 1996. However could the Appellant have received in December, 1995, N120,000.00 out of N10 Million stolen in April, 1996."*

C 2. *The evidence of P.W. 12 in Exhibit 61, on this was tantamount to hearsay".*

On the 7<sup>th</sup> and 8<sup>th</sup> counts, to wit: conspiracy to commit official corruption by procuring the sum of N500,000.00 and N300,000.00 D to corrupt the Auditor General and officials of the Federal Ministry of Finance respectively, the court found for the Respondent on the following grounds.

1. No prosecution witness testified in respect of these counts; neither did any official from the office of the Auditor General nor the E Federal Ministry of Finance gave evidence to this effect.

2. The purpose for which the said sums were given was not given in evidence.

F 3. The proceedings of the summary of Evidence attached to Exhibit 61 did not amount to statements under caution as could be relied upon by the prosecution as confessional statement by the appellant and as such there was insufficient evidence to ground a conviction.

G On counts 9 and 10, the court below held inter alia that the Respondent was correctly found guilty for unlawful possession of firearms but held that since it had earlier found that the GCM lacked jurisdiction to adjudicate on the matter any order made is a nullity. The court below went on to hold that *"given the fact that the appellant had served some years in prison, the fair conclusion is to discharge and acquit the appellant."*

H In respect of the 11<sup>th</sup> and 12<sup>th</sup> counts of engaging in private business and conspiracy to defraud the NAF with Flt. Lt. Yakassai where the Respondent received the sum of N5,002.20, the court below also found in favour of the Respondent. The basis for this was



that the offence said to have been committed in 1985 was over 11 years and not supported by any evidence. It also held that the circular which the Respondent was said to have contravened by engaging in private business was not in evidence and the text therefore not known to the GCM and form CAC 10 held that “*the fact that Exhibit 46, form CAC 10 was found in the possession of the Respondent would not be enough evidence that he had engaged in private business.*”<sup>B</sup>

The court below in the result discharged and acquitted the Respondent on all counts and set aside the judgment of the GCM inclusive of the restitution order made against the Respondent. The appeal herein is against that decision premised on fourteen grounds.<sup>C</sup>

Before the appeal came up for hearing, the parties filed and exchanged briefs of arguments. While the Appellant submitted eight issues as arising for our determination, the Respondent for his part, preferred seven such issues. The eight issues formulated by the Appellant complain as follows: <sup>D</sup>

1. Whether the Court of Appeal was right in holding that the General Court Martial lacked jurisdiction to adjudicate or try the Respondent before it (GCM).

2. Whether the Court of Appeal was right in holding that there was no evidence in proof of counts 1 to 5 of the charges brought against the Respondent. <sup>E</sup>

3. Whether the burden is on the prosecution to call Wg. Cdr. Iyen and the retired Chief of Air Staff as witnesses in order to prove that the said Chief of Air Staff had or had not made the order that the sum of N10 Million belonging to the Nigerian Air Force be withdrawn and expended by the Accused person, Respondent inclusive, as a welfare gift. <sup>F</sup>

4. Whether the Court of Appeal was right in holding that there was insufficient evidence to ground a conviction against the Respondent in respect of counts 7 and 8. <sup>G</sup>

5. Was the Court of Appeal right in discharging and acquitting the Respondent on all counts against him after having found that:

a. The Respondent was correctly found guilty for unlawful possession of Fire Arms and <sup>H</sup>

b. The proceedings of the General Court Martial were a nullity in the absence of jurisdiction?

6. Having regard to the fact that the Respondent was sentence

to 15 years imprisonment on counts 9 and 10, was the Court of Appeal right in discharging and acquitting the Respondent of these same counts he had served “some years” in prison?

7. Was the Court of Appeal right in discharging and acquitting the Respondent on count 12 on the ground that the offence committed more than 11 (Eleven) years ago was unsupported by any evidence?

8. Whether the Court of Appeal was right in setting aside the orders of restitution made against the Respondent to pay the sum of N4,402,500.00.

The seven issues which the Respondent submitted as calling for determination are as follows:

(i) Whether the Court of Appeal was right in holding that the General Court Martial was not properly convened and had no jurisdiction to try the Respondent.

(ii) Whether the Court of Appeal was right in holding that there was no evidence in proof of counts 1 to 5 of the charges brought against the Respondent.

(iii) Whether the then retired Chief of Air Staff (CAS) AVM Femi John Femi and Wg. Cdr. Iyen in the circumstances of the case were not a (sic) vital material witnesses to have been called by the prosecution at the trial.

(iv) Whether the Court of Appeal was right in holding that there was insufficient evidence to ground conviction against the Respondent in respect of counts 7 and 8.

(v) Whether the Court of Appeal was right in discharging and acquitting the Respondent on all counts brought against him.

(vi) Whether the Court of Appeal was right in discharging and acquitting the Respondent on count 12.

(vii) Whether the Court of Appeal was right in setting aside the order of restitution made against the Respondent.

For the argument of the appeal, I respectfully adopt the eight issues proffered by the Appellant as apt and enough to dispose of them as follows:

#### ISSUE ONE:

This issue deals with the competence of the trial court (in the instant case the GCM) to assume jurisdiction under Section 131 of the AFD No. 105 of 1993.

Further, by determining that the Respondent was no longer under service law when on the 6<sup>th</sup> August, 1996 the charges against him were struck out, the court below declared the trial and indeed the orders made therein, as nullities in the absence of jurisdiction. ***I am of the view that the GCM was properly constituted, could validly and did validly assume jurisdiction in this matter. My treatment of this is two pronged, viz.*** B

***(i) Section 131 of the AFD no. 105 of 1993***

***The Court below held that the power to convene a GCM resided in the Officers listed in Section 131(2) of the Decree and there was nothing in this section that enabled the officers so listed to delegate that power (to issue a convening (order) to Air Cdr. Ajobena in the instant case. By a reading of Section 131(2), parties are agreed that the Chief of Air Staff can convene a GCM, However, by virtue of Section 131(3) of the same Decree, the Chief of Air Staff had every power to delegate his power to issue convening order for a GCM to Air Cdr. Ajobena.*** C D

***Section 131(3) provides as follows:***

***“The senior officer of a detached unit, establishment or squadron may be authorized by the appropriate superior authority to order a court martial in special circumstances.”*** E

***In the instant appeal, the CAS by Exhibit A.1 and its attachment duly authorized Air Cdr. Ajobena to sign the convening order for a GCM, which he did.*** Further and in confirmation of the above statement, on a perusal of Exhibits 69 and 70, the CAS who as an appropriate authority vide section 128 of the AFD on 11<sup>th</sup> of July, 1996, directed either the Air Officer Personnel (AOP) or the Director of Personnel (DOP), that is Air Cdr. Ajobena, to sign the convening order for a GCM. F G

Learned counsel for the Appellant in construing Section 131(3) of Decree No. 105 of 1993, (ibid) contended that the subsection provides for delegation of power, while learned counsel for the Respondent argued to the contrary. In construing what constitutes special circumstances in the subsection, learned counsel cited in support thereof the case of Onagoruwa v. I.G.P. (1991) 5 NWLR (Pt. 193) 563 at 600 to 607. ***I hold the view that the subsection empowers an appropriate superior authority to authorise a senior officer*** H

**to order a court martial in special circumstances. By Section 128(1) of the Decree, an appropriate superior authority in relation to a person charged with an offence include (a) a commanding officer, and (b) any officer of the rank of Brigadier or above or officer of corresponding rank or those directed**  
 B **to so act under whose command the person is for the time being. I am of the firm view that the CAS qualifies as an appropriate superior officer under the subsection. See the case of Madukolu v. Nkemdilim (1962) 1 All NLR (Pt.4) wherein**  
 C **it was stated at page 595 that where all three conditions for the exercise of the courts jurisdiction set out therein exist, such a court is said to have competence and jurisdiction.**

**I am not persuaded by the learned counsel for Respondent's submission to hold that the letter attached to**  
 D **Exhibit A1 is not a delegation of power but rather an abdication of power.** The two paragraph letter, for purposes of emphasis and clarity, states:

**"AUTHORITY TO SIGN THE CONVENING ORDERS OF THE TRIAL OF GROUP CAPTAIN R.M. TINGLOCHA AND 8 OTHERS:**

E **1. I write to confirm that I had duly authorised Air Commodore F. O. Ajobena (Director of Personnel HQ. NAF) to sign the Convening Order, Charge, Sheets and other Documents relating to the above court-martial.**

F **2. The directives are verbal and perfectly normal and I hereby confirm that authorization in writing.**

**Signed N. E. Eduok AVM CAS."**

**It is clear from the wording of the above document that the power to convene a GCM was delegated to Air Cdr. Ajobena. The document raises a presumption of regularity. Thus, even though in paragraph 2 of Exhibit A1, AVM Eduok said that directives are verbal, he nevertheless confirmed the authorizations in writing. A presumption of regularity applies, as in the case in hand, where there is no evidence to the**  
 H **contrary and things are presumed to have been rightly and properly done. This is expressed in the common law maxim in the Latin phrase – omnia praesumuntur rite esse acta. This type of presumption is very commonly resorted to and applied especially with respect to official acts. See Ogbuanyinya v. Okudo**

(No. 2) (1990) 4 NWLR (Pt. 146) 551 at 570 paragraphs D - E.

(ii) Now, to the purports of Section 168(1) and 169(2) of the AD No. 105 of 1993, the 2<sup>nd</sup> prong of the argument which provide thus:

168(1) Subject to the provisions of Section 169 of this decree where an offence under this decree triable by a court martial has been committed, or is reasonably suspected to having been committed, by a person while subject to service law under this decree, then in relation to that offence he shall be treated, for the purposes of the provisions of this decree relating to arrest, keeping in custody, investigation of charge, trial and punishment by a court martial, (including confirmation, review and reconsideration), and execution of sentences, as continuing to be subject to service law under this Decree notwithstanding his ceasing at any time to be so subject.” and

“162(2) A person shall not be triable by virtue of subsection (12) of Section 168 of this Decree unless his trial is begun within three months after he ceases to be subject to service law under this Decree or the trial is for civil offence committed outside Nigeria and the Attorney-General of the Federation consents to the trial, but this subsection shall not apply to the offences of mutiny, failure to suppress mutiny and desertion under this Decree.”

**By the due interpretation of the sections set out above while it is conceded by the appellant that unless trial is begun within three months after a person ceases to be subject to service law, any trial otherwise conducted is a nullity.**

**In the instant appeal, the GCM arraigned the Respondent on 5 counts within three months after he became subject to service law. The Court below more or less recognized this but went further to hold that by striking out the counts and bringing fresh charges (a period after 3 months had elapsed) and so Section 169(2) of the Decree had been violated. With due respect, the court below failed to properly appreciate how the proceedings of the GCM or Criminal law and procedure are invoked as they relate to substitution of charges.**

Applying Section 169(2) of the Decree to the facts, trial commenced on the 26<sup>th</sup> of July, 1996, when the GCM formally arraigned the Respondent on 5 counts and his plea was taken vide pages 14 – 16 vol. 1 of the Records. At pages 56, 66 – 69 in Volume 1 of the

Records, the prosecution applied under Section 162 of the Criminal Procedure Act to substitute the charges against all accused persons and the charges against the Respondent were withdrawn and new charges were so substituted. Fresh pleas were also taken. ***In the case of Nosiru Attah v. State (1993) 7 NWLR (Pt. 305) 257 this Court at page 273, paragraph A, (per Mohammed, JSC., held, whilst dealing with the issue of taking fresh pleas after amendment, that “the amendment may be through alteration by substitution of new counts for the original ones or addition of new counts to the charge.” The dictum of Karibi-Whyte, JSC., in the above case being a minority decision, would in my respectful view, not avail the Respondent.***

***Be that as it may, where at page 286, paragraph H of the Report Karibi-Whyte, JSC., in his dissenting judgment, (not on this issue) held that “subsection (4) of Section 164 C.P.A. renders an amendment retrospective to the date of the filing of the charge” cannot, in my opinion, be faulted. Be it emphasised therefore that the only criterion laid down by Section 169(2) (ibid) is that the Respondent’s trial is “begun within three months.” I share the Appellant’s view in its entirety that it cannot clearly be the intention of that section to exclude amendments by alteration, substitution, addition or subtraction in an action like the one culminating in this appeal, brought as it were within three months as the Decree enjoins.***

***In conclusion, I hold that despite the proceedings of the 6<sup>th</sup> of August 1996, there was still a valid trial before the GCM. Thus, the court below was wrong to declare the trial a nullity on the ground it did.***

#### ISSUE TWO

The Court below held that counts 1 to 5 (Theft of N10 Million of which the Respondent’s share was N750,000.00) were unproven for the grounds set out earlier on in this judgment.

H In the absence that the CAS had or had not made the order, the Court below felt that the theft was not proven as it went ahead to hold at page 121 Vol. 6 of the Records where the prosecution’s case and the defence were aptly stated. It was never the Appellant’s case that the retired CAS approved or declined to approve some funds.

This issue, as clearly recognized by the Court below and as can be deciphered from the Records was introduced by the defence. The facts giving rise to this appeal are as narrated in “Facts of the Case, Exhibits 9A – C were processed to the tune of N10 Million for “short payment of salary”, T5/packing and “printing of forms and repairs of Addressograph Machines.” B

The purpose for which the sums were approved was not fulfilled. Rather, it was demonstrated, the money was withdrawn from the bank account of the NAF and eventually shared between the officers, including the Respondent herein whose share was to the tune of N750,000.00. C

There was also evidence that there was in fact no short payment of salaries between January and March, 1996, and this was to the knowledge of the Respondent. The 1<sup>st</sup> P.W. and 1<sup>st</sup> Accused testified to this effect while the Respondent in his Statement (Exhibit 10) recommended Exhibits 9A – C for payment upon instruction from Wg. Cdr. Iyen. He was informed two days later about the ‘welfare gift’ from the retired CAS which clearly was not the expressed intention of Exhibits 9A – C which speak for themselves. Even at this stage, the Respondent did not abandon the conspiracy but rather partook of it or fully indulged in it. E

***On the point that the money was shared contrary to the express intention of Exhibits 9A – C, the court below had this to say:***

***“The problem arose when funds approved for a particular purpose were applied for another allegedly on the instruction of the retired CAS. There was therefore no forgery of any kind involved here. If, for instance, the Funds had been applied for the purposes stated on Exhibits 9A, 9B and 9C, no one would have suggested that the forms were forged.”*** F G

***With utmost due respect, the above finding of fact cannot be correct because, firstly, it was not the case of the Respondent nor of any of the other accused that the retired CAS instructed them to convert money meant for short salaries to another purpose. Secondly, the Respondent’s defence was that the retired CAS has approved the sum of N10 Million to the accused persons as a welfare gift. Thirdly, the court below failed to take cognisance of the fact that the*** H

**expressed purpose for Exhibits 9A – C did not exist as no finding was made on this. Fourthly, contrary to the speculative findings of the court below, the reality of the matter is that Exhibits 9A – C were demonstrated to be false representations with the intention to defraud on the part of all the conspirators. It is irrelevant to contend as done by the Respondent, that because the forms were prepared by the officers whose duty it was to prepare them in the ordinary course of duty, there could be no offence committed. As each document was in itself telling a lie about itself and the lie was exposed and confirmed, thus culminating in the sharing of the money by the accused persons, the Respondent inclusive, what further proof of forgery was needed?** See the case of Babalola v. The State (1989) 7 S.C. (Pt.1) 94; (1989) 4 NWLR (Pt. 115) 264 at page 272 paragraphs E - H.

On whether the retired CAS ordered or had authority to authorise the withdrawal of N10 Million, the GCM held:

*“(1) He is not authorised to disburse such large sums of money for welfare purposes. Therefore, even if the order existed (which we believe did not exist) it was manifestly illegal. See the Air Forces Manuals cited by the learned J.A.*

*(2) At that time, 2 April, 1996, he was retired, he if at all he did, lacked the locus standi to issue any such purported order, he would have acted functus officio, that it to say, without the requisite authority.*

*(3) ...even if he gave such orders, (of which no authority existed), it passes for hearsay and it is not shown that he equally authorised nor could he authorise the fraud.*

*(4) The Court believes, that the order to withdraw N10 Million from NAF funds as it affects the accused officers does not exist.”*

I am of the view that the above findings of the GCM are sound and uncontroverted. The Court below in its judgment considered the above findings, unjustifiably and erroneously as being hearsay and arrived at the conclusion that there was no evidence that the CAS had not make such an order nor was there evidence that the N10 Million was stolen.

It also held that there was no manifest illegality but an excess of powers if indeed the order did not exist.



***It was next submitted by the appellant and I am in entire agreement therewith that the Court below arrived at the wrong conclusion without a proper appreciation of the GCM's reasonings when it held:***

***“Firstly, the GCM took judicial notice of Air Force Manuals inclusive of their service knowledge. The address of the Judge Advocate (J.A.) for a proper appreciation of the financial regulations and manuals that the GCM took judicial notice of, (see pages 196 to 198, Volume 5 of the Records), before making the above findings. That cannot, in my view, amount to hearsay but an application of rules and service knowledge to the issue at hand. The first two findings quoted above are therefore clearly in order to show that the order attributed to CAS, whether made or not, would be outside his powers.***

***Secondly, the GCM was entitled to make the 3<sup>rd</sup> and 4<sup>th</sup> findings of fact because upon consideration of the evidence before it, there was no proof that the retired CAS made such an order. As a matter of fact, the only evidence before the GCM was hearsay because none of the accused persons, Respondent inclusive, or any other witness gave direct evidence of the order purportedly made by the retired CAS.***

***Thirdly, relying on the above submissions, the conclusion arrived at by the Court below on “manifest illegality/excess of powers” vis-à-vis the application of the above rules and regulations, are unknown to law. See the case of Pius Nwaoga v. The State (1972) All NLR 153 where it was held, inter alia, that “a Soldier is responsible by Military and Civil Law and it is monstrous to suppose that a Soldier could be protected when the Order is grossly and manifestly illegal. Of course, there is the other proposition that a Soldier is only bound to obey lawful orders and is responsible if he obeys an orders and is responsible if he obeys an order not strictly lawful.”***

The Court below went further to hold as follows:

***“In the case before me that order to eliminate the deceased was given by an officer of an illegal regime, his orders therefore are necessarily unlawful and obedience to them involves a violation of the law and the defence of superior orders is untenable.”***

The Court below preferred to believe the evidence of one of the accused persons of the usual practice in the Armed Forces of giving gifts in the “IBB spirit” A gift in the IBB spirit given outside and in excess of lawful authority is clearly illegal, particularly procured, as in the instance case through fraudulent means. ***In the light of the foregoing, the Appellant had clearly proven that the sum of N10m was stolen and shared by the accused persons, Respondent inclusive, and that he aided and abetted the forgery that led to the theft of the money contained in the indictment. In the result, I will answer Issue 2 in the negative and hold that there was sufficient evidence to prove counts 1 to 5.***

### ISSUE THREE

Be it noted that in giving an answer to this issue, that it was the defence that introduced the order purportedly made by the retired CAS as their defence, an ingredient of this defence was that Wg. Cdr Iyen told the Respondent that the CAS made this order.

***The Court below at page 121 vol. 6 of the Records set out the prosecution’s case as the defence, it was never the Appellant’s case that the retired CAS approved or did not approve some funds. This issue, as can clearly be seen from the records, was introduced by the defence. It is therefore pertinent to point out that the burden rests solely on the Respondent to prove that the order was so made. This could have been done by him producing the said order in proof of his defence or calling Wg. Cdr. Iyen, the retired CAS or any other material witness to so prove. It is indisputable that Wg. Cdr. Iyen has been at all material times at large and if found, would have also been prosecuted. See page 44, Volume 1 of the Records. On the other hand, there was no excuse for the defence not to have called the retired CAS, See Section 141(1) of the Evidence Act, Cap. 113, Laws of the Federation of Nigeria which provides:***

***“14(1) Where a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any exception or exception from or qualification to, the operation of the law creating the offence with which he is charged is upon such person.***

See also this Court’s decision in Inusa Saidu v. State (1982) 4

S.C. 41 at pages 66 - 69 wherein it held. “*This Court had repeatedly stated of recent that although the burden on the prosecution is to prove its case against the accused beyond reasonable doubt the prosecution has a discretion to call only those witnesses required to unfold its case. The law does not impose on the prosecution the duty or function of both prosecution and defence.*” See also the case of F. O. Raphael v. Commissioner of Police (1971) NNLR 16 where the Kwara State High Court sitting on appeal and in distinguishing the earlier case of Rex v. George Kuree 7 WACA 175; Police v. Addae 11 WACA 42 and Abdulkadir Gusau v. Police (1968) NMLR 329 as to the burden of proof in criminal cases which lies on the prosecution, held that:

“*In the present appeal the appellant knew of the availability of the woman and what she could say and could have called her as a witness. The prosecution could not, therefore, be held responsible for the evidence not being made available to the court.*”

In the instant case the Court below was therefore wrong to have placed the burden on the Appellant, i.e., the prosecution.

#### ISSUE FOUR

In respect of counts 7 and 8 which overlap issue 4 and where the court below held that there was insufficiency of evidence to ground a conviction, three things were clear:

1. The sum of N350,000.00 was to be distributed to the Auditor General whilst N500,000.00 was meant for the Federal Ministry of Finance in Abuja in order to get out NAF bills and a cheque for N49 Million for the bills.

2. In February, 1996, sometime after 4.45p.m., the sum of N350,000.00 was given to the Auditor General at his residence in 1004, Victoria Island.

3. In March, 1996, two files containing NAF bills were collected from an official of the Ministry upon receipt of “a parcel” collected by this official.

***The above body of evidence was sufficient from which the purpose the said sums was procured could be inferred. See the address of the judge Advocate (J.A.) at pages 210 – 212 in Volume 5 of the Records and statements made in Exhibit 61 by the Respondent. In that Exhibit, the court below held that such statements “did not amount to statements under***

***caution as and could be relied upon by the prosecution as confessional statements by the Appellant.”***

***As this was never an issue raised in the court below by the Respondent, the Court was wrong, in my view, to have considered it suo motu. My answer to this issue is rendered in the negative.***

#### ISSUES FIVE AND SIX

The GCM at page 277, volume 5 of the Records found the Respondent guilty of unlawful possession of Fire Arms under counts 9 and 10. ***The court below on appeal also noted that the Respondent was correctly found guilty on these counts (five and six). The only reason the court below did not confirm these findings of the GCM was the so-called absence of jurisdiction. Having come to the conclusion elsewhere in this judgment that the GCM was competent to try the Respondent, his conviction, ipso facto is confirmed. The GCM has at the same page sentenced the Respondent to 15 years imprisonment upon conviction. The court below, however, at page 131, Vol. 6 of the Records discharged and acquitted the Respondent because, to put it in its own words, he had served “some years in prison.” This manifest error on the part of the court below to have discharged and acquitted the Respondent, is palpably wrong as there is no legal basis for so deciding. In the event, the sentence imposed on these two counts ought to be restored.***

***Having erroneously found that the proceedings of the GCM were a nullity in the absence of jurisdiction the court below ought not to have discharged the Respondent and acquitted him as it did, the moreso, as it found that the Respondent was correctly convicted on counts 9 and 10.***

#### ISSUE SEVEN

This issue asks whether the court below was right in discharging and acquitting the Respondent on count 12 on the ground that the offence committed more that eleven years before was unsupported by any evidence. In as much as a trial is commenced within 3 months from when the Respondent ceased to be subject in service law and no other provision of law is made that could have prevented his prosecution of conspiracy to defraud the Nigerian Air Force, his

conviction cannot, in my firm view, be faulted. The count is clearly supported by evidence in the form of Exhibit 17, a self-explanatory letter by the 9<sup>th</sup> accused Sqn. Ldr. Yakassai in 1985 and addressed to the Respondent. Moreover, the document was recovered from the Respondent's residence over which he exercised total control. Exhibit 17 shows that the Respondent and the 9<sup>th</sup> accused were involved in a conspiracy to defraud the NAF by inflating figures and sharing the excess. In this particular instance, the Respondent was meant to receive N5,002.00 while the 9<sup>th</sup> accused received about N1.5 Million. Save for a bare denial of this offence, the Respondent could not explain away the incriminating and devastating evidence contained in that document as demonstrated at the trial. In the result, I hold that the offence was established beyond reasonable doubt. See David Uso v. Commissioner of Police (1972) 11 S.C. 37.

#### ISSUE EIGHT

The Court below set aside the orders as to restitution made by the GCM after having found that the Respondent was not guilty of the offences brought against him and also because the proceedings were a nullity in the absence of jurisdiction. ***As I have resolved issues 1 – 7 in favour of the Appellant it goes without saying that the GCM was therefore right in making the orders as to restitution. Be it noted that Section 174 of the AFD No. 105 of 1993 permits the invocation of restitution against a person who had been properly found guilty of an offence and SAVE for the order of restitution in respect of Count 6 (supra); monthly sharing to the tune of N120,000.00 which the Appellant has not appealed against, the order for restitution is, in my view, unimpeachable and should be confirmed.***

Section 174 AFD 1993 No. 105 provides, inter alia, in subsection (1) and (2) as follows:

*“(1) The following provisions of this section shall have effect where a person has been convicted by a court martial of unlawfully obtaining a property, whether by stealing, receiving or retaining it knowing or having reason to believe it to have been stolen, fraudulently misapplied or otherwise.*

*If a property unlawfully obtained is found in the possession of the offender, it may be ordered to be delivered or paid to the person appearing to be the owner of the property...”*

***I have no hesitation therefore in answering this issue in the affirmative.***

B In the result, and for all I have been saying, this appeal succeeds and it is allowed by me. Save for the 6<sup>th</sup> and 11<sup>th</sup> charges not appealed against for which a sentence of 2 years imprisonment each was ordered to run concurrently, the other conviction and sentences (totaling 50 years) are hereby affirmed and restored accordingly.

C For the avoidance of doubt, the order for N4,402,500.00 as restitution to the appellant for the various offences committed by the Respondent is hereby accordingly restored.

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### **KUTIGI JSC**

D I read in advance a copy of the judgment just rendered by my learned brother, Onu, JSC. He has sufficiently covered all the issues canvassed before us. I agree with his reasoning and conclusions. The appeal is meritorious and it is hereby allowed. The judgment of the Court of Appeal is set aside while that delivered by the General Court Martial restored.

E

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### **MOHAMMED JSC**

F I have had a preview of the judgment written by my learned brother, Onu, JSC, in draft, on this appeal and I entirely agree that the appeal should be allowed.

G My learned brother has considered all the salient issues raised in this appeal and I do not desire to add to the conclusion expressed in the lead judgment. In the result I concur in holding that the judgment should be allowed. I affirm the judgment, conviction and sentence passed by the General Court Martial against the Respondent.

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### **KALGO JSC**

H I have had the privilege of reading in advance the judgment of my learned brother, Onu, JSC., just delivered in this appeal. I entirely agree that there is merit in the appeal and that it ought to be allowed for the reasons set out in the judgment.

In their briefs of argument, the appellant formulated 8 issues

for the determination of this court and the Respondent seven, respectively. *Their issues were very similar in all respects and it appears to me that issue 1 in each brief is the most important one as it deals with the question of jurisdiction which is the power house of any adjudication by any court or tribunal. Without it an adjudicating authority is powerless and any proceedings in exercise of the power will be a fruitless exercise and a complete nullity.* B

The appellant's issue 1 reads:-

*"whether the Court of Appeal was right in holding that the General Court Martial lacked jurisdiction to adjudicate or try the Respondent before it (GCM)".* C

Although the two issues deals with the same matter, the Respondent's issues is more lucid and I prefer it to that of the appellant's. The Court of Appeal per Oguntade, JCA., and concurred by Galadima and Aderemi, JJCA., held:- D

*"I have already concluded that the GCM was not properly convened. That fact robbed the GCM the jurisdiction to adjudicate in this matter. When court is without jurisdiction to adjudicate, any order made by it is a nullity. See Achineku v. Isagbola (1988) 4 NWLR (Pt. 89) 411 and Akingbola v. Plisson Fisco Nigeria Limited (1988) 4 NWLR (Pt.88) 335.* E

*Further, I held that the appellant as at 6/8/96 when he was arraigned on fresh charges was by the force of Section 169(2) of the AFD, 1993, no longer subject to service law. The GCM was therefore in error to have assumed jurisdiction over the appellant to try this case".* F

In effect the Court of Appeal found that the General Court Martial which tried the appellant had no jurisdiction to do so ab initio.

*The power to convene a General Court Martial (GCM) is clearly vested in the officers listed in Section 131(2) of the Armed Forces Decree No. 105 of 1993, hereinafter referred to as "AFD". That section provides:-*

*"2. A general court marshal may be convened by –*

*(a) the President, or*

*(b) the Chief of Defence Staff, or*

*(c) the Service Chiefs, or*

*(d) A General Officer Commanding or corresponding commands; or* H

(e) *A Brigade Commander or corresponding command*".

It is common ground that the GCM which tried the appellant was convened by one Air Commodore F. O. Ajobena, Director of Personnel NAF Headquarters. He did not hold any of the posts listed in subsection (2) of S. 131 AFD, and did not ordinarily qualify to convene a GCM. But the Court of Appeal did not examine and consider the whole evidence before it before it concluded that the GCM was not properly convened. It only looked at the provisions of S. 131(2) AFD above and Exhibit A1, (the letter signed by Chief of Air Staff attached to the convening order confirming the authority given to Air Commander Ajobena to sign the convening order) and held that the Chief of Air Staff had no power to delegate his power to convene the GCM to Air Commodore Ajobena or anybody else.

Section 131(3) of AFD provides:-

"*The senior officer of a detached unit, establishment or squadron may be authorised by the appropriate superior authority to order a court martial in special circumstances*". (Underlining mine)

There is no doubt that the Chief of Air Staff is such an "appropriate senior authority" under the provisions of S. 131 of AFD that can order a court martial. However, by virtue of provisions of S.131(3) above, he can properly authorise any senior officer of a detached unit or squadron under him to order a court martial. Air Commodore Ajobena is a senior officer in charge of the personnel unit of NAF as Director of Personnel and Exhibits 69 and 70 clearly indicated that the Chief of Air Staff had authorised Air Commodore Ajobena to sign the convening order, which he could do pursuant to S. 131(3) of AFD.

It is significant to observe that the Court of Appeal did not advert its thoughts to the provisions of S.131(3); it only examined S. 131(2) of AFD, and the letter, Exhibit A1, signed by the Chief of Air Staff confirming that he gave verbal authority to Air Commodore Ajobena to sign the covering order. In this case, even though the letter was written 14 days after the GCM was convened, it had the effect of confirming what was done earlier and there was nothing to discredit or challenge it. It is also my respectful view that what made the circumstance of this case special, is the decision of the Chief of Air Staff to delegate his power to convene a court martial for the trial of his own staff.



I therefore find that the GCM was properly convened in this case and has satisfied all requirements of the relevant law. It is therefore competent to adjudicate on issues brought before it and its proceedings thereon are valid. See *Madukolu v. Nkemdilim* (1962) 1 All NLR 587; *Saude v. Abdullahi* (1989) 7 S. C. (Pt. 11) 11b; (1989) 7 S.C. (Pt. II) 116; (1989) 4 NWLR (Pt. 116) 387. B

The second part to this issue which deals with the interpretation of S. 169(2) AFD also touched on the question of the exercise of jurisdiction over the appellant. The combined effect of the provisions of sections 168(1) and 169(2) of the AFD is that unless the appellant was tried within three months after leaving service, his trial proceedings thereafter would be a nullity. In this case, the appellant was arraigned before the GCM and his plea taken on 5 count charge on 26/7/96. He was however discharged from service on 26/4/96. Therefore he was properly arraigned within three months after his discharge. But on application by the prosecution under S. 162 of the Criminal Procedure Act, the 5 counts were withdrawn and substituted by twelve count charge on the 6/8/96. The 5 counts were struck out. The Court of Appeal held that having struck out the original 5 counts against the appellant on the 6/8/96, his trial ended forthwith and the substitution of the new twelve (12) counts on that day amounts to a first trial, and since he was discharged on 27/4/96, and fresh charges were brought on 6/8/96, a period of more than three months had elapsed. The appellant was therefore not subject to service law on 6/8/96. C D E F

I have no doubt in my mind that what happened on 6/8/96 was a “substitution” of counts as opposed to a simple “amendment”. What then is the difference in law? S.162 and S. 163 of the Criminal Procedure Act speak of framing a new charge or adding to or altering the original charge. In the case of *Okwechime v. I.G.P.* (1956) FSC 73, it was held that the alteration of a charge under Section 162 and 163 of the Act includes the framing of a new charge in place of the original charge. There the Federal Supreme Court held at page 74 of the report that- G H

*“The learned trial judge was of the opinion that the word “alter” in the context means more than “amend” and includes “substitute”, with this view we respectfully agree. In view of the fact that new charges could, under the section, be added to the original one, it*

*would be unreasonable to hold that alteration of the charge cannot be extended to the framing of new charge in place of the original one”.*

Therefore substitution will have the same meaning and effect with alteration. And according to S. 164 of the said Act, where a charge or count is altered all that is required to be done is to read the new charge or count to the accused and record his or her plea thereto. The proceedings are deemed to be continued and not disturbed as a result of the alteration. This, in my view, is the correct position in the instant appeal immediately after the original counts were struck out. It is also my respectful view that once the trial of the appellant was commenced by his arraignment on 26/7/96, which was within three months after his retirement or discharge, the requirements of S. 169(2) are fully complied with until any provision is made in the law to the contrary and there is none. I am therefore of the firm view that the trial of the appellant proceeded properly and validly after 6/8/96 when the new counts were filed and his plea taken. I answer issue 1 in the negative.

For the rest of the issues in the appellant’s brief, I adopt the reasoning and conclusions reached on them by my learned brother, Onu, JSC., and I have nothing to add thereto.

For the above and the more detailed reasons given by my learned brother, Onu, JSC., in the leading judgment, I find that there is merit in this appeal. I allow it and set aside the decision of the Court of Appeal made on 28<sup>th</sup> September, 2000.

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**EJIWUNMI JSC**

Lead judgment of Onu, JSC., read concurring judgment of Kutigi, Mohammed, Kalgo and Ejiwunmi, JJSC. Appeal allowed, the judgment of the Court of Appeal set aside. The judgment and sentences of the General Court Martial remain undisturbed.

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