

**SUPREME COURT OF NIGERIA**  
6TH FEBRUARY, 2004. SC. 97/2003  
**CORAM:- M. L. UWAI, CJN, S. M. A. BELGORE,**  
**A. I. IGUH, U. A. KALGO, S. O. UWAI, F.**  
**A. O. EJIWUNMI, D. MUSDAPHER, JJSC**

1. ENGINEER GOODNEWS AGBI ..... 1ST PLAINTIFF/  
RESPONDENT/CROSS-APPELLANT
  2. BARRISTER ANTHONY ALABI ..... 2ND PLAINTIFF/  
RESPONDENT/CROSS-APPELLANT
  - AND
  1. CHIEF AUDU OGBE }
  2. CHIEF VINCENT OGBULAFOR
  3. PEOPLES DEMOCRATIC PARTY ..... DEFENDANTS/  
RESPONDENTS
  4. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION
  5. CHIEF JAMES ONANEFEBOR ..... DEFENDANT/  
APPELLANT/RESPONDENT
- 

APPEALS - Briefs - Issues - Question that fails to properly reflect facts or law in dispute - Should be struck out (H1)

CRIMINAL PROCEDURE - Conviction - Appeals - Issues - Exhibits - Where the parties in agreement with trial court narrowed down the issues to one - Court of Appeal rightly remitted the case to the High Court - To determine whether 5<sup>th</sup> defendant - Was the person convicted vide exhibit A (H2)

APPEALS - Extraneous matters - Setting aside lower Court's decision - On the grounds that it considered extraneous matters - May only arise where that consideration influenced that Court's decision (H3)

APPEALS - Leave - Allegation that leave was not obtained to appeal to Court of Appeal - Will not be taken before Supreme Court for being too late (H4)

ACTIONS - Parties - Exhibits - Admission - Where parties and trial court were at one in admitting an exhibit - Present move by counsel to discredit that exhibit - Will not be allowed - As it will change his earlier position (H5)

LEGAL PRACTITIONERS - Party - Procedure adopted by counsel on behalf of a party - Which turns out to be unfavourable - Cannot be abandoned by that party and his counsel (H6)

APPEALS - Finding of fact - Will not be interfered with by an appellate Court - Save there is ample evidence of lack of evaluation (H7)

APPEALS - Pronouncement - By an appellate Court - Can only be made - In respect of a decision of the lower Court - And not in respect of a question that was not decided (H8)

EVIDENCE - Admission - Exhibit - Failure to consider s. 225(2) EA - Before admitting Exhibit A - Has not led to a miscarriage of Justice (H9)

APPEALS - Jurisdiction - Decision of lower Court - Was not that trial court lacked jurisdiction - But that it made some technical mistakes - In not conforming with s. 157(1) CPC - And the error did not affect exercise of jurisdiction (H10)

APPEALS - Objection - Question that ought be raised as objection - In the course of trial - Is incompetent before the Supreme Court (H11)

COURTS - Appeals - Suo Motu raising of issue - Without calling parties attention is wrong - But no miscarriage of justice - Was occasioned

thereby in this case (H12)

APPEALS - Merit - Issue - That speculates on non existent events - Must fail - And appeals that lack merit - Will be entirely dismissed (H13)

### **FACTS**

Before the Gwagwalada Division of the High Court of the FCT (Federal Capital Territory) plaintiffs/cross appellants by an originating summons dated 3-2-2003, commenced an action against 1<sup>st</sup> - 4<sup>th</sup> defendants/respondents. The said action sought to establish that by virtue of Exhibit A, the 5<sup>th</sup> defendant/appellant was an ex-convict and therefore not entitled to contest the 2003 gubernatorial elections under the platform of the Peoples Democratic Party (PDP). By an application filed by 5<sup>th</sup> defendant's Counsel, he was joined as a party in the suit. That application also raised a preliminary objection as to lack of locus standi, and lack of jurisdiction. But the preliminary objection was struck out as lacking any merit. The trial court pursuant to O.35 r.2 ordered the parties to prepare the issues they deem germane for the determination of this case. The parties then agreed that the issue to be determined is whether Exhibit A (Proceedings of the Bwari Upper Area Court) Convicted any person at all as it purported to convict one James Onanefe Ibori. That subject to the court's decision, evidence may then be led to show whether it was the 5<sup>th</sup> defendant that was so convicted vide the said exhibit.

The trial court held that there is no conviction in Exhibit A and went ahead to dismiss plaintiffs' claim as its trial is unnecessary. Plaintiffs' appeal to the Court of Appeal was allowed as that Court held that Exhibit A recorded a conviction. It then ordered that the case be heard de novo by another judge of the FCT high court. Being dissatisfied, 5<sup>th</sup> defendant has now appealed to the Supreme Court while the plaintiffs have also cross appealed against the lower court's judgment, raising various issues. Issue (i) raised by 5<sup>th</sup> defendant was struck out for being improper.

### **ISSUES FOR DETERMINATION**

*“(i) What was the sole issue tried by the High Court in this case.*

(ii) *In the light of the answer to Question (i) –*

(a) Was it open to the Court of Appeal to comment upon and to criticize the course pursued by the High Court and the parties in agreeing to try the sole issue as a preliminary issue?

B *and*

(b) In any event were the comments and criticism of the Court of Appeal justified?

(iii) Whether Exhibit “A” is admissible in evidence for the purpose of the determination of the sole issue before the High Court.

(iv) Whether the proceedings in Exhibit “A” are valid and remain valid unless they are set aside on appeal (as the Court of Appeal has decided) or whether they are void for want of jurisdiction (as the Appellant herein contends).”

D The plaintiff/respondent for their own part formulated the following as the proper issues for the determination of the appeal:-

“(i) Whether having regard to the proceedings before the trial court, the sole issue tried by the High Court was not the only issue settled by the parties for the trial court to consider in the determination of the suit and whether it was not opened to the Court of Appeal to come to the conclusion that the appellant in this case was an ex-convict. Grounds 1 and 2.

F (ii) Whether Exhibit “A” was admissible for the determination of the issue before the Court. Grounds 3 and 4.

(iii) Whether or not the jurisdiction of the Upper Area Court to try and convict the accused in Exhibit “A” is a competent issue in this appeal and if so, whether the Upper Area Court which convicted the accused in Exhibit “A” had no jurisdiction to do so. Ground 5”.

**HELD** (Unanimously allowing the appeal per lead judgment of **EJIWUNMI JSC**)

## <sup>H</sup> *Briefs - Issues*

1. It must therefore be accepted that for an appellant or cross-appellant to have either facts or point of law resolved in its favour, it is necessary to raise issue or issues in his brief to reflect properly what facts or law are

in dispute in the appeal.

Having regard to what I have said above, and having also duly considered question No.1 as posed in the appellant's brief, it is my humble view that that "question" has not raised an issue for the determination of this appeal. It follows that I must uphold the preliminary objection raised against it by the learned Senior Advocate for the plaintiffs/respondents. Thus question No. 1 is therefore struck out from the appellant's brief accordingly. (p. 452 G)

### ***Conviction - Appeals - Issues***

*2. It is patent from the record of proceedings that parties with the concurrence of the lower court had merely isolated an issue from the other possible issues in the case for determination. It was thought that if the lower court decided that exhibit "A" was invalid as evidence of conviction, the need to call evidence would not arise; and that if the same court decided that the said exhibit was a valid evidence of conviction, the need would then arise to call evidence to show that the person who was tried and convicted in exhibit "A" was the 5<sup>th</sup> respondent. There are clear indications in the record of proceedings that this was the pre-occupation of the court and parties in the proceedings out of which this appeal arose.*

I therefore would for the above reasons uphold issue No.1 in favour of the 5<sup>th</sup> defendant/appellant. The subsidiary question raised by the plaintiffs/respondents in this issue No. 1 must fail. And having held that the sole issue was whether Exhibit "A" was a conviction of the person mentioned therein, it was open to the Court of Appeal having held that Exhibit "A" on the face of it evidenced the conviction of the person named therein to order that the matter be heard by the High Court, Abuja to determine whether the 5<sup>th</sup> defendant/appellant was the person convicted. (p. 458 D/G)

### ***Appeals - Extraneous matters***

3. It follows perforce, that where counsel would wish to have a decision of the Court below set aside because it considered extraneous matters, it

must be shown that the said extraneous matters influenced the decision of the Court. It is certainly not enough to seek redress from this Court merely because matters which were strictly not before the Court below were considered in the course of the judgment of that Court. While it is entirely within the rights of learned Senior Advocate to criticize the judgment of the Court, it would have been far more beneficial if he had gone on to show how the comments made by the learned Justice in his judgment influenced him in the decision reached by him. It is manifest that nothing of this kind was brought to our attention in this appeal. It follows that I must hold that it was well within the rights of the Court below to have given its own appraisal of the procedure followed by the High Court in the course of the trial of the case. (p. 460 F/H)

***D Allegation that leave was not obtained to appeal to Court of Appeal***  
 4. It being also my view that if leave was not obtained to appeal to the Court of Appeal as alleged that point should have been taken at the relevant time in the Court below. With profound respect to the learned Senior Advocate, it is far too late for that point to be taken in this Court. (p. 461 B)

***Parties - Exhibits - Admission***  
 5. From the above passages from the record of proceedings, there cannot be any doubt in my own respectful view that the Court and the counsel appearing for the parties were at one in accepting that Exhibit “A” was the document that the trial Court is required to pronounce upon as to whether a conviction was recorded against the person charged in the said document. In other words, Exhibit “A” was admitted as part of the proceedings with the consent of the parties.

Before concluding, I think it is only right to mention that the learned counsel for the 5<sup>th</sup> defendant/appellant who advocated before the trial Court that the matter could be resolved by the sole issue which he suggested, must be taken to be acting with the full authority and consent of his client, the 5<sup>th</sup> defendant/appellant in adopting the position he took at the trial. It is therefore my view that the argument to show that the Area

Court had no jurisdiction to try the accused in Exhibit “A”, or that it is incompetent, having regard that certain rules of evidence were not complied with in the course of the trial by the Bwari Upper Area Court, is with respect an attempt to change the position that counsel took with regard to Exhibit “A” at the trial in the High Court. (p. 464 B) B

***Party - Procedure adopted by counsel on behalf of a party***

6. It seems that were as in this case, counsel appearing for the party decided to adopt a procedure for the prosecution of the case of that party which he thought would be advantageous to that party, and that procedure turned out negatively, he cannot be allowed to deny that approach which he adopted of his own volition. The party he represented and the counsel must be prepared to acknowledge whatever resulted from their plan and strategy which they had conceived as a quick convenient resolution of the dispute. (p. 464 F) C D

***Appeals - Finding of fact***

7. I should also add that an appellate Court will not ordinarily interfere with the findings of fact by the trial judge but where there is ample evidence that the trial judge failed to evaluate it and make correct findings on the issue, the appellate court is in as much a good position as the trial court to deal with the facts and make proper findings. See Akibu v. Opaleye (1974) 1 ALL NLR (pt. 2) 344. E F

For the above reasons, I am satisfied that the Court below upon the evidence which I have also reviewed in this judgment rightly came to the conclusion that Exhibit “A” depicted that a James Onanefe Ibori was convicted by reason of Exhibit “A”. (p. 465 E) G

***Pronouncement - By an appellate Court***

8. As the trial Court did not have the opportunity to decide that question, the Court below could not have pronounced upon what was not decided by the trial Court. This is because, it is settled law that an appellate Court can only consider on appeal a matter that has been decided by the trial Court or the Court below, as the case may be. (p. 466 D) H

**Admission - Exhibit - Failure to consider s. 225(2) EA**

9. There is some force in the argument proffered for the 5<sup>th</sup> defendant/appellant and particularly with regard to the failure of the trial High Court to consider S. 225 (2) of the Evidence Act, before admitting Exhibit “A”. But as found by the Court below, the failure to consider the said provisions of the Evidence Act has not led to miscarriage of justice. Exhibit “A” was without doubt admitted as evidence of the proceedings before the Bwari Upper Area Court with the consent of all the parties. All the arguments now raised against its admission has not in my respectful view persuaded me to hold that the trail Court should not have admitted it in the circumstances. It follows from what I have said above that I must resolve Issue iii against the defendant/appellant. (p. 466 E)

**Jurisdiction - Decision of lower Court**

10. It is in my view clear that what the Court below said is that the Upper Area Court, Bwari in the course of exercising its undoubted jurisdiction, made some technical errors in that it did not comply with section 157 (1) of the Criminal Procedure Code. Hence I hold that it cannot be right to argue that the Court below held that the Bwari Upper Area Court had no jurisdiction to try the accused that resulted in "Exhibit A". Having regard to the principles stated above, the Court below was right in holding that the mistake of the Court in not conforming with the provisions of Section 157 (1) of the Criminal Procedure Code did not affect the undoubted exercise of the jurisdiction vested in it. With that conclusion, I must hold that Exhibit ‘A’ is a valid proceedings of the Bwari Upper Area Court, and that Exhibit ‘A’ is not void in the circumstances. I also hold that the appeal of the defendant/appellant must fail although its issue I as framed by the plaintiff/respondent succeeded. (p. 470 C/472 D)

**H APPEALS - Objection**

11. It is my respectful view that this question ought to have been raised as an objection, in the course of the trial. Counsel who is seised of a case ought to have been aware of the Rules of Court in defending or prosecut-



ing a matter. As it was not raised when it was proper to have done so, it is my view that it is incompetent for the cross-appellants to raise it in this Court. (p. 474 B)

***COURTS - Appeals - Suo Motu raising of issue***

12. In my humble view, the short answer to this question is that a Court cannot be deterred from referring to the provisions of the law as it deems fit. But an ancillary to that right is also absolutely necessary for this point to be brought to the attention of the parties and their counsel so that the Court may receive their addresses on the point of law so raised, clearly, suo motu by the Court. The Court below therefore erred to that extent. See Ogiamen & Anor v. Ogiamen 1967 N.S.C.C. 189; Hambe v. Hueze 2001 A.N.L.R. 1.

But having not done so as in the instant appeal, the question that falls to be considered is, whether by so doing a miscarriage of justice has occurred thereby. In the determination of this question, the party who claims that he has suffered such a miscarriage of justice by the verdict of the Court has a duty in the circumstances, to show how he had suffered as alleged a miscarriage of justice. In respect of the instant appeal, I have considered carefully the submissions made for the cross-appellant, and it is my humble view that the cross-appellants have not shown me how they suffered a miscarriage of justice by the decision of the Court, having regard to all the circumstances of the case. I must therefore resolve the issue against the cross-appellants. (p. 474 H)

***APPEALS - Merit - Issue***

13. I think by this issue, the cross-appellants are seeking to know whether if the Court held in their favour as plaintiffs in the trial Court, then the consequence of that finding would be the automatic disqualification of the 5<sup>th</sup> respondent/appellant. I think this question dwells upon a supposition of events which had not occurred. It follows that this issue must be resolved against the cross-appellants for that reason. For all the reasons given, the cross-appeal cannot succeed, and it is dismissed.

In conclusion, I must hold that for all I have said in this judgment

there is no merit in the main appeal and the cross-appeals filed against the judgment of the Court below. It follows that the appeal and cross-appeal are hereby dismissed respectively in their entirety. The judgment and orders of the Court below are hereby affirmed. (p. 475 F/477 D)

**B**  
**REPRESENTATION**

Alhaji Abdullahi Ibrahim, SAN with him, Chief M. Ohwovoriole, SAN; T. E. Williams, SAN; O.J.O Oghenejabor; A. Oyeyipo; R. Ogumeso, I. Idris, O. Gbadeyan, B. K. Abu, A. Binjin (Miss), O. A. Owoduni, A.S Omotosho, C K.T. Adedeji (Miss), O.K. Okeowo L.O. Udobang and Mrs. E. R. Igbako for the Appellant.

J. K Gadzama, SAN with him, R. O. Yusuf, M. A. Ebute, Miss J. O. Ibe, M. Oddiri, and N. Amajama for the 1<sup>st</sup> Plaintiff/Respondent/Cross-Appellant.

Chief Afe Babalola, SAN with him O. Okunleye, SAN, , Dr. O. F. Ayeni, O. Amao and R. Awe (Miss) for the 2<sup>nd</sup> Plaintiff/Respondent/Cross-Appellant.

**E**  
**CASES REFERRED TO**

Akibu v. Opaleye (1974) 1 ALL NLR (pt. 2) 344

Atolagbe v. Shorun (1989) 1 NWLR (pt. 2) 360

Awoyale v. Ogunbiyi (1986) 2 NWLR (pt. 24) 626

F Shell B.P Petroleum Dev. Co. Ltd v. Cole (1978) 3 S.C 183

Ogiamen & Anor v. Ogiamen 1967 N.S.C.C. 189

Hambe v. Hueze 2001 A.N.L.R. 1, (2001) 2 KLR (pt 115) 437

Joy v Dom (1999) 9 NWLR (pt. 620) 538 at 547, (1999) 7 KLR (pt 87)

G 2181

Max Ins. Co, Ltd v. Omoniyi (1994) 3 NWLR (pt. 331) 168

Fidelitas Shipping Co. Ltd v. V/O Exportchleb (1996) 1 Q.B 630, 642.

Exquisite Ind. Ltd. v. Owners of M.V. Bacliners (1-3) (1998) 5 NWLR (pt.549) 335, 345

H UBN Ltd v. Odusote Bookstores Ltd (1995) 9 NWLR (pt.421) 558, 578,(1995) 12 KLR 2031

### **STATUTES & RULES REFERRED TO**

Evidence Act, Cap 112 laws of the Federation 1990 ss. 112, 114, 115, 124 of, 225, 226, 111

Rules of the High Court of the Federal Capital Territory O. 35 rr. 1 & 2 Criminal Procedure Code s. 157 (1) & (2) B

Constitution of Nigeria 1999 s. 241 (2) (c)

Area Courts Act, Cap. 477 of the Laws of the Federation of Nigeria, 1990 applicable to the Federal Capital Territory S. 17 (1)

### **LEAD JUDGMENT BY EJIWUNMIJSC** C

The appeal and cross-appeals in this matter arose from the judgment and order of the Court below wherein that Court (Coram, Abdullahi, PCA, Oguntade, Muhammad, Bulkachuwa, Oduyemi JJCA upheld the appeal against the ruling of Yusuf J, delivered on the 24<sup>th</sup> of March 2003 and set it aside. The Court went further to order that the case be heard de novo by another judge of the High Court of the Federal Capital Territory (FCT). D

For a proper appraisal of the issues raised in the said appeals, it is in my view necessary that the facts leading thereto should be reviewed briefly. The matter apparently commenced when the appellants by an originating summons dated 3<sup>rd</sup> February 2003, was taken out at the Gwagwalada Division of the High Court of the FCT against 1<sup>st</sup> – 4<sup>th</sup> respondents for the following reliefs:- E

*“(1) A declaration that by virtue of the combined effect of sections 112, 114, 115 and 124 of the Evidence Act, Cap 112 laws of the Federation 1990 the Record proceeding of the Bwari Upper Area Court of 18/8/1995 in Case No. CR81 – 95 is presumed genuine and sufficient in law for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to rely on same to act against the ex-convict. G*

*2. A declaration that a ex-convict, Chief Onanefe Ibori, by virtue of his conviction and sentence in Case No. CR81-95 is not qualified to carry the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ flag as its Gubernatorial candidate in the 2003 elections within the meaning of section 182 (1) of the 1999 Constitution. H*

3. *An order compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to disqualify and withdraw its flag and certificate by affirmation given in the case, to the ex-convict, Chief James Onanefe Ibori, to contest the 2003 Gubernatorial elections in Delta State on the platform of the Peoples Democratic Party.*

4. *An injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and privies from presenting the name of the ex-convict in this case, Chief James Onanefe Ibori to the independent Electoral Commission as the candidate of the Peoples Democratic Party (PDP) for the 2003 Gubernatorial Elections.*

5. *An injunction restraining the 4<sup>th</sup> defendant from recognizing and accepting the candidature of Chief James Onanefe Ibori, the candidate of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents for the 2003 Gubernatorial Elections in Delta State."*

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent by their counsel filed a memorandum of appearance and also filed a counter affidavit in response to the summons filed on them. The Court then set the motion for hearing on the 10<sup>th</sup> February 2003. On that date, the respondents were not in Court and they did not also defend the summons against them. The learned trial judge then adjourned the matter for ruling later on the same date. But that ruling could not be delivered as Mr. Alex Izinyon SAN, brought an application on behalf of the 5<sup>th</sup> respondent, wherein it was prayed that the 5<sup>th</sup> respondent be joined as defendant in the suit pending before the trial Court. By the said application, the 5<sup>th</sup> defendant also raised a preliminary objection to the originating summons upon the grounds (a) that the applicants has not locus standi to institute the action and (b) that the court lacked jurisdiction to hear the suit. The trial Court in a considered ruling granted the prayer for the joinder of the 5<sup>th</sup> respondent as one of the defendants to the action before it. The trial Court thereafter proceeded with the hearing of the originating summons with which the action was commenced and the preliminary objection raised against it as aforesaid. It was however resolved that the arguments of counsel in respect of the preliminary objection be taken first. After due consideration of the submissions made thereon by learned counsel for the parties, the learned trial

judge struck out the preliminary objection as it lacked any merit.

After this ruling, learned Senior Counsel, Mr. Alex Izinyon, apparently appeared for the 5<sup>th</sup> respondent and led other counsel who had appeared for him. Following his appearance, he then made the submission to the Court, which, inter alia, read thus:-

*“We shall be addressing the Court on the affidavit before the Court. The issue is narrow. By virtue of Order 35 (1) of the Rules of this Court we can identify the issues and address the court upon them. The issue in controversy is that the 5<sup>th</sup> defendant is an ex-convict. The law is that no oral evidence can be given of a judgment or proceeding of Court if reduced to writing except if...”*

In his response to that submission, Mr. Odiri, learned counsel for the plaintiffs said inter alia that “As a legal practitioner of several years standing, I cannot be a party to impersonation by anybody. However I suggest that oral evidence be heard to show if the governor was convicted.” The Court then adjourned further hearing to the 20<sup>th</sup> of March 2003. On that date the trial Court ordered as follows:-

*“I therefore deem it necessary to direct parties to prepare this issues they think germane for the determination of this case. This is pursuant to Order 35 Rule 2”*

Following that order, the trial Court proceeded to hear the submissions of learned counsel who appeared for the parties. In the course of which Exh. A the proceedings of the Upper Area Court bware that convicted one James Onanefe Ibori was admitted in evidence. On the 24<sup>th</sup> day of March 2003, the Court delivered its ruling, and I consider it desirable to set out part of its reasoning for dismissing the claims of the plaintiffs. It reads:-

*“In the record before me the substance which involves the determination of guilty by the Court was neglected and I am convinced that this Court has power to say so. Now that there is no conviction in exhibit A, which is CR/8/95 what is the effect of it on the claims of the plaintiff. The effect is to sweep the claims off the ground. All the claims which I referred to at the beginning of this ruling are to the effect that the 5<sup>th</sup> defendant is an ex-convict by virtue of CR/81/95 decided by Upper Area*

*Court Bwari on 28/9/95 and that under Section 182 (1) E of the 1999 Constitution, he is disqualified from contesting 2003 election to the office of a Governor. That section provides 182 (1) No person shall be qualified to the office of Governor of a State if – (E) within a period of less than ten year before the date of election to the office of Governor of the State he has been convicted and sentenced or an offence involving dishonesty or has been found guilty of the contravention of the code of conduct; on the argument of the learned SAN that 225 of the evidence act was not complied with. I am of the view that argument cannot be pursued seriously. The Certified True Copy of the record of proceedings exhibited in this case substantially complied with the provision. I also agree with the Plaintiff’s counsel that section 226 of the Evidence Act does not apply. I am of the view that the issues decided renders the trial of the claims of the plaintiffs unnecessary. I accordingly dismiss them.”*

As the appellants were dissatisfied with the ruling and orders of the trial Court, they appealed to the Court of Appeal, Abuja Division against the said ruling and orders of the trial Court. Pursuant thereto, the Court of Appeal granted leave for the accelerated hearing of the Court upon the bundle of documents prepared by them. The Court in granting their prayers apparently bore in mind their (the appellants) plea that the appeal be heard before 19/4/03 when elections to the office of Governor would take place. Indeed, the Court below also set the hearing of the appeal for the 9<sup>th</sup> of April 2003. Though the appeal was not heard as scheduled, it was further adjourned from that date to a day mutually convenient to the Court and learned counsel appearing for the parties. Eventually, the appeal before that Court was heard and judgment was delivered on the 16<sup>th</sup> day of April 2003. By the judgment, the Court below allowed the plaintiff’s appeal and set aside the ruling of Yusuf J. It is I think useful in the circumstances to quote verbatim, in part reasons to the conclusion reached by the Court below, per the judgment of Oguntade JCA and which reads:-

“The accused in Exhibit A pleaded guilty and the Court thereafter proceeded to impose a sentence. The only conclusion to be arrived at on that hypothesis is that the Upper Area Court did not observe the essential pre-requisites laid down under Section 157 (1) of the CPC (i.e. Criminal

*Procedure Code) before proceeding to convict the accused. It is in my view clearly unarguable to say that there was no conviction may be deficient and liable to be set aside by an appellate Court upon a proper Appeal against the judgment of the Upper Area Court; but it is nonetheless still a conviction. I am therefore unable to agree with the conclusion of the lower Court that no conviction was recorded. That approach smacks in my view of undue legalism and irrelevant hair-splitting in a case where the purpose of tendering Exhibit A was merely to show that the accused therein was convicted. It was not tendered to show that the Upper Area Court erred in its decision.*

It was further ordered that the case be heard de novo by another judge of the High Court of the Federal Capital Territory, Abuja.

As the plaintiff/appellants and the 5<sup>th</sup> defendant were dissatisfied with the judgment and orders made by the Court below, both parties have further appealed to this Court as appellants and cross-appellants respectively. Pursuant thereto, the 5<sup>th</sup> defendant filed eventually an Amended Notice of Appeal dated the 1<sup>st</sup> day of August 2003 based upon the following grounds:-

“(1) *The Court of Appeal erred in law in failing to focus its attention on the sole issue which was actually tried by the High Court with the agreement of the parties.*

Particulars of Error

(a) *At the trial in the High Court, that court, with the agreement of the parties decided to try (as a preliminary point) the sole issue of whether or not the proceedings before the Upper Area Court, Bwari, dated 28.9.95 (Exhibit “A”) is proof of the conviction of any person.*

(b) *I was further decided by the said High Court with the agreement of the parties that if, but only if the answer to the aforementioned sole issue is in the affirmative, then the High Court will proceed to try the issue whether the person convicted in Exhibit “A” was indeed the 5<sup>th</sup> defendant (now appellant) herein.*

(c) *There was no appeal by the plaintiffs or any of the other parties interested in this suit from the decision of the high court referred to in paragraphs (a) and (b) hereof; nor was there any complaint whatsoever*

by any of the parties against such decisions in the briefs before the court of appeal.

(d) In the premises the Court of Appeal ought not (as they in fact did) to have considered and decided the issue of the admissibility in evidence of Exhibit “A” in so far as that document is relevant for the purpose of deciding –

(i) whether or not the 5<sup>th</sup> defendant (now appellant) was the person in fact convicted in the proceeding before the Upper Area Court, Bwari on 28.9.95;

Or

(ii) to comment upon and to criticize (as they in fact did) the course pursued by the High Court and the parties in agreeing to try the sole issue as a preliminary issue.

(2) Further and in the alternative, the Court below erred in law in failing to observe that its comments upon and criticism of the course pursued by the High Court (with the agreement of the parties) were unjustified and ought not to have been made.

#### Particulars of Error

(a) Paragraph (a) and (b) of Ground (1) are hereby repeated.

(b) In the premises the aforementioned comments and criticism are unjustified on the ground that they are irrelevant and contradictory to the trial of the sole issue before the High Court.

(3) The Court of Appeal erred in law when it held as follows:

*It is in my view clearly unarguable to say that there was no conviction. The procedure leading to the conviction may be deficient and liable to be set aside by an appellate court upon a proper appeal against the judgment of the Upper Area Court; but it is nonetheless still a conviction. I am therefore unable to agree with the conclusion of the lower court that no conviction was recorded. That approach smacks in my view of undue legalism and irrelevant hair-splitting in a case where the purpose of tendering exhibit “A” was merely to show that the accused therein was convicted. It was not tendered to show that the Upper Area Court erred in its decision.*

#### Particulars of Error



(a) Exhibit “A” was tendered (as the Court of Appeal rightly observed) “merely to show that the accused therein was convicted”.

(b) The said Exhibit “A” would be relevant to the proof of such conviction if, but only if It was admissible in evidence for the purpose of the trial of the sole issue which was tried by the High Court. B

(c) The said Exhibit “A” was inadmissible in evidence in view of the requirements of sections 111 (1) and 225 (1) of the Evidence Act.

(d) Accordingly by reason of well established rules of law including the provision contained in Section 53 of the Evidence Act, the 5<sup>th</sup> defendant is entitled to show that the judgment or order or purported judgment or order of conviction in the said Exhibit “A” was inadmissible in evidence and if admissible was delivered by a court without jurisdiction. C

(e) In the premises the purported judgment or order of conviction in Exhibit “A” was a nullity and the said purported judgment or order has no probative force in law. In the alternative the said exhibit was inadmissible in evidence and proved nothing. D

4. The Court of Appeal erred in law in holding as follows:- E

Parties and the court, it would seem did not bear in mind the provisions of Section 225 (2). If they did, they would have known that since the 5<sup>th</sup> respondent had by his counter – claim and counter – affidavit denied that he was the person convicted vide Exhibit “A” the said Exhibit “A” ought not to have been treated as evidence at that stage. F

#### Particulars of Error

(a) The passage cited from the judgment of the Court of Appeal overlooks the fact the scope of the trial in the court below was limited to trial of the sole issue. G

(b) Exhibit “A” was admissible (if any at all) for the purpose of the trial of the sole issue.

(c) Even if Exhibit “A” was Admissible in evidence, the provisions of Section 225 of the Evidence Act may no doubt render it inadmissible for the purpose of proving that the 5<sup>th</sup> defendant (now appellant) was indeed the person convicted thereunder, but they are clearly applicable for the purpose of deciding whether or not Exhibit “A” meets the H

statutory requirements for proving conviction in civil proceedings against the person named therein.

(d) The issue whether the 5<sup>th</sup> defendant (now appellant) in indeed the person named in Exhibit “A” is not taken as established during the trial of the sole issue.

5. The Court of Appeal erred in law in failing to decide that the Upper Area Court, Bwari has no jurisdiction to convict any person under Section 57 (1) of the Criminal Procedure Code and also in holding as follows:

*In the instant case, it was the contention of the 5<sup>th</sup> respondent before the lower court and this court that the Upper Area Court Bwari had not jurisdiction in 1995 to try the accused brought before it in exhibit (sic) of the offences alleged. The substance of the contention of the 5<sup>th</sup> respondent was/is that the Upper Area Court, Bwari in the course of exercising its undoubted jurisdiction made some technical errors in that it did not comply with Section 157 (1) of the criminal Procedure Code. When a court has jurisdiction to entertain a matter, it by implication has jurisdiction to make mistakes or errors of law in the exercise of such jurisdiction. The remedy available to any party to the suit who is damaged or adversely affected by the error is to bring an appeal that the errors be corrected.*

Particulars of Error

(a) At page 19 of the brief of the 5<sup>th</sup> defendant (now appellant) in the court below the said defendant in the last paragraph of that page urged the Court of Appeal to hold the Exhibit ‘A’ must be treated as proceedings held without jurisdiction and must be held to be void and without any probative value.

(b) Furthermore at pp. 15-16 of the said brief, it was further argued on behalf of the 5<sup>th</sup> defendant/appellant that by reason of the provision of Section 157 (3) of the Criminal procedure Code the Upper Area Court is expressly prohibited from exercising any powers to convict an accused person under Section 157 (1) unless an Order under Section 157 (2) has been made in respect of that grade or class of court.

(c) No Order was in force at all material times in respect of any

grade or class of area court under Section 157 (2).

(d) *In the premises the law is very clear that the Upper Area Court has no jurisdiction to convict and accused person under Section 157 (1) of the Criminal Procedure Code and the Court below ought to have so held' accordingly Exhibit "A" has no probative force.*" B

Similarly, the plaintiffs as cross-appellants with the leave of the Court also filed against the judgment of the Court below 16 grounds of appeal, which, without their particulars, read thus:-

"1. The learned Justices of the Courts of Appeal erred in law when they held that the issue settled by parties and court for determination after the close of pleadings was a preliminary issue. C

2. The Court of Appeal misconceived the fact when it held that the issue settled for determination was a preliminary issue and parties have reserved other issues for determination at a later state. D

3. The learned Justices of the Court of Appeal erred in law when they ordered that the issue of the identity of the person convicted in Exhibit "A" in this case be tried again by another judge of the High Court of Federal Capital Territory, and thereby occasion miscarriage of Justice. E

4. The learned Justices of the Court of Appeal erred in law in allowing the respondent to raise the issue of jurisdiction of the trial Upper Area Court in this case when necessary procedure was not followed. F

5. The learned Justices of the Court of Appeal erred in law in entertaining and deciding issues arising from the respondent's cross-appeal when the respondent did not file brief of argument on the cross-appeal.

6. The learned Justices of the Court of Appeal erred in Law and misconstrued the purpose of tendering of Exhibit "A" when they held as follows: G

The purpose of tendering Exhibit "A" was merely to show that the accused therein was convicted. H

7. The learned Justices of the Court of Appeal erred in law and misconstrued the argument of the Senior counsel for the 5<sup>th</sup> respondent before the trial Court when they held as follows:-

*The argument of Chief Izinyon S.A.N. substance is that the procedure shown to have been followed in Exhibit “A” was a departure from section 157 of the Criminal Procedure Code and that therefore nobody could be said to have been convicted under Exhibit “A”.*

B            8. *The learned Justices of the Court of Appeal erred in Law and breached the appellants’ right to fair hearing and when they decided the issue of non compliance with Section 225 (2) of the Evidence Act against the appellant suo motu and without hearing the parties.*

C            9. *The learned Justices of the Court of Appeal erred in law when they held that:*  
*Exhibit “A” in the manner it was pleaded by the plaintiffs was only the evidence of conviction and thereby failed to give the correct considerations to the issues regarding Exhibit “A”.*

D            10. *The learned Justices of the Court of Appeal erred in law in holding that the Upper Area Court which decided the case in Exhibit “A” did not comply with the provisions of S. 157 (i) of the Criminal Procedure Code without stating the non compliance and when there was*  
E *in fact strict compliance with the Section.*

              11. *The learned Justices of the Court of Appeal erred in law when they held as follow:*  
*The appellants in their approach to this appeal laboured under the notion that once they succeed in their appeal, their success would lead to the conclusion that the 5<sup>th</sup> respondent was an ex-convict who could not be allowed to contest for the office of Governor of Delta State pursuant to Section 182 (1) (e) of the 1999 Constitution, That obviously must be a false notion given the procedure followed by the lower court to the determination of the appellants, suit.*  
G

              12. *The Court of Appeal erred in law when it held that the procedure adopted by the lower court was an infraction of Section 225 (2) of the Evidence Act.*

H            13. *The Court of Appeal erred in law when it held as follows: It seems to me unnecessary answering the question whether or not a Native Court is bound by the Criminal Procedure Code.*

              14. *The learned Justices of the Court of appeal erred in law when*

*it held that the case must be sent back to the lower court to be heard de novo before another judge of the High Court.*

15. *The learned Justices of the Court of appeal erred in law when they held as follows.*

*Parties ought to file fresh pleadings where it will be clearly made manifest the issues for adjudication by the court. This is necessary even the process filed by appellants before the lower court and captioned “FACTS IN SUPPORT OF THE APPLICATION” should have been considered irregular by the lower court as it was not an affidavit as should be the case where a suit is commenced by originating summons.*

16. *The Court of Appeal erred in law when it held as follows: Clearly therefore the approach of parties to this case before the lower court was to determine first whether or not Exhibit “A” could be evidence of conviction. It was not directed at showing in the first instance that the 5<sup>th</sup> defendant was the person convicted. Parties would appear to have reserved that for sometime later in the proceedings if the lower court decided the Exhibit “A” was good enough to be relied upon as evidence of convictions.*

Pursuant to the Rules of the Court, the 5<sup>th</sup> defendant/appellant filed his brief in support of his appeal to which the plaintiff/respondents filed and served their respondents’ brief. Also the plaintiff as cross-appellant filed his brief in support of that appeal to which the 5<sup>th</sup> defendant/appellant filed a reply brief. The only other party to this appeal namely, the 1<sup>st</sup> plaintiff, who had filed a cross-appeal against the judgment of the Court of Appeal also filed and served his brief pursuant to his appeal. At the hearing, learned counsel who represented each of the parties adopted and placed reliance on their respective briefs. Each of them also addressed the court in elaboration of the issue argued in their respective brief. In the determination of the merits of this appeal, the contention made for the 5<sup>th</sup> defendant/appellant will be considered first. The issues or questions set down for the determination of the appeal by the appellant are as follows:—

- “(i) *What was the sole issue tried by the High Court in this case.*
- (ii) *In the light of the answer to Question (i) –*

*(a) Was it open to the Court of Appeal to comment upon and to criticize the course pursued by the High Court and the parties in agreeing to try the sole issue as a preliminary issue?*

*and*

B *(b) In any event were the comments and criticism of the Court of Appeal justified?*

*(iii) Whether Exhibit “A” is admissible in evidence for the purpose of the determination of the sole issue before the High Court.*

C *(iv) Whether the proceedings in Exhibit “A” are valid and remain valid unless they are set aside on appeal (as the Court of Appeal has decided) or whether they are void for want of jurisdiction (as the Appellant herein contends).”*

D The plaintiff/respondent for their own part formulated the following as the proper issues for the determination of the appeal:-

*“(i) Whether having regard to the proceedings before the trial court, the sole issue tried by the High Court was not the only issue settled by the parties for the trial court to consider in the determination of the suit and whether it was not opened to the Court of Appeal to come to the conclusion that the appellant in this case was an ex-convict. Grounds 1 and 2.*

F *(ii) Whether Exhibit “A” was admissible for the determination of the issue before the Court. Grounds 3 and 4.*

*(iii) Whether or not the jurisdiction of the Upper Area Court to try and convict the accused in Exhibit “A” is a competent issue in this appeal and if so, whether the Upper Area Court which convicted the accused in Exhibit “A” had no jurisdiction to do so. Ground 5”.*

G However, I must consider first whether issues as framed for the 5<sup>th</sup> defendant/appellant by his learned counsel, Chief F.R.A. Williams, SAN were validly raised having regard to the preliminary objection raised against them in the brief filed for the plaintiff/respondents by their learned counsel, H Chief Afe Babalola, SAN. In that brief, it is contended for them that in the formulation of the questions for the determination of the appeal and the argument proffered thereon in the appellants’ brief, no attempt was made’ to relate any of the said questions for the determination of the appeal with

any of the grounds of appeal filed against the judgment of the Court below. It is upon that ground that it is argued for the respondents that the appellants' brief is bad for non-compliance with the law and practice which has been laid down in several decisions of this Court. On this point, reference was made to the following decisions: Exquisite Ind. Ltd. v. B Owners of M.V. Bacliners (1-3) (1998) 5 NWLR (pt.549) 335, 345; UBN Ltd v. Odusote Bookstores Ltd (1995) 9 NWLR (pt.421) 558, 578; Busari v. Oseni (1992) 4 NWLR (pt.237) 557, 580; Momodu v. Momoh (1991) 1 NWLR (pt. 169) 508; Oshinupebi v Saibu (1982) 7 S.C. 104; Macauley v. NAL Merchant Bank Ltd (1990) 4 NWLR (pt. 144) 283, 321. C

And with regard particularly to question No. 1, it is the submission of learned counsel for the plaintiff/respondents that it is merely a question and no issue was raised thereby. It is further submitted that an issue in an appeal is that which if decided in favour of the plaintiff will give a right to the relief claimed, or would but for some other consideration in itself give a right to relief. If on the other hand, it is decided in favour of the defendant, will in itself be a defence. For this proposition, he cited the following authorities:- Ap Ltd v. Owodunni (1991) 8 NWLR (pt.210) 391, 410; Ugo v. Obiekwe (1989) 1 NWLR (pt. 99) 566, 581 and Fidelitas Shipping Co. Ltd v. V/O Exportchleb (1996) 1 Q.B 630, 642. It is upon the argument advanced above that learned Senior Advocate has asked this Court to strike out question No. 1 raised for the appellant in the 5<sup>th</sup> defendant/appellant's brief in its entirety. D E F

As a number of cases have been referred to by the learned Senior Advocate on behalf of the appellant in support of this preliminary objection, I will now examine some of them to determine whether there is any merit in his objection to question No. 1 But before doing so, it is necessary to restate the complaint of the plaintiffs/respondents against the question. It seems to me manifest from the argument proffered that the complaint does appear to be that question No.1 as raised did not raise an issue but a mere question. G H

Now, what then could be described as a proper issue? In Ugo v, Obiekwe (1989) 1 NWLR (pt.99) 566, Nnaemeka –Agu, JSC borrowed gratefully the words of Buckley, LJ in Howell v. Dering & Ors (1915) 1

K.B 54 at p. 62 for the meaning of issue, which read thus:-

*“The word can be used in more than one sense. It may be said that every disputed question of fact is in issue. It is in a sense, that is to say, it is in dispute. But every question of fact which is 'in issue', and which and which in jury has to decide is not necessarily “an issue” within the meaning of the rule.”*

Later in the same judgment, Buckley LJ also said.

*“An issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief, or would, but for some other consideration, in itself give a right to relief; and if decided in favour of the defendant will in itself be a defence.”*

His Lordship, Nnaemeka - Agu, JSC then applied this principle in that case when he said thus:-

*“So it is in an appellate brief, mutates mutanda. It is not every fact in dispute or indeed every ground of appeal that raises an issue for determination. While sometimes one such fact or ground may raise an issue, more often than not it takes a combination of such facts or grounds to raise an issue. The acid test is whether the legal consequences of that ground or fact, or a combination of those grounds or facts as framed by the appellant, if decided in favour of the appellant, will result in a verdict in his favour. Lord Diplock put it in Fidelitas Shipping Co. Ltd v. V/O Exportchleb (1966) 1 Q.B. 630 at p. 642 thus: -*

*“But while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an issue.”*

See also African Petroleum Ltd. v Owodunni (1991) 8 NWLR (pt. 210) 391 at 410. **It must therefore be accepted that for an appellant or cross-appellant to have either facts or point of law resolved in its favour, it is necessary to raise issue or issues in his brief to reflect properly what facts or law are in dispute in the appeal.**

**Having regard to what I have said above, and having also duly considered question No.1 as posed in the appellant’s brief, it is my humble view that “question” has not raised an issue for the determination of this appeal. It follows that I must uphold the pre-**



**liminary objection raised against it by the learned Senior Advocate for the plaintiff/respondents. Thus question No. 1 is therefore struck out from the appellant's brief accordingly.** As issue (ii) (a & b) can stand by itself, as it is an "issue" properly raised, it will be considered with the other issues raised for the appellant. Though issue (i) in the defendant/appellant's brief is now struck out, issue (i) in the plaintiff/respondent's brief, which raises directly the question raised in the issue (i) of the 5<sup>th</sup> defendant/appellant that has been struck out, I will now consider the merit of that issue as raised in the plaintiffs/respondents brief. In respect of this issue, it is manifest from a careful reading of the briefs filed for the 5<sup>th</sup> defendant/appellant and the plaintiffs/respondents that they have taken opposite positions with regard to the question raised by this issue. For the appellant, it is contended that while though the sole issue agreed between the parties was, whether the record of proceedings of the Bwari Upper Area Court, "Exhibit A" was a conviction of the person tried in that proceedings, it is further argued that if the said proceedings was a record of conviction, then it became open to the trial Court to hear evidence as to whether it was the 5<sup>th</sup> defendant/appellant who was convicted thereby.

The contrary position taken for the plaintiffs/respondents however appears to be that the sole issue was not limited to the determination of whether "Exhibit A" was a conviction, but argued that it was also meant to establish that it was the 5<sup>th</sup> defendant/appellant that was convicted by reason of "Exhibit A". In support of that contention, the learned Senior Advocate for the plaintiffs/respondents itemized in his brief the events that led to the agreement that subsequently governed the hearing of the action at the High Court. Though I have earlier in this judgment reviewed the facts of the case, I will here reproduce the events that happened as itemized. They read as follows:-

- "1. That parties had joined issues in their affidavit and counter-affidavit in the originating summons.*
- 2. That the Court observed that the facts and claims are irreconcilable and converted the affidavits to pleadings with liberty to the parties to file further pleadings.*

3. *That the parties filed further pleadings and the case was fixed for trial.*

4. *That on the date fixed for trials, the parties attended the Court. The plaintiffs had their witnesses in court and applied to call the witnesses.*

5. *That it was thereafter that appellant's senior counsel applied under Order 35 of the Rules of the Court for settlement of issue.*

6. *That it was in furtherance of the application for settlement of issue under Order 35 that the appellant's senior counsel formulated the sole issue for determination and resisted the calling for any evidence".*

Learned Senior Advocate therefore argued that having regard to the facts set out above, it was Mr. S.A. Izinyon, learned Senior Advocate for the 5<sup>th</sup> defendant/appellant who on his own initiative asked for the settlement of issue under Order 35 of the Rules of the High Court of the Federal Capital Territory. And that furthermore, it was the counsel who formulated the alleged sole issue. For that reason, it is the submission of counsel that the appellant cannot be heard to say that the sole issue he formulated, upon which the trial Court decided the action, allowed for the examination of witnesses to determine whether it was the appellant who was convicted by reason of "Exhibit A". It is the further submission of counsel for the plaintiffs/respondents that counsel for the 5<sup>th</sup> defendant/appellant was only concerned with the interpretation to be given to "Exhibit A", and had no quarrel with the identity of who was convicted as James Onanefe Ibori. And the High Court having found that there was conviction of James Onanefe Ibori, the 5<sup>th</sup> defendant/appellant, there was no further issue before the High Court to adjudicate upon. It was also not competent for the Court below to raise a non-issue and ask that the case be sent back for retrial de novo.

In the course of his argument, learned Senior Advocate in the plaintiffs/respondents brief, made reference to the case of Max Ins. Co. Ltd v. Omoniyi (1994) 3 NWLR (pt. 331) 168, for the proposition that where counsel as in this case has agreed upon an issue to settle the action, he is taken to have abandoned all other issues cognate to the case. He also referred to Akanbi v. Alao (1989) 3 NWLR (pt. 108) 118, 140,

143 in support of his submission, that a party cannot by his counsel adopt a procedure, which was open to him in a trial, and later renege on that procedure when it is found that another procedure could have served his cause better. It is upon this argument that parties wished to have the controversy between them resolved. It is of course clear that in order to do so, it is necessary to have recourse to the printed record of the pertinent proceedings at the High Court and that of the Court of Appeal. B

Now, there can be no doubt that the question with regard to the question of issues was raised when at pages 116-118 of the Record, learned counsel for the 5<sup>th</sup> defendant/appellant, Mr. S.A Izinyon SAN C said to the Court as follows:

*"We shall be addressing the Court on the affidavit before the Court. The issue is narrow. By virtue of Order 35 (i) of the Rules of this Court we can identify the issues and address the Court upon them. The issue in controversy is that the 5<sup>th</sup> defendant is an ex-convict. The law is that no oral evidence can be given of a judgment or proceeding of court if reduced to writing except if found intimidating, neglect or want of due execution are alleged."* E

To this submission, learned counsel forth plaintiffs/respondents, Mr. Odiri replied thus:

*"I refer to counter-affidavit filed which we just received this morning. We intend to go through the averments before we respond. As a legal practitioner of several years standing, I cannot be a party to impersonation by anybody. However I suggest that oral evidence be had to show if the governor was convicted."* F

And the printed record shows that the Court said,

*"This is taken care of by the order of the Court."* G

The matter was thereafter adjourned to the 20-3-03. On that day, the Court said after hearing from counsel then appearing:

*"Action stood down for 30 minutes to enable counsel to the plaintiffs appear. We no longer have time in this case. I therefore deem it necessary to direct parties to prepare the issues they think germane to the determination of this case. This is pursuant to Order 35 Rule 2".* H

The hearing was thereafter stood down for counsel for the plain-

tiffs to appear. When he later appeared, and had apologized to the Court, learned counsel for the 5<sup>th</sup> defendant/appellant Mr. S.A. Izinyon, SAN addressed the Court thus:-

“This Court has requested the parties to identify the issues involved in this trial and raised questions for the determination of the case. I submit that the Court can so direct under Order 35 (i) of the rules of Court. There is very narrow issue of law for determination of the Court. It is whether anybody has been convicted at all based on Exhibit A. Which is the case in Upper Area Court in CR/8/95. This is the foundation of the plaintiffs case wherein it is said that by virtue of that record the 5<sup>th</sup> defendant is an ex-convict. By that record is there anybody convicted at all?” (Underlining mine)

Now, it is evident from the passage above quoted that though learned senior counsel for the 5<sup>th</sup> defendant/appellant still maintained that the sole issue for determination is whether by Exhibit A, a conviction was recorded, yet it seems also clear that while he recognized that the case of the plaintiffs/respondents was that the 5<sup>th</sup> defendant/appellant was the person convicted by Exhibit A, he did not admit that fact in his submission. It is also clear from the printed record that though learned counsel for the plaintiffs/respondents did not differ that Exhibit A be considered by the Court, he did indicate that he would want to call witnesses and produce the record book. And for that purpose, he asked for an adjournment for the next day. That request was however denied to counsel by the Court at that stage of the proceedings. The Court then allowed learned Senior Advocate for the 5<sup>th</sup> defendant to address the Court. As learned counsel for the plaintiffs/respondents maintained his stand that he be allowed to call witnesses, he did not address the Court. However Mr. Bala. Kabir, of counsel for the 4<sup>th</sup> defendant addressed the Court. It ought to be noted that he opened his address by saying thus:-

“I adopt the issue for address and in fact which learned counsel has addressed upon. That is whether there is a conviction of any person based on the exhibit A by the Upper Area Court Bwari in charge No. CR/81/95....”

It must also be noted that the Court later granted to Mr. Odiri of

counsel for the plaintiffs/respondents his request for an adjournment. And on the adjourned date, which was 21/3/03, he began his submission by making the following observation:

*“There was a security problem here yesterday and so I left late. The originals of the materials I intend to use are not here but I would get them to the Court later...”* B

The in the course of his submission, the Court intervened to say thus:

*“The issue is for we (sic) to address on whether there is any conviction based on the originating summons. We must limit ourselves to that. Whether the 5<sup>th</sup> defendant is the one convicted or not is a question of fact to be proved”.* C

It is manifest from the above quoted passage from the proceedings at the High Court that the Court duly appreciated and clearly reflected the basis upon which the trial proceeded before him. For the purpose of this issue (i) I need not refer to the conclusion reached by the ruling of the learned trial judge, but would now only consider what the Court below said in respect of this aspect of the appeal. In this respect, may I refer to the lead judgment delivered by Oguntade JCA with which (Abdullahi PCA, Mohammed, Bulkachuwa and Oduyemi, JJCA) concurred, in my view correctly, captured the issue as agreed upon when he said thus at page 442 of the Record of Proceedings:\_ D E F

*“The observation made by the court on 21/03/03 is poignant to the purpose why parties addressed the court on the issue they did. The court said at page 124:*

*“The issue is for me to address on whether there is any conviction based on the originating summons. We must limit ourselves to that. Whether the 5<sup>th</sup> defendant is the one convicted or not is a question of fact to be proved”* Clearly therefore the approach of parties to this case before the lower court was to determine first whether or not exhibit “A” could be evidence of conviction. It was not directed at showing in the first instance that the 5<sup>th</sup> defendant was the person convicted. Parties would appear to have reserved that for sometimes later in the proceedings if the lower court decided that Exhibit “A” was good enough to be relied upon G H

as evidence of conviction. If for instance the lower court had been able to decide that exhibit "A" was valid as evidence of conviction, the lower court would on its own showing have called for oral evidence to show that the 5<sup>th</sup> respondent was the person convicted". (Underlining mine)

B From the above passages culled from the judgment of the Court below, it is clear in my humble view, that that Court correctly adjudged what transpired between the Court below and the learned counsel who appeared when his Lordship said thus at pp. 451 – 451

C "The appellants in their approach to this appeal laboured under the notion that once they succeed in their appeal, their success would lead to the conclusion that the 5<sup>th</sup> respondent was an ex-convict who could not be allowed to contest for the office of Governor of Delta State pursuant to Section 182 (1) (e) of the 1999 Constitution. That obviously  
D must be a false notion given the procedure followed by the lower court to the determination of the appellants' suit.

It is patent from the record of proceedings that parties with the concurrence of the lower court had merely isolated an issue from the  
E other possible issues in the case for determination. It was thought that if the lower court decided that exhibit "A" was invalid as evidence of conviction, the need to call evidence would not arise; and that if the same court decided that the said exhibit was a valid evidence of conviction,  
F the need would then arise to call evidence to show that the person who was tried and convicted in exhibit "A" was the 5<sup>th</sup> respondent. There are clear indications in the record of proceedings that this was the pre-occupation of the court and parties in the proceedings out of which this appeal arose. Indeed in the concluding part of the ruling of  
G the lower court appealed against, the court said that it was the decision it made on the preliminary issue that removed the necessity to pursue the appellants' other claims".

I therefore would for the above reasons uphold issue No.1 in  
H favour of the 5<sup>th</sup> defendant/appellant. The subsidiary question raised by the plaintiffs/respondents in this issue No. 1 must fail. And having held that the sole issue was whether Exhibit "A" was a conviction of the person mentioned therein, it was open to the Court of

**Appeal having held that Exhibit “A” on the face of it evidenced the conviction of the person named therein to order that the matter be heard by the High Court, Abuja to determine whether the 5<sup>th</sup> defendant/appellant was the person convicted.**

I now will consider the question raised in respect of issue (ii) (a), B the appellant questions whether it was open to the Court of Appeal to comment upon and to criticize the course pursued by the High Court and the parties in agreeing to try the sole issue as a preliminary issue. The appellant in support of this compliant attacked the conduct of the case on C appeal upon two main points. The first point that was made is that, as the decision to hear the matter on a sole issue was made by agreement of all the parties concerned, no appeal can lie from such a decision except with leave of the High Court. See Sec 241 (2) (c) of the 1999 Constitution. On the second point, it is contended that it is well settled by a plethora of D authorities that the Court of Appeal is bound to give its decision on the arguments of the parties based on the grounds of appeal. Furthermore, it is further argued that it is well settled by judicial authorities that where the Court of Appeal in the exercise of its decision decides to take a point E suo motu, the party must be given an opportunity to address it on that point before it makes decision thereon. In support of the submissions so made, reliance was placed on several decisions of this Court some of which would considered later in this judgment. F

There is no doubt that learned Senior Advocate is right in the sub- G mission made that, should an appellate court in the exercise of its discretionary power decide to take a point suo motu in the course of determining a matter, the Court is duty bound to invite the parties to the action must first be given an opportunity of addressing it in respect of the point. H If the Court did not bring the point to the attention of counsel before deciding the matter, then appeal against such a decision is liable to be allowed by an appellate Court. It is pertinent to refer to the decision of this Court in Olusanya v. Olusanya (1983) N.S.C.C. 97. In that case, this Court after a close examination of the judgment of the Federal Court of Appeal was satisfied that the Court below did not at all consider the compliments in grounds properly filed before it but instead dealt with

extraneous matters proceedings before it. For this reason in the lead judgment of Uwais JSC (as he then was) then made the following very illustrative statement on this point at page 102. It reads:-

"It is abundantly clear from the judgment of the Federal Court of Appeal that these extraneous matters influenced the learned Justices in arriving at the decision to allow the appeal. This Court has said on a number of occasions that although an appeal court is entitled, in its discretion, to take points suo motu if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only. Where the point are so taken the parties must be given the opportunity to address the appeal court before decision on the points is made by the Appeal Court. See Western steel Works v. Iron & Steel Works (1987) 1 NWLR 284; Olusanya v. Olusanya Vol. 14 (1983) NSCC 97; Iyayi v. Eyigebe Vol. 18 (1987) NSCC, 1035; Kuti & Anor v. Jibowu & Anor (1972) 1 ALL NLR (pt.2) 180 at 192; Ajao v. Ashiru (1973) 1 ALL NLR (pt. 11) 5 at 63; Alando v. Lakunmi (1974) 1 ALL NLR (pt.1) 168 at 178; Kuti v. Balogun (1978) LRN 353 at 357.

Now, it must be pointed out that a careful reading of the passage, and the other authorities on this point is that the decision of the Court below would be faulted if it was shown that the Court was influenced by the extraneous matter, which counsel for the parties were not given the opportunity to address the Court before the Court arrived at its decision. **It follows perforce, that where counsel would wish to have a decision of the Court below set aside because it considered extraneous matters, it must be shown that the said extraneous matters influenced the decision of the Court. It is certainly not enough to seek redress from this Court merely because matters which were strictly not before the Court below were considered in the course of the judgment of that Court.** In the instant case, learned Senior Advocate considered that the Court below, per the judgment of Oguntade JCA erred in making critical comments about the procedure adopted in the High Court in the course of the trial of this case in that Court. **While it is entirely within the rights of learned Senior Advocate to criticize the judgment of the Court, it would have been far more beneficial**



if he had gone on to show how the comments made by the learned Justice in his judgment influenced him in the decision reached by him. It is manifest that nothing of this kind was brought to our attention in this appeal. It follows that I must hold that it was well within the rights of the Court below to have given its own appraisal of the procedure followed by the High Court in the course of the trial of the case. B

I would therefore resolve this issue against the 5<sup>th</sup> defendant/appellant. It being also my view that if leave was not obtained to appeal to the Court of Appeal as alleged that point should have been taken at the relevant time in the Court below. With profound respect to the learned Senior Advocate, it is far too late for that point to be taken in this Court. C

The next issue that calls for consideration is issue (iii). By it, the appellant is asking whether Exhibit "A" is admissible in evidence for the purpose of the determination of the sole issue before the High Court. Now the argument proffered for the appellant in support of that issue runs thus: the appellant concedes it that the Court below had properly recognized that the sole issue before the High Court was, whether or not the person named as the accused was convicted of the offences mentioned in Exhibit "A" but excluding the question whether the person so convicted was the appellant. He also conceded it that the Court below also fully appreciated the differing positions of the parties in the action. F This is because in its lead judgment at p.440, the Court below held that the case of the plaintiffs/respondents was that it was the appellant who was convicted vide Exhibit "A" by the Bwari Upper Area Court, whilst the case of the appellant was that he never appeared before the said Bwari Upper Area Court and was never tried by the said Court. But he G now contends that the plaintiffs/respondents in tendering Exhibit "A" enabled it to prove that the appellant was indeed the person tried by the Bwari Upper Area Court. This it is claimed they wished to establish by H Exhibit "A", the conviction of an accused person named James Onanefe Ibori but not including the question whether the accused person was indeed he appellant in this action. However the main contention of the

appellant is that Exhibit “A” is inadmissible in evidence as it is in breach of sections 111 (1) or section 225 (4) of the Evidence Act. By reason of this, it is argued for the appellant that the case of the plaintiff must fail in respect of this issue. In support of this submission, the case of Okulade

B v. Alade (1976) ALL NLR 56

Responding to that contention of the appellant, learned Senior Advocate for the respondents began his submission by saying that the complaint of the appellant lacks merit. In the first place, he argued that the appellant did not raise the issue of admissibility of Exhibit “A” in the Court below as he is now doing. The position taken by the appellant in that regard that Exhibit “A” did not meet the requirements of a certificate because (1) it was not signed by the Clerk of Court or scribe of the Court in whose custody is the record of the said conviction, and (2) no one D was recorded as having been convicted on the face of Exhibit “A”. He further argued that the inadmissibility of Exhibit “A” under S. 255 (1) of the Evidence Act as argued in the appeal was not so raised in the Court below. Neither was non-compliance with S.111 (1) mentioned in that E Court. He therefore argues that the issue as raised is not only a fresh issue, but also contends that the leave of this Court was not sought and obtained to argue the issue. In any event, he argued that the issue of absence of jurisdiction in the Upper Area Court to hear and determine the case depicted in Exhibit “A” was not a competent issue before the Court F below. In support of all his arguments in response to this issue, he called in aid the decision of this Court in *Joy v Dom* (1999) 9 NWLR (pt. 620) 538 at 547.

G From the arguments advanced by learned counsel for the parties in respect of this issue, it is manifest that they have as expected looked at the question from different angles. But what this Court has to be concerned with is, whether the Court below was right to have held thus:-

H *“In the instant case, it was not the contention of the 5<sup>th</sup> respondent before the lower court and this Court that the Upper Area Court, Bwari had no jurisdiction in 1995 to try the accused brought before it in exhibit (sic) of the offences alleged. The substance of the contention of the 5<sup>th</sup> respondent was/is that the Upper Area Court, Bwari in the course*

*of exercising its undoubted jurisdiction made some technical errors in that it did not comply with section 157 (1) of the Criminal Procedure Code...*

Now, although the Court below went on to say affirmatively that there was no appeal filed against the admission of Exhibit “A” by either party, the question that an Appeal Court has to consider is, whether that finding particularly where the Court below said that is was not contention of the 5<sup>th</sup> defendant/appellant before that trial Court and the Court below that the Bwari Upper Area Court had no jurisdiction in 1995 to try the accused for the offences alleged therein brought before it is Exhibit “A”. I have before now reviewed the evidence of what transpired before Exhibit “A” was admitted by the trial Court in order to determine what is now generally referred to in this appeal as the “sole issue” raised before the trial Court. I therefore do not need to restate them. However, I need to state that at the beginning of his address before the trial Court, the sole issue was put to the trial Court by Mr. A.A Izinyon SAN who was then the counsel for the 5<sup>th</sup> defendant/appellant, Chief James Onanefe Ibori, thus:-

*“The sole issue is whether based on the document annexed to the summons and marked as exhibit “A” which is the CTC of Bwari Upper Area Court in CR/81/95 there is a conviction of anybody at all. That is a public document and it is a certified true copy the court can look at. Our submission is that nobody was convicted at all. If the court look at the document what it contains is that somebody pleaded guilty to an offence and he was sentenced.” (underlining mine)*

It is no doubt clear from the above that it was counsel for the 5<sup>th</sup> defendant/appellant who introduced Exhibit “A” to the proceedings and who addressed the Court on whether anyone was convicted or not as depicted in Exhibit “A”. It is also manifest from the records that though learned counsel then appearing for the plaintiff/respondents insisted that evidence must be led to and was indeed prepared to identify who in fact was convicted no such evidence was given at the trial before the High Court as he was overruled at that stage by the Court. Though I have referred to that ruling earlier in this judgment, it deserves to be re-stated

in the present context. It reads:-

*“Ct: The issue for we to address on whether there is any conviction based on the originating summons. We must limited (sic) ourselves to that, whether the 5<sup>th</sup> defendant is the one convicted or not is a question of fact to be proved.”*

**From the above passages from the record of proceedings, there cannot be any doubt in my own respectful view that the Court and the counsel appearing for the parties were at one in accepting that Exhibit “A” was the document that the trial Court is required to pronounce upon as to whether a conviction was recorded against the person charged in the said document. In other words, Exhibit “A” was admitted as part of the proceedings with the consent of the parties.**

**Before concluding, I think it is only right to mention that the learned counsel for the 5<sup>th</sup> defendant/appellant who advocated before the trial Court that the matter could be resolved by the sole issue which he suggested, must be taken to be acting with the full authority and consent of his client, the 5<sup>th</sup> defendant/appellant in adopting the position he took at the trial. It is therefore my view that the argument to show that the Area Court had no jurisdiction to try the accused in Exhibit “A”, or that it is incompetent, having regard that certain rules of evidence were not complied with in the course of the trial by the Bwari Upper Area Court, is with respect an attempt to change the position that counsel took with regard to Exhibit “A” at the trial in the High Court.**

**It seems that were as in this case, counsel appearing for the party decided to adopt a procedure for the prosecution of the case of that party which he thought would be advantageous to that party, and that procedure turned out negatively, he cannot be allowed to deny that approach which he adopted of this own volition. The party he represented and the counsel must be prepared to acknowledge whatever resulted from their plan and strategy which they had conceived as a quick and convenient resolution of the dispute. It is apposite to refer to the dictum of Eso JSC in the**

case of Mosheshe General Merchant Ltd. v. Nigeria Steel Procedure Ltd. (1987) 2 NWLR (pt. 55) 110 which was quoted with approval in Akanbi v. Alao (1989) 3 NWLR (pt. 108) 118 at 141. It reads:-

*“A Counsel who has been briefed and has accepted the brief and also has indicated to the court that he has instructions to conduct a case has full control of the case. He is to conduct the case in the manner proper to him, so far he is not in fraud of his client. He can even compromise the case. He can submit to judgment. Sometimes, he could filibuster, if he considers it necessary for the conduct of his case but subject to caution by the Court. The only thing open to the client is to withdraw instructions from the counsel or if the counsel was negligent sue in tort for professional negligence. Such are the powers but such are also the risks.”*

In my humble view, the views expressed above apply to this case.

Moreover, it is right to mention that the Court below has not in my humble view fallen into error by concluding that Exhibit “A” only depicted that at James Onanefe Ibori was convicted by reason of Exhibit “A”. **I should also add that an appellate Court will not ordinarily interfere with the findings of fact by the trial judge but where there is ample evidence that the trial judge failed to evaluate it and make correct findings on the issue, the appellate court is in as much a good position as the trial court to deal with the facts and make proper findings. See Akibu v. Opaleye (1974) 1 ALL NLR (pt. 2) 344; Fatoyinbo v. Williams (1956) SCNLR 274; Atolagbe v. Shorun (1985) 1 NWLR (pt. 2) 360; Awoyale v. Ogunbiyi (1986) 2 NWLR (pt. 24) 626; Shell B.P Petroleum Dev. Co. Ltd v. Cole (1978) 3 S.C 183.**

**For the above reasons, I am satisfied that the Court below upon the evidence which I have also reviewed in this judgment rightly came to the conclusion that Exhibit “A” depicted that a James Onanefe Ibori was convicted by reason of Exhibit “A”.**

In this appeal, faced with the fact that the Court below had reached the conclusion that by reason Exhibit “A”, the person charged in that proceedings was indeed found guilty, it is now being argued that Exhibit “A” should have been rejected by Court below as it proceeded from a

court which did not validly conduct the trial of the accused. It is manifest that had the strategy, which was employed to prosecute the matter worked in their favour, there would have been no need to challenge the competency of Exhibit “A” at the Bwari Upper Area Court. Now, although  
B learned counsel for the plaintiffs/respondents wished to call evidence in the High Court to identify who in fact was convicted by the convicted by the Bwari Upper Area Court in Exhibit “A” it is clear that such evidence was not led during the trial at the High Court.

C This is manifest from a careful reading of the proceedings wherein the trial Court held the view that evidence would be called to identify who in fact was convicted by Exhibit “A”, if he concluded that Exhibit “A” recorded a conviction, he did not go to the next; state, that is, the calling of evidence to identify if anyone was in fact convicted. **As the trial**  
D **Court did not have the opportunity to decide that question, the Court below could not have pronounced upon what was not decided by the trial Court. This is because, it is settled law that an appellate Court can only consider on appeal a matter that has been decided**  
E **by the trial Court or the Court below, as the case may be.**

**There is some force in the argument proffered for the 5<sup>th</sup> defendant/appellant and particularly with regard to the failure of the trial High Court to consider S. 225 (2) of the Evidence Act, before admitting Exhibit “A”. But as found by the Court below, the**  
F **failure to consider the said provisions of the Evidence Act has not led to miscarriage of justice. Exhibit “A” was without doubt admitted as evidence of the proceedings before the Bwari Upper Area Court with the consent of all the parties. All the arguments now**  
G **raised against its admission has not in my respectful view persuaded me to hold that the trial Court should not have admitted it in the circumstances. It follows from what I have said above that I must resolve Issue iii against the defendant/appellant.**

H I will now consider Issue iv. By this issue, the question framed for the 5<sup>th</sup> defendant/appellant is whether the proceedings in Exhibit “A” are valid and remain valid unless they are set aside on appeal (as the Court of Appeal has decided) or whether they are void for want of jurisdiction (as

the appellant herein contends). From a careful reading of the submission made in respect of this issue in the 5<sup>th</sup> defendant/appellant's brief. It seems clear that the contention with regard to the nullity of proceedings in Exhibit "A" will only be relevant if it had been resolved that Exhibit "A" is admissible in evidence for the purpose of the trial of the sole issue. As I have earlier in the judgment resolved that Exhibit "A" as the proceedings in the case against James Onanefe Ibori before Bwari Upper Area Court, what remains to be considered is whether the proceedings in Exhibit "A" amount to a nullity.

The argument for the 5<sup>th</sup> defendant/appellant appears to be in two parts. By the first part, it is the submission of his counsel that when the judgment of a Court of inferior jurisdiction is tendered before a superior Court to prove a fact in issue that Superior Court is entitled to look at the said judgment in order to see whether or not the inferior court had jurisdiction to give judgment. And in support of this submission referred to Timitimi v. Amabebe (1953) 14 WACA 374 and Ude v. Agu (1961) 1 ANLR 63 and to Section 53 of the Evidence Act. It is also argued for the 5<sup>th</sup> defendant/appellant that the Court, that Exhibit "A" must be treated as proceedings held without jurisdiction and be held to be void and without jurisdiction.

The second part of the argument for the 5<sup>th</sup> defendant/appellant is that the Upper Area Court failed to comply with the requirements of Section 157 (1) of the Criminal Procedure Code. It is submission of counsel that as the Court below duly acknowledged in its judgment that failure of the Bwari Upper Area Court to comply with the said provisions of the Criminal Procedure Code, Exhibit "A" should have declared the entire proceedings a nullity. He has therefore submitted that this court should hold that Exhibit "A" must be treated as proceedings held without jurisdiction and for that reason be declared void and without any probative value. In support of this submission, he cited the case of Musa Harunani & Anor v. Bornu Native Authority 1967 NMLR 18. (The judgment of the Appellate Division of the High Court of Northern Nigeria). Reference was also made to the statement of the learned author of "Criminal Procedure in the Northern States of Nigeria" by J.R. Jones, 2<sup>nd</sup> edition

1979 at page 87. And also to the observation of the learned author under Section 157 at p.88, which reads:

*“No order has been made in respect of any grade or class of area court. Thus no area court can convict under this section. Musa Harunami*

*B & Ors v. Bornu N.A. (1968) Scope 57, NNLR 19”.*

The thrust of the response for the plaintiffs/respondents to this issue is clearly to the effect that the submissions made for the 5<sup>th</sup> defendant/appellant lacks merit. Rather than setting out the argument set out in the plaintiffs/respondents brief, it is my intention to consider them in the course of determining the merit of the submissions made in support of the case for the 5<sup>th</sup> defendant/appellant. The first point taken for the 5<sup>th</sup> defendant/appellant is that the Court below failed to uphold its contention that the Upper Area Court had no jurisdiction to try the case that resulted in the proceeding, Exhibit ‘A’. But it is argued for the plaintiffs/respondents that the 5<sup>th</sup> defendant/appellant did not raise a ground challenging the jurisdiction of the Bwari Upper Area Court to try the accused that resulted in Exhibit ‘A’, before the court below. In support of that contention, reference was made issue ‘2’ raised in the brief of the 5<sup>th</sup> defendant/appellant in the Court below. Therefore, it is further argued that the issue of absence of jurisdiction of the Upper Area Court which gave the judgment in Exhibit ‘A’ was not a competent issue before the Court below.

Now, issue 2 raised in the brief of the 5<sup>th</sup> defendant/appellant in the Court below, reads thus:

*“Whether the Upper Area Court is bound or bound to be guided by the provision of the Criminal Procedure Code.”*

It has been argued for the 5<sup>th</sup> defendant/appellant that the Court below fell into error when the Court, per Oguntade JCA, said.

*“In the instant case, it was not the contention of the 5<sup>th</sup> respondent (now appellant before the Supreme Court) before the lower court and this court that the Upper Area Court Bwari had no jurisdiction in 1995 to try the accused brought it in exhibit (sic) of the offences alleged. The substance of the contention of the 5<sup>th</sup> respondent was/is that the Upper Area Court, Bwari in the course of exercising its undoubted jurisdiction*



*made some technical error in that it did not comply with Section 157 (1) of the Criminal Procedure Code.”*

After that pronouncement the learned Justice of the Court of Appeal, then said further thus:

“When a court has jurisdiction to entertain a matter, it by implication has jurisdiction to make mistakes or errors of law in the exercise of such jurisdiction. The remedy available to any party to the suit who is damnified or adversely affected by the error is to bring an appeal that the errors be corrected”.

Later in that judgment, the Court below with regard to non-compliance with section 157 (1) of the Criminal Procedure Code said thus at p.450.

“The 5<sup>th</sup> respondent’s counsel has in his brief cited the case of Musa Harunami and Madu Meremi v. Bornu Native Authority 1967 NNLR 19 where Hurley, CJ and Bate, J. expressed the view that at all events including where an accused pleads guilty a native court cannot convict under section 157 of the CPC above unless evidence is taken from the complainant and a charge framed. On the supposition that section 157 of the CPC applies to the proceedings of a Native Court, there is no doubt that the Upper Area Court, Bwari did not in exhibit ‘A’ observe the provisions of section 157. The accused in exhibit ‘A’ pleaded guilty and the court thereafter proceeded to impose a sentence. The only conclusion to be arrived at on that hypothesis is that the Upper Area Court did not observe the essential pre-requisites laid down under Section 157 (1) before proceeding to convict the accused”.

In this brief, learned counsel for the 5<sup>th</sup> defendant/appellant while agreeing with the above quoted observation of the Court below, has however argued that the Court below should have gone on to hold that the error of the Bwari Upper Area Court clearly goes to jurisdiction and the Court below should have treated the proceedings in Exhibit ‘A’ as amounting to a nullity with no probative force. However, for the plaintiffs/respondents, it is submitted that passage from the judgment of the Court below cannot be so construed. The decision of the Court below, it is argued is that, any alleged failure to comply with S. 157 (1) of the Criminal Procedure Code in the making of Exhibit ‘A’ goes to the wrong-

ful exercise of jurisdiction and not absence of jurisdiction in the Bwari Upper Area Court. It is the contention of the plaintiffs/respondents that the Court below decided what was on appeal before it, as raised in the issue 2 in the brief filed by the appellant as cross-appellant in the Court below. And as the question as to the absence of jurisdiction in the Upper Area Court was not raised on appeal before the Court below, nor was it raised as an issue before this Court, therefore, it is submitted that it was not open to the 5<sup>th</sup> defendant/appellant to argue that question in this Court. In support of this submission, the case of Joy v. Dom (1999) 9 NWLR (pt.620) 538 at 547 was cited.

I have earlier in this judgment quoted the passage of the passage of the judgment of the Court below that is relevant to this submission. ***“It is in my view clear that what the Court below said is that the Upper Area Court, Bwari in the course of exercising its undoubted jurisdiction, made some technical errors in that it did not comply with section 157 (1) of the criminal Procedure Code. Hence I hold that it cannot be right to argue that the Court below held that the Bwari Upper Area Court had no jurisdiction to try the accused that resulted in Exhibit A”.*** In coming to that conclusion, I must quickly deal with the contention of the plaintiffs/respondents that the 5<sup>th</sup> defendant/appellant did not appeal against the jurisdiction of the Bwari Upper Area Court in respect of Exhibit ‘A’.

It does appear from the grounds of appeal filed against the ruling of High Court only related to whether the Upper Area Court did not comply with the provisions of section 157 (1) of the Criminal Procedure Code. It is patent that there was no specific ground of appeal that the Bwari Upper Area Court lacked the jurisdiction to try the accused as revealed in Exhibit ‘A’. This is clearly the position as it was in the appellant’s brief to that Court that learned Senior Advocate urged the Court below to allow the issue of jurisdiction to be raised in that court. It would appear that the point of jurisdiction was subsequently taken up in that Court. The argument in the Court below as in this Court was based on the failure of the Bwari Upper Area Court to conform with section 157 (1) of the Criminal Procedure Code.

As I have already considered earlier in this judgment, the decision of the Court below in respect of this contention, I do not need to need to repeat them. However, it is further argued for the 5<sup>th</sup> defendant/appellant that such an error should be held as to its jurisdiction. And in addition to the cases referred to above in the course of reviewing earlier the argument in support of the case of the 5<sup>th</sup> defendant/appellant, reference was made to the case of Ports Authority v. Panalpina 1974 NMLR p. 82 at 95, where the dictum of Lord Pearce in Anisminic Ltd. v. the Foreign Compensation Commission and Anor. (1969) 1 All E.R. at p.233 said for the proposition, “that the tribunal may at the end make an order that it has no jurisdiction to make.”

Let me also deal with that aspect of the argument for the 5<sup>th</sup> defendant/appellant in support of the view that the Bwari Upper Area Court had no statutory jurisdiction to try the accused in Exhibit ‘A’. In this regard, I wish to refer to Area Courts Act, Cap.477 of the Laws of the Federation of Nigeria, 1990 applicable to the Federal Capital Territory. S. 17 (1) provides thus:

“(1) There shall be four grades of area courts, namely, upper area courts and area courts grade I, grade II and grade III and the jurisdiction and powers of an area court shall not, subject to the provisions of subsection (2) this section, exceed those prescribed in the first Schedule to this Act in respect of each such grade.

(2) The Chief Judge may by order:

(a) Vary the grade of any area court; and

(b) Confer on any court of any particular grade such additional powers or jurisdiction as he may think fit.

(3) For the more convenient dispatch of business an upper area court may sit in two or more divisions and in that case an area court judge shall sit alone or with one or more members in each division and the provisions of subsections (2) and (3) of section 4 of this section shall apply to the sittings of any division.”

The Schedule to the above Act stated section provides that the jurisdiction of Upper Area Court in criminal causes is limited only by the absence of jurisdiction in homicide cases otherwise it is unlimited. In my

respectful view, I think it is pertinent to state that.

“A Court is said to be of competent jurisdiction with regard to a suit or other proceeding when it has power to hear or determine it or exercise any judicial power therein. There is a distinction between an order or judgment which a Court is not competent to make and order which, even if erroneous in law or in fact, is within the Court’s competency: where a Court of competent jurisdiction the proceedings are void; but where a Court of competent jurisdiction makes an erroneous order, it is appealed. An irregularity in the exercise of jurisdiction should not be confused with a total lack of jurisdiction, as, for example, where the adjudicating body was so composed that it had no power or authority whatever to hear and determine the suit, as was the case of the Native Court whose judgment was put in evidence in the Court below.”

D See Timitimi v. Amabebe (1953) 14 WACA p. 374 at 375.

Having regard to the principles stated above, the Court below was right in holding that the mistake of the Court in not conforming with the provisions of Section 157 (1) of the criminal Procedure Code did not affect the undoubted exercise of the jurisdiction vested in it. With that conclusion, I must hold that Exhibit ‘A’ is a valid proceedings of the Bwari Upper Area Court, and that Exhibit ‘A’ is not void in the circumstances. I also hold that the appeal of the defendant/appellant must fail although its issue I as framed by the plaintiff/respondent succeeded.

I will now consider the merits of the cross-appeal against the judgment of the Court below and who for this purpose, filed their pleadings. Upon being served with the plaintiffs/respondents’ statement of claim and brief, the 5<sup>th</sup> defendant/appellant also filed and served his reply brief. Pursuant to the grounds of appeals and pleadings filed and exchanged, the plaintiffs/respondents formulated in their brief the following as the issues for the determination of their appeal: -

H “(1) Whether in law and on the available materials, the Court of appeals was right in holding that the High Court merely “isolated” the issue of conviction by Bwari Area Court for trial as a preliminary issue while the issue of identity was to come up later (Grounds 1,2,6,7,9 & 16).

- (ii) *Whether the Court of Appeal was right in making an order that the case be heard de novo before another Judge and that parties should file fresh pleadings where it would be clearly made manifest the issue for adjudication before the Court. (This issue cover grounds 3,14 & 15)*
- (iii) *Whether the Court of Appeal was competent to raise the issue of B non-compliance with S.225 (2) of the Evidence Act suo motu and apply same without allowing parties to address on the said issue. (Grounds 8 & 12).*
- (iv) *Whether or not the consequence of the case of the plaintiff at the C lower court if found in their favour, would be a disqualification of the 5<sup>th</sup> respondent. (Ground 11)".*

The 5<sup>th</sup> defendant/appellant in the reply brief filed for him by Chief F.R.A. Williams SAN, did not consider it necessary to offer separate issues for the determination of the appeal. Therefore only proffered his own argu- D ments in response to that of the plaintiffs/respondents in their brief.

#### **Issue (i)**

It would be recalled that earlier in this judgment, I considered issue (i) raised in the plaintiffs/respondent's brief when issue (1) in the E 5<sup>th</sup> defendant's/appellant's fell for consideration. The reason then was because the issue (i) of the plaintiffs/respondent's brief was more ger- mane for the determination of the question raised as issue (i) in the 5<sup>th</sup> F defendant's/appellant's brief. A careful reading of this issue in the cross- appellant's brief, and which is now under consideration here, would re- veal that the question raised therein was that which was raised as issue I in the plaintiff's/respondent's brief. As the questions raised therein have been fully considered by me as aforesaid, I do not consider it necessary G to go over again what I have earlier said. Therefore the question raised by this issue would be answered as I had earlier done. It follows that my answer to the question in issue (i) is in the positive. This means that the answer is 'yes' as the parties fully agreed with the procedure adopted by H the trial Court. It must also be held that with regard to the argument of learned Senior Advocate for the cross-appellants, once an issue is settled, the party who has raised that issue cannot at any time depart from the consequences of that determination of the issue for trial. His argument is

based on the provisions of Order 35 Rules 5 of the Rules of the High Court of the Federal Capital Territory, Civil Procedure Rules which reads thus:-

*“At any time before the decision of the case, if it appears to the Court necessary for the purpose of determining the real question or controversy between the parties, the Court may amend the issues or frame additional issues on such terms as to it shall deem fit”.*

**It is my respectful view that this question ought to have been raised as an objection, in the course of the trial. Counsel who is seised of a case ought to have been aware of the Rules of Court in defending or prosecuting a matter. As it was not raised when it was proper to have done so, it is my view that it is incompetent for the cross-appellants to raise it in this Court.**

**Issue (ii)**

The question raised here is, whether the Court of Appeal is right in making an order that the case be heard de novo by another judge and that the parties should file fresh pleadings to reflect clearly the issue for adjudication. Again, the questions raised in this issue have been fully considered earlier in this judgment when considering the case for the 5<sup>th</sup> defendant/appellant. I do not therefore need to consider the arguments by the parties to the cross-appeal. It follows that my view, which I have held earlier. This means that the answer to the question raised in this issue is that the Court below was right to have made the Orders. For the avoidance of doubt, the Orders that the case be remitted to the trial Court for hearing de novo before another judge, and that fresh pleadings be filed are hereby affirmed.

**Issue (iii)**

In respect of this issue, the complaint of the cross-appellants is that the Court below raised the issue of non-compliance with S.225 (2) of the Evidence Act suo motu, and did not give the parties an opportunity to address the Court thereon. The question then is, whether the Court of Appeal was competent to refer to S.225 (2) of the Evidence Act in the circumstances, and whether it was right not to receive the addresses of counsel for the parties on the point. **In my humble view, the short**

answer to this question is that a Court cannot be deterred from referring to the provisions of the law as it deems fit. But an ancillary to that right is also absolutely necessary for this point to be brought to the attention of the parties and their counsel so that the Court may receive their addresses on the point of law so raised, B clearly, suo motu by the Court. The Court below therefore erred to that extent. See Ogiamen & Anor v. Ogiamen 1967 N.S.C.C. 189; Hambe v. Hueze<sup>1</sup> 2001 A.N.L.R. 1.

But having not done so as in the instant appeal, the question C that falls to be considered is, whether by so doing a miscarriage of justice has occurred thereby. In the determination of this question, the party who claims that he has suffered such a miscarriage of justice by the verdict of the Court has a duty in the circumstances, D to show how he had suffered as alleged a miscarriage of justice. In respect of the instant appeal, I have considered carefully the submissions made for the cross-appellant, and it is my humble view that the cross-appellants have not shown me how they suffered a miscarriage of justice by the decision of the Court, having regard E to all the circumstances of the case. I must therefore resolve the issue against the cross-appellants.

#### Issue (iv)

I think by this issue, the cross-appellants are seeking to know F whether if the Court held in their favour as plaintiffs in the trial Court, then the consequence of that finding would be the automatic disqualification of the 5<sup>th</sup> respondent/appellant. I think this question dwells upon a supposition of events which had not occurred. G It follows that this issue must be resolved against the cross-appellants for that reason. For all the reasons given, the cross-appeal cannot succeed, and it is dismissed.

The 1<sup>st</sup> plaintiff, who was 1<sup>st</sup> respondent to the main appeal, has also filed a cross-appeal. And pursuant thereto, has filled a cross-appellant's brief settled by his counsel, R.O. Yusuf, Esq. on behalf of J.K. Gadzama SAN appeared for the 1<sup>st</sup> plaintiff/cross-appellant, and he duty adopted and placed reliance on the said brief for the determination of the H

appeal. Five issues were raised, and they would be serially considered as follows: -

Issue (A)

B “Whether the lower Court was right in holding that the issue settled for determination was a preliminary issue and parties have reserved other issue for determination at a later stage.”

C As the questions raised by this issue have been considered and resolved positively in the consideration of the main appeal, I do not consider it necessary to repeat here what I have already said earlier. It only suffices to say that the sole issue was as agreed by the parties. And the Court of Appeal was right to have considered that sole issue that the parties agreed upon. But it was not open to the Court of Appeal to find that the appellant is an ex-convict.

D Issue (B) – raises the question, whether the lower Court was right in making an order that the case be heard de novo before another judge with a further order that parties should file fresh pleadings. Again as it is manifest that the question raised by this issue has been raised in the main appeal and considered earlier in this judgment, it did not consider it necessary to dwell herein upon the arguments proffered in support of this issue. What it remains to be said is that the Court below was right in making the Orders which are the subject of this issue. And I accordingly affirm the judgment of the Court below.

F Issue (C)

G In respect of this, the question raised by the 1<sup>st</sup> plaintiff/appellant is, whether the lower court was right in allowing the respondent to raise the issue of jurisdiction of the Upper Area Court, Bwari. Earlier in this judgment, this question was adequately considered in the main appeal. It follows that the resolution of this question would be as what I said earlier in this judgment.

Issue (D)

H \_ The question raised under this issue is, whether the lower Court was right in raising the issue of non-compliance with Section 225 (2) of the Evidence Act suo motu and applying same without calling on parties to address it on same. This question was also raised in similar terms by the



plaintiffs/cross-appellants. I have in my judgment in support of their cross-appeal come to the conclusion that the Court below was wrong. But that not withstanding, the cross-appellants did not show that a miscarriage occurred thereby. I am afraid and with due respect to learned counsel, my view in respect of this issue is as recapitulated above. That issue is B therefore resolved against the 1<sup>st</sup> plaintiff/cross-appellant.

Issue (E)

Here the question is whether the consequence of the case of the plaintiffs at the lower Court if found in their favour, would be a disqualification of the 5<sup>th</sup> respondent. As this question is on all fours with the question C raised for the cross-appellant, my answer to the question is a I have said earlier in this judgment when considering the case of the cross-appellants. It follows that this issue must be and is hereby resolved against the 1<sup>st</sup> plaintiff/cross-appellant for the same reasons. D

**In conclusion, I must hold that for all I have said in this judgment there is no merit in the main appeal and the cross-appeals filed against the judgment of the Court below. It follows that the appeal and cross-appeal are hereby dismissed respectively in E their entirety. The judgment and orders of the Court below are hereby affirmed.** For the avoidance of doubt, I hereby restate them as follows: -

(1) That the sole issue before the High Court was as agreed by the F parties.

(2) That sole issue being whether by Exhibit 'A' there was a conviction against anyone.

(3) That the Court below was right when it held that contrary to G what the High Court held, Exhibit 'A' as the certified record of proceedings of the Bwari Upper Area Court showed that the defendant in that case duly convicted for the offences for which he was charged. That the Court below right held that it was not established by the trial Court as to whether it was the 5<sup>th</sup> defendant/appellant who was the person con- H victed by the Bwari Upper Area Court, per Exhibit 'A', and matter be remitted to be High Court of FCT for trial de novo before another Judge of the Court.

(4) That for the purpose of that new trial, party are to file fresh pleadings wherein they are to clearly plead the issue in dispute. There shall be no order as to costs.

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B

### UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Ejiwunmi, JSC. I entirely agree that both the appeal by the 5<sup>th</sup> Defendant and the cross-appeals by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively are devoid of merit.

The preliminary objection raised by the 2<sup>nd</sup> Plaintiff in his brief of argument has substance. A question for determination should state an issue and not be a mere statement devoid of any issue for determination. I too, therefore, strike out issue (i) in the 1<sup>st</sup> plaintiff/Applicant's brief of argument for being incompetent.

However, this does not vitiate grounds of appeals nos. 1 and 2 filed by the 5th Defendant/Appellant since the 2nd Plaintiff/Respondent has formulated a valid issue for determination in respect of the grounds of appeal.

As all the parties before the learned trial judge (Yusuf J.) agreed by consent that issue to be determined primarily by the learned trial judge was whether Exhibit A- the judgment of Bwari Upper Area Court proved that a person by the name "James Onanefe Ibori" was convicted by the Bwari Upper Area Court of a criminal offence, this in itself was not sufficient evidence for the trial court to arrive at a conclusion whether in the light of the claims by the plaintiffs before it, the 5<sup>th</sup> Defendant/Appellant was in fact the person so convicted. In other words, for the plaintiffs to succeed in their claims they would have to identify the 5<sup>th</sup> Defendant/Appellant with or provide nexus by evidence that the 5<sup>th</sup> Defendant/Appellant was in fact one and the same person as the one convicted in Exhibit "A". This is so because section 135 of the Evidence Act, Cap. 112 provides, that he who asserts must prove. The section reads:-

*"135. (1) whoever desire any court to give judgment as to any legal right or liability Dependent on the existence of facts which he asserts must*

*prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person .”*

It is therefore not enough to prove that a person by certain name has been convicted. For this to be relevant to the plaintiff’s case, that person B must specifically be shown to be the party to the suit before the plaintiffs’ case can be proved against the 5<sup>th</sup> Defendant/Appellant.

This is the missing link in the case before the learned trial Judge, it is a fine legal point hence the necessity for the court of Appeal to remit C the case, which had been inconclusive, to the High Court for the identity of the person convicted to be proved.

As to the admissibility of Exhibit “A” before the trial court, the 5<sup>th</sup> Defendant/Appellant cannot be heard to complain. All the parties before the learned trial judge including the 5<sup>th</sup> Defendant/Appellant agreed, by D consent, to address the court on the document. The implication of this is that all the parties were at one that Exhibit “A” was admissible. A document may be inadmissible but the parties in the case can consent to its being admitted. Once this has happened none of the parties will be allowed to E resile from such an agreement. They are stopped to do so

The appeal therefore fails.

#### Cross Appeal by the 1<sup>st</sup> Plaintiff/Respondent

The 1<sup>st</sup> plaintiff/Respondent/Cross-Appellant formulated five is- F sue, named, (a), (b), (c), (d) and (e). This have been set out in the judgment of my learned brother Ejiwunmi, JSC. I need no re-state them here. Suffice it to say that I too would answer issues (a) and (b) in the affirmative, so also issue (d) which did not occasion any miscarriage of G justice. As to issue (c) it is too late now to raise it since the party had failed to raise the objection in the Court of Appeal. Issue (e) deals with a live issue which will have to be determined by the trial court after evidence has been adduced. It, therefore, cannot be entertained by this Court.

The cross-appeal fails. H

#### Cross-Appeal by the 2<sup>nd</sup> Plaintiff/Respondent

Four issues were raised by the 2<sup>nd</sup> Plaintiff/Respondent/Cross-Appellant, viz, issues nos. (i), (ii), (iii) and (iv). These too have been set

out in the leading judgment of my learned brother Ejiwunmi, JSC. I need not repeat them here. My answers to them are similar to the answers I gave to the issues formulated by the 1<sup>st</sup> Plaintiff/Respondent/Cross-Appellant.

B In brief, I answer the issues as follows.

Issue no. (i) – the answer is in the affirmative. It was not the trial High Court that isolated the issue to be determined by it but the parties in the case who settled, by consent, the single issue to be determined.

C Issue no (ii) – The answer is in the affirmative. The Court below was right to order trial de novo before another judge in order to conclusively link the 5<sup>th</sup> Defendant/Appellant with Exhibit “A” or otherwise.

D Issue no. (iii) – The Court of Appeal was not right to raise suo motu the issue of non-compliance with the provisions of section 225 subsection (2) of the Evidence Act and applying the provisions to the case without giving the parties the opportunity to address it on the point. However, no miscarriage of justice was occasioned since a retrial was ordered.

E Issue no. (iv) – This question cannot be answered now as a trail de novo has been ordered. It is after the retrial that the question posed by the issue could be answered. It is in fact a matter to be determined by the trial court.

Therefore the cross-appear has failed.

F On the whole I too hereby dismiss the appeal by the 5<sup>th</sup> Defendant/Appellant and the cross-appeals by the 1<sup>st</sup> Plaintiff/Respondent and the 2<sup>nd</sup> Plaintiff/Respondent respectively. I affirm the decision by the Court of Appeal and the order that the case be remitted to the High Court of the Federal Capital Territory, to be heard by a judge other than Yusuf J.

G I also endorse the order that all the parties shall file fresh pleadings for the purposes of the retrial.

I too make no order as to costs, each party is to bear its costs.

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H

### **BELGORE JSC**

I have read in advance the judgment of my learned brother, Ejiwunmi, JSC, in which he set out clearly the narrow issue in the lower

courts and I am in full agreement with him that this appeal and these cross-appeals must fail. For the full reasons in the said judgment I dismiss the appeal and the cross-appeals. I make the same consequential orders as in that judgment.

B

### **PRONOUNCEMENT BY UWAI S CJN (ON IGUH JSC)**

(Section 294 subsection (2) of the Constitution of the Federal Republic of Nigeria 1999)

C

The Hon. Justice Anthony Ikechukwu Iguh, JSC who sat with us on the 6<sup>th</sup> day of November, 2003 to hear this appeal and participated thereafter in the conference which we held on 19<sup>th</sup> day of November, 2003 is unavoidably absent on medical ground. During the conference he agreed that the appeal by the 5<sup>th</sup> Defendant/Appellant and the cross-appeals by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Cross-Appellants respectively should be dismissed.

D

I accordingly hereby pronounce in accordance with the provisions of section 294 subsection (2) of the 1999 Constitution, the opinion of Hon. Justice A. I. Iguh, JSC that for the reasons contained in the leading judgment of Hon. Justice A.O Ejiwunmi, JSC he too demises the appeal by the 5<sup>th</sup> Defendant/Appellant and cross-appeals by the 1<sup>st</sup> Plaintiff/Cross-Appellant and the 2<sup>nd</sup> Plaintiff/Cross-Appellant with no order as to costs.

F

### **KALGO JSC**

I have before now read the judgment of my learned brother Ejiwunmi JSC just delivered. I agree with him that the appeal and the cross-appeals lacked merit and ought to be dismissed. I entirely agree with the reasoning and conclusions reached in the said judgment and I adopt same as mine. Accordingly, I also dismiss the appeal and the cross-appeals with no order as to costs. I affirm the decision of the Courts of Appeal and abide by the consequential orders made in the leading judgment.

G

H

### UWAIFO.JSC

I had the opportunity to read in advance the judgment of my learned brother Ejiwunmi JSC. I entirely agree with it for the reasons he has  
B painstakingly given. I shall attempt to give my judgment in support in few words and in a simplified manner as much as I possibly can.

The learned trial judge at the hearing fixed for 20 March, 2003, invited counsel for the parties to state the issues they thought were germane to the determination of this case. The learned Senior Advocate, Mr.  
C Izinyon, stated thus:

*“There is very narrow issue of law for determination of the court. It is whether anybody has been convicted at all based on the exhibit A which is the case in Upper Area Court in CR/81/95. This is the foundation of the plaintiffs case wherein it is said that by virtue of that record the 5<sup>th</sup> defendant is an ex-convict. By that record is there anybody convicted at all?”*  
D

From the further submission of Mr. Izinyon, his position was that when  
E the Bwari Upper Area Court conducted the proceedings in CR/81/95, it imposed sentence without a formal pronouncement of conviction. He said:

*“The sole issue is whether based on the document annexed to the summons and marked as exhibit A which is the CTC of Bwari upper area court in CR/81/95 there is a conviction of anybody at all. That is a public document and it is a certified true copy the court can look at. Our submission is that nobody was convicted at all. If the court looks at the documents what it contains is that somebody pleaded guilty to an offence and he was sentenced. The proceedings of 28/9/95 is as follows:”*  
F

He then took the court through the record of proceedings on the issue and  
G said:

*“My Lord there is no where in the record where the judge said anybody was convicted. In law there has to be a conviction before sentence  
H can be imposed. So my Lord nobody was convicted from what I have read the trial court proceeded under section 157(1) of the CPC. This is the short summary trial procedure. This must entail a conviction before any sentences. The essence of this trial is that one James Onanefe Ibori was*

*convicted. The record we have and being relied upon does not show that anybody was convicted. I submit that further apart from the CTC produced section 225 (1) (6) and section 226 (2) (3)c of the Evidence Act have not been complied with. Based on this non-compliance the CTC is faulted. On my earlier submission I would like to cite a Supreme Court authority of Mohammed v. Olawumi (1993) 4 NWLR (pt. 287) 254 particularly at 287-288 held that there can be no sentence without conviction.*"

After hearing the other counsel, and upon some counsel, and upon some consensus by them, the court seemed to have decided that the issue to be resolved in the first instance was narrow one. The learned trial judge ruled thus:

*"The issues is for we (sic) to address on whether there is any conviction based on the originating summons (sic) . We must limit ourselves to that. Whether the 5<sup>th</sup> defendant is the one convicted or not is a question of fact to be proved."*

It was this which formed the basis of the ruling of the learned trial judge on 24 March, 2003 wherein he said:

*"Now that there is no conviction is exhibit A which is CR/81/95 what is the effect of is the effect of it on the claims of the plaintiffs. The effect is to sweep the claims off the ground."*

He accordingly dismissed the claim.

It is clear that the claim was not considered and therefore no decision was reached on it. Now, what was the claim before the High Court of the Federal Capital Territory, Abuja? It was stated by the plaintiffs thus:

*"whereof the plaintiffs claim against the defendants as follows:*

A. A declaration that by virtue of the combined effect of section 112, 114, 115 and 124 of the Evidence Act Cap 112 Laws of the Federation 1990, the record of proceedings of the Bwari Upper Area Court of 28<sup>th</sup> September, 1985 in case No. Cr-81-95 is presumed genuine and sufficient for the defendants to rely on same to act against the ex-convict Chief James Onanefe Ibori.

B. A declaration that the ex-convict Chief James Onanefe Ibori by virtue of his conviction and sentence in case on Cr-81-95 is not qualified to carry the defendants flag as its Gubernatorial candidate in the 2003

*elections within the meaning of section 182, 1, e of the 1999 constitutions.*

C. *An order compelling the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> defendants to disqualify and withdraw its flag and certificate of affirmation given in this case to the ex-convict Chief James Onanefe Ibori to contest the 2003 Gubernatorial elections in Delta States on the platform of the People's Democratic Party.*

D. *An injunction restraining the 4<sup>th</sup> defendant from recognizing and accepting the candidature of Chief James Onanefe Ibori, the candidate of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the 2003 Gubernatorial Elections in Delta State."*

The case went on appeal to the Court of Appeal, Abuja Division in respect of the ruling of 24 March, 2003 on that narrow issue. Extensive arguments were canvassed before that court and on 16 April, 2003 it came to the conclusion that the trial court was wrong in holding that no conviction was reached by the Upper Area Court in exhibit A. The appeal was allowed; and this was in respect of that narrow issue. The main claim of the plaintiff, or at least, the core of it touching on the 5<sup>th</sup> defendant as to whether or not he is an ex-convict, in which they have ask for four reliefs remains to decided. That was why the Court of Appeal ordered that the said claim be remitted to the trial court for determination. The Court of Appeal could not in law take it upon itself to decide that claim by taking the place of the trial court.

Each of the plaintiff appealed; the 5<sup>th</sup> defendant also appealed. It should be remembered that the 5<sup>th</sup> defendant counterclaimed. Among other things, he denied that he was the one convicted in exhibit A. By section 225 (2) of the Evidence Act, if a conviction is denied, there are conditions which must be satisfied, It is necessary to reproduce the relevant provisions of section 225 of the Evidence Act as follows:

"225. (1) *Where it is necessary to prove a conviction of a criminal offence the same may be proved -*

(a) *by the production of a certificate of conviction containing the substance and effect of the conviction only, purporting to be signed by the registrar or other officer of the court in whose custody is the record of the said conviction;*



*(b) if the conviction was before a customary court by a similar certificate signed by the clerk of court or scribe of the court in whose custody is the record of the said conviction; or*

*(c) by a certificate purporting to be signed by the Director of Prisons or officer in charge of the records of a prison in which the prisoner was confined giving the offence for which the prisoner was convicted, the date and the sentence.*

*(2) if the person alleged to be the person referred to in the certificate denies that he is such person the certificate shall not be put in evidence unless the court is satisfied by the evidence that the individual in question and the person named in the certificate are the same.”*

In the plaintiffs/appellants’ appeals, the contention is that his court should find the enough facts have been established to lead to the conclusion that is was the 5<sup>th</sup> defendant that was convicted as per exhibit A. The argument is that the suit should be determined in that light by the Supreme Court. On the other hand it has been argued on behalf of the 5<sup>th</sup> defendant that the ruling of the trial court dismissing the suit should be upheld after setting aside the judgment of the Court of Appeal because it contains errors leading to a miscarriage of justice. I am unable to accept the contention of either side. In a matter of this nature, the Supreme Court cannot function outside its normal constitutional role as an appellate court which is to consider whether issues raised in the trial court have been competently decided there and thereafter properly examined on appeal by the Court of Appeal. Issues not raised, or if raised not decided by trial court, will not normally by allowed to be raised on appeal. In appropriate circumstances, they will be remitted to the trial court.

It has thus been held that under the appellate jurisdiction of the Supreme Court as conferred by the Constitution [s. 213 (1) of the 1979 Constitution, now s. 233 (1) of the 1999 Constitution], the Supreme Court has no jurisdiction to usurp the function of the Court of Appeal either by hearing an appeal directly from the High Court or by hearing an appeal which though lying before the Court of Appeal is yet to be decided by that Court because to do so will amount to a violation of the Constitution and will be null and void: see *Harriman v. Harriman* (1987) 3 NWLR (pt.60)

244 at 257 per Uwais JSC (now CJN). *A fortiori*, the Supreme Court has no jurisdiction to hear a suit or an issue in a suit fit for the High Court. Hence the general rule adopted by the Supreme Court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court. But where the question involves a substantial point of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision, the Court will allow the question to be raised and the point taken to prevent and obvious miscarriage of justice: see Akpene v. Barclays Bank of Nigeria Ltd (1977) 1 S.C 47. Where an appellant seeks to raise a case different from that agitated in the lower courts, leave will be refused because to allow such a case would amount to allowing a litigant to commence a new case before the Supreme Court as if it were a trial court: see Ejiofodomi v. Okonkwo (1982) 11 S.C. 74; Attorney – General Oyo State v. Fairlakes Hotel Ltd (1988) 5 NWLR (pt.92) 1. These authorities are signposts to indicate that the trial courts are the normal forums for hearing suits, and that all relevant facts are to be produced for agitation there for a proper determination of the dispute between litigants. In the instant case the conditions in section 255 of the Evidence Act remain to be satisfied.

It is plain beyond argument that is only in a trial court that the conditions so stated will have to be fulfilled. The conditions are mandatory. The Supreme Court cannot act in that regard as if a trial court in the circumstances of this case. As I said before, it can only consider in an appellate status what the trial court did as decided on appeal by the Court of Appeal in an appropriate case. It is clearly inevitable that what remains to be done by the trial court in this case must be remitted to it by this court. Even with the keenest desire to have the case resolved one way or the other with a minimum of delay, this court has no alternative but to follow the only available procedure to have a trial of the suit in the appropriate forum. In order to comply with section 225 (2) of the Evidence Act, evidence must be led to the satisfaction of the court identifying who is fact was the James Onanefe Ibori convicted as per exhibit A.

It is for the above reasons that those more copiously stated by my learned brother Ejiofodomi JSC that I dismiss the appeals and remit the case

to the trial court for hearing by another Judge. I abide by all the orders made in the leading judgment. I make no order for costs.

### MUSDAPHER JSC

I have had the preview of the judgment of my lord Ejiwunmi, JSC just delivered. In the aforesaid judgment his lordship has adequately dealt with all the issues submitted to this court for the determination of the appeal and the cross-appeal. For the same reasons contained in the judgment, which I adopt as mine, I too dismiss both the appeal and cross-appeal and affirm in its entirety the judgment of the court below. For the avoidance of doubt, I restate the decision as follows:-

(1) That the only issue before the High Court was as agreed by the parties.

(2) The sole issue being whether by exhibit "A" there was a conviction against any one.

(3) That the Court of Appeal was right when it held contrary to what the High Court held, Exhibit "A" the certified record of proceedings of the BWARI UPPER AREA COURT showed that the defendant in that case was duly convicted for the offences for which he was charged. The Court below rightly held that it was not established by the trial courts as to whether it was the 5<sup>th</sup> defendant/appellant who was the person convicted by the BWARI UPPER AREA COURT, PER Exhibit "A"

(4) The matter is remitted back to the High Court for trial de novo before another judge of that court.

(5) That for the purpose for the new trial, parties are to file fresh pleadings wherein they are to clearly plead the issues they desire to canvass.

There shall be no order as to cost.