

SUPREME COURT NIGERIA
14TH MAY, 2004. SC.157/2002
CORAM:- S.A. BELGORE, I.L. KUTIGI, A.O. EJIWUNMI,
D. MUSDAPHER, I.C. PATS-ACHOLONU, JJSC

LT. COMMANDER STEVE OBISI APPELLANT
AND
CHIEF OF NAVAL STAFF RESPONDENT.

COURT MARTIAL - Composition of - Armed Forces Act 1993 s. 129 -
Liaison officer - Meaning of - Absence of Liaison officer and waiting
member - Does not nullify the trial (H1)

WORDS & PHRASES - “Liaison officer”- Meaning of - Court Martial -
Composition of - Liaison officer - Is one that coordinates - An intercom-
municating officer (H1)

WORDS & PHRASES - “Waiting” - Meaning of - Court Martial - The
waiting officer is not a member of the court (H2)

ACTIONS - Court Martial - Waiver - Appellant’s failure to object - To
composition of the court - Is a waiver of that right (H3)

COURT MARTIAL - Oath taking - By members before commencement
of trial - Is not in respect of every case - As oath taking at commence-
ment of daily proceedings - Is enough (H4)

EVIDENCE - Witnesses - Statement in writing - Found to be an admis-
sion - Was not shown to be obtained under duress - By the witness (H5)

CRIMINAL PROCEDURE - Court Martial - Confessional statement -
Trial within trial - As to examine a confessional statement - Will not arise
- As the witness failed to show use of force (H6)

CRIMINAL PROCEDURE - Court Martial - Conviction - Restitution of stolen property - Does not apply to appellant - As he was not convicted of stealing (H7)

FACTS

The appellant was charged and tried by a general Court Martial for various offences under the Armed Forces Decree No. 105 of 1993. The charges are that he disobeyed standing orders, engaged in private business, received 12 million naira gratification, etc. He was convicted and sentenced by the General Court Martial.

Being dissatisfied, he appealed to the Court of Appeal, where his appeal succeeded in part. He has further appealed to the Supreme Court raising two issues. The respondent cross-appealed raising an issue.

ISSUES FOR DETERMINATION

1. *“Whether the General Court Martial was competent to try the Appellant in view of its composition and the condition precedent to the assumption of its jurisdiction specified in the Armed forces Decree No. 105 of 1993.*

2. *Whether the Court of Appeal was right in affirming the conviction of the appellant based mainly on his purported confessional statement when the condition precedent to the admission of the statement viz – a trial within a trial by the Court Martial was not complied with.*

“whether the learned Justices of the Court of Appeal were right in law to have failed to make and or reaffirm the consequential orders of refund of various sums of money made against the cross-respondent by the Court Martial having due regard to the circumstances of this case”.

HELD (Unanimously dismissing the appeal and cross-appeal per **PATS-ACHOLONU JSC**)

COURT MARTIAL - Composition of

1. The term “liaison officer” as used in the Act means nothing more than an officer in military office whose duty is merely to coordinate or insure proper co-ordination of activities, a sort of intercommunicating

officer. He is not a member of the trial court. These officers are mentioned together along with a waiting member. They are necessary adjuncts meant to situate the Court Martial in its proper context of the military. For the purpose of the proceedings and trials in Court Martial cases, they are not members of the panel. It is stretching the interpretation to be accorded to Section 129 too far I believe, to state or insinuate that because the liaison officer who is not involved in the trial or prosecuting of a case cannot be located by the appellant therefore the trial was a nullity and the court should so hold. The same applies to the position of a waiting member. (p. 1300 G)

WORDS & PHRASES - “Waiting”

2. The term “waiting” derived from the verb wait as used adjectively in the statute and in the context it is referred to, denotes that no place is available right now for the officer so waiting but when the condition is ripe for the waiting process to cease, then the officer so waiting may then become a member. Consider, for example, the everyday occurrence of people waiting for a bus or at a Doctor’s clinic. A person continues to wait until the happening of an event. Having discussed this matter forensically, I hold that the waiting officer is not a member of the court and that his not being seen by the appellant or his counsel in the Court Hall since he does not sit on the panel cannot make the decision of the court null and void. Therefore, the 1st issue as canvassed by the appellant that the trial and the subsequent decision of the Court Martial Court are irregularly conducted does not hold, and I find no fault in its proceedings. (p. 1301 B)

ACTIONS - Court Martial - Waiver

3. In the appellant’s counsel’s submission, it is evident that he strongly believed in the accuracy of the transcript of the trial as espoused by his counsel. Given that situation, there is no where in the record where he protested either to non-presence of the waiting member or he objected to any member’s presence or evinced an intention that he could or might possibly object to the membership of whoever might be the waiting mem-

ber. He was aided in his case by a counsel of his choice who should have advised him of his rights. The only inference is that he chose to waive these rights. (p. 1301 H)

B COURT MARTIAL - Oath taking

4. To my mind, it cannot be said to be the proper interpretation of the Act that regardless of the number of case the panel might have tried on that day, the members should swear an oath in respect of every trial of any case on that day. Admitted that Section 137 made provision for the members to swear before the trial, it is my opinion and I hold that where the court had heard several trials previous or preceding the one for which the appellant had complained of no oath taking, the inference is that the court might have taken the oath previous to the new trial. Besides, I do not see any objection to the commencement of the trial without an oath being taken. This is not a question of having waived his right but not objecting so as to indicate a protest of violation of the spirit of the Act. My view is premised on the possibility that hitherto the court had taken the Oath during the time of the trial of the first case or cases. If no oath was taken, I wonder why the appellant did not protest. In a situation like this where possibly the court is left in doubt as to speculate to the true situations of matters, the party raising the objection would fail where he fails to satisfactorily convince the court of the state of affairs of the trial. (p. 1302 E)

EVIDENCE - Witnesses - Statement in writing

5. For a literate Engineer not to be able to describe graphically and with certainty how he was made to make an admission that sought to incriminate him but rather relied on equivocation and invocation of expression of doubtful meaning and connotation thereby indulging in double talk is to say the least trifling with his defence and burying his defence on words that convey no meaning to the court. The appellant insinuated and construed the expression “subtle” there to mean use of coercive force. Well, it is important for one to understand the meaning of the words. The word subtle is defined in Oxford Advanced Learner’s Dictionary to mean not very noticeable or obvious, behaving in a clever way, using indirect method

to achieve an aim. (p. 1303 D)

Court Martial - Confessional statement

6. The appellant did not expatiate on what he referred to as humiliating circumstance. How can any court worth its salt construe an equivocation to mean coercion. There would be need for a trial within a trial where the appellant can clearly demonstrate by the nature of the language he used to express his ordeal that the statement credited to him was obtained by force, trick or non-recognizable legal ways. In the absence of that, it will be idle for this court to forage out in an attempt to be considered to have done its duties magnificently and according to its calling. (p. 1304 A)

Court Martial - Conviction - Restitution of stolen property

7. When an issue is before an appellate Court unless it is abandoned, it must be pronounced upon by the court. Now as the lower court has failed to pronounce on the issue of refund, does this court have the jurisdiction to make an order to that effect. The appellant was convicted under a Federal Law. The issue of restitution of property stolen is reflected or provided in Section 270 of the Criminal Procedure Act, which is a federal law. I have carefully examined the provision of Section 270 of the Criminal Procedure Act which is a federal law and I find it hard to pigeon hole the conviction of the appellant on this section as the conviction does not appear on the surface of it to relate to theft or allied offences. The conviction seems centered on purely military offences even though there is an insinuation implicit in the conviction which tends to show that the appellant's honesty is in doubt, but essentially he was not convicted of stealing. In the circumstance, the relief sought in the cross-appeal cannot be upheld or acceded to. Accordingly, the Cross-Appeal fails and is dismissed. (p. 1304 H)

H

NOTABLE POINT OF INTEREST

MUSDAPHER.JSC

I. Procedural irregularity - Should not overcome substantial justice

I am of the view, that while the emphasis in a civil case is to ensure the determination of the rights of the parties, in a criminal case the prevailing consideration is the need to balance the interest of the society at large in the due administration of criminal justice with the need to protect the accused person from possible oppressive trial. In Okegbu v. State (1979) 11SC 1., Irikefe, JSC said at page 6 – 7:-

“It seems tome that in deciding upon whether there has been a substantial miscarriage of justice, the Court of Appeal dealing with the issue raised must be satisfied that it is not one of a mere technicality which had caused no embarrassment or prejudice to the appellant.”

It is also the law that an appeal court such as the Supreme Court will not interfere with the decision of the trial court on the ground of procedural irregularity where the irregularity has not occasioned a miscarriage of justice. A waiting member is not a member of the Court Martial, his absence is a mere irregularity and could not affect the decision of the Court Martial. Substantial justice should not be allowed to be overcome by procedural irregularity. (p.1317 B)

REPRESENTATION

Etigwe Uwa for the Appellant.

C.I. Okpoko (Senior Legal Officer) with him, Mallan J.A. Adamu (Senior Legal Officer) for the Respondent.

CASES REFERRED TO

Oloriegbe v. Omotosho (1993) 1 NWLR (Pt.270) 386 at 402 and 409

Olatunji v. The State (2000) 12 NWLR (Pt. 680) P. 182 at 191

Soy Agencies v. Metallum (1991) 3 NWLR (Pt. 177)35 at 43-44

The Miscellaneous Offences Tribunal & Anor v. N.E. Okoroafor & Anor (2001) 18 NWLR (Pt. 745) 295 at 337

Rossek v. ACB (1993) 8 NWLR (Pt. 312) 382 at 488

Olatunji v. State 12 NWLR (Pt. 680) 182 at 191

Madukolu & Ors. v. Nkemdilim 1962 1 AII NLR 58 at 594

Okegbu v. State (1979) 11SC 1., Irikefe, JSC said at page 6 – 7

STATUTES REFERRED TO

Armed Forces Decree No. 105 of 1993 ss. 129, 133(1), 57(1), 138 B
Criminal Procedure Act s.270(1)

LEAD JUDGMENT BY PATS-ACHOLONU JSC

The appellant who is equally the cross respondent was charged C
and tried by a general Court Martial for various offences that violate the
spirit of Armed Forces Decree No. 105 of 1993. The charges are that he
disobeyed standing orders contrary to Section (1) of Decree No. 105 of
1993. And that he engaged in private business and received gratification D
of N12,000,000.00 from Agric (Nig) Ltd; that contrary to Section 91 of
the said Decree he donated the sum of N1,000,000.00 to Christ Chapel
International Church Ijora, that he traveled to London without official
permission and lodged a sum of £40,000.00 with Barclays D/C London
situate at 25 – 27 Northumberland Avenue London. He was convicted E
and sentenced by the General Court Martial, but not satisfied with the
judgment of the Court Martial, he appealed to the Court of Appeal. Again
before the Court of Appeal, his appeal was dismissed, whereupon he
appealed to this court: Two issues were framed by the appellant's counsel F
for consideration and they are as follows:-

1. *“Whether the General Court Martial was competent to try the
Appellant in view of its composition and the condition precedent to the
assumption of its jurisdiction specified in the Armed forces Decree No.
105 of 1993.* G

2. *Whether the Court of Appeal was right in affirming the conviction
of the appellant based mainly on his purported confessional statement
when the condition precedent to the admission of the statement viz
– a trial within a trial by the Court Martial was not complied with”.* H

The respondent replicando identified also two issues for determination and they are:

(a) Whether the learned Justices of the Court of Appeal were right

in law to have affirmed the conviction of the Appellant by the Court Martial.

(b) Whether the composition of the Court Martial without a waiting member at the trial of the appellant by same failed to comply substantially (sic) with the provisions of the Armed forces Decree No. 105 1993 as amended.

The respondent who cross-appealed formulated one issue which is “*whether the learned Justices of the Court of Appeal were right in law to have failed to make and or reaffirm the consequential orders of refund of various sums of money made against the cross-respondent by the Court Martial having due regard to the circumstances of this case*”.

In respect of the first issue in the appellant’s brief the gravamen of his complaint is that the Court Martial that tried him was not duly constituted as prescribed by Section 129 and Section 133(1) of the Armed Forces Act of 1993, id est; that there was flagrant disregard of the clear provision of the Act as some members were not in that court at the hearing of the case against him. The learned counsel for the appellant took a great exception to the fact that in particular there was no waiting member. He fervently argued with gusto and unction that a Court Martial where the waiting member is not present notwithstanding the presence of other members of the panel made up of the President and two or four other members depending whether the Court Martial is a General Court Martial or Special Court Martial, is null and void.

I shall set down the provisions of Sections 129 and 133 of the armed forces Act of 1993.

Section 129.

“*There shall be, for the purpose of carrying out the provisions of this Decree, two types of courts martial, that is*

(a) *A general court martial, consisting of a president and not less than four members, a waiting member, a liaison officer and a Judge Advocate.*

(b) *A special court martial, consisting of a president and not less than two members, a waiting member, a liaison officer and a Judge Advocate.*

133-(1) Subject to the provisions of Sections 128 and 129 of this Decree, a court martial shall be duly constituted if it consists of the President of the court martial, not less than two other officers and a waiting member”.

The learned counsel for the appellant submitted that in the absence B of the waiting member whose presence he vigorously canvassed was preeminently necessary and prerequisite for a duly constituted Martial court proceedings, any purported decision taken by the court is a nullity. He cited Oloriegbe v. Omotosho (1993) 1 NWLR (Pt.270) 386 at 402 C and 409 and also Olatunji v. The State (2000) 12 NWLR (Pt. 680) P. 182 at 191.

In his submission, this Court was referred to Olatunji v. The State (2000) 12 NWLR (Pt. 680) at 182 on the constitution of the court. Although the above case referred to in this court, is a Court of Appeal D decision, I have carefully read the judgment and there is nothing in it in respect of what constitutes a valid Court Martial Court. In that case the appellant was being tried after he had left the military and after the expiration of the statutory period during which he would be tried. Following E this statutory provision the Court of Appeal, held as follows:

“Since as at 6th August 1996 the appellant had been more than three months out of the N.A.F., he had become no longer subject to service law in accordance with Section 69(2) of the A.F.D. He could not F therefore be tried by that date”.

That case is of no relevance here.

Another case cited by the appellant counsel to strengthen his case on the unconstitutionality of the Court Martial court is Alhaji Raimi Oloriegbe v. J.A. Omotosho (1993) 1 NWLR (Pt. 270) P.386. In that G case the Supreme Court was called upon to pronounce on the unconstitutionality of Section 63(1) of the High Court Law Cap. 49 Laws of Northern Nigeria applicable to Kwara State. That case has nothing to do with the unique composition of the Court Martial Court, because in that H case referred to, the panel was not properly constituted as there ought to be three members one learned in Islamic or Sharia Law. It is inapplicable. We are here dealing with the unique case of Court Martial Court which is

peculiar in its character. Let me illustrate. In the case under consideration, the Judge Advocate, for example, is not a member of the court and cannot be described as such. He is in the nature of a State Counsel being a legal officer whose duty it is to prosecute any one arraigned before the Court Martial Court. From the provision of Section 129 (Supra), his position relative to the strict constitution of the Court Martial Court is the same as the waiting member.

The question here then is who is a waiting member and what does the term or phrase “*waiting member*” denote. It is important to stress that there is no distinctive definition of who a waiting member is. However, I would define or describe a waiting member to mean a person who is to perform or stand by to take the place or position of a member of the panel of the court who in stricto sensu, for one reason or the other, is unable to sit in the panel and has to be substituted by another person already appointed or nominated to be a member in case of any eventuality. He shall be likened to a spare tyre. If he is around he may not be noticed. He is not a member of the panel exercising judicial function. Although this is not necessarily important or relevant for the purposes of establishing the importance or otherwise of the waiting member in relation to the construction of what is a valid Court Martial Court. Black’s Law dictionary describes the term “*Judge Advocate*” in American parlance as a principal legal adviser on the staff of a military commander Or more broadly to any officer in the Judge Advocate General Corps or Department of one of the US armed forces. Webster’s 20th Century Dictionary describes a Judge Advocate “*as a military legal officer, especially an officer designated to act as prosecutor at a Court Martial*”. He is not a member of the court but he must be present to do his work to prosecute the alleged offender. **The term “*liaison officer*” as used in the Act means nothing more than an officer in military office whose duty is merely to coordinate or insure proper co-ordination of activities, a sort of intercommunicating officer. He is not a member of the trial court. These officers are mentioned together along with a waiting member. They are necessary adjuncts meant to situate the Court Martial in its proper context of the military.**

For the purpose of the proceedings and trials in Court Martial cases, they are not members of the panel. It is stretching the interpretation to be accorded to Section 129 too far I believe, to state or insinuate that because the liaison officer who is not involved in the trial or prosecuting of a case cannot be located by the appellant therefore the trial was a nullity and the court should so hold. The same applies to the position of a waiting member. B

The term “waiting” derived from the verb wait as used adjectively in the statute and in the context it is referred to, denotes that no place is available right now for the officer so waiting but when the condition is ripe for the waiting process to cease, then the officer so waiting may then become a member. Consider, for example, the everyday occurrence of people waiting for a bus or at a Doctor’s clinic. A person continues to wait until the happening of an event. Having discussed this matter forensically, I hold that the waiting officer is not a member of the court and that his not being seen by the appellant or his counsel in the Court Hall since he does not sit on the panel cannot make the decision of the court null and void. Therefore, the 1st issue as canvassed by the appellant that the trial and the subsequent decision of the Court Martial Court are irregularly conducted does not hold, and I find no fault in its proceedings. C D E

Two other points allied to the complaint of the appellant about alleged irregularity of the trial which he said was a nullity are: F

(1) That the accused i.e. the appellant was not given an opportunity to object to any member he considered undesirable as prescribed by Section 137 of the Act to wit that “*an accused about to be tried by a court Martial shall be entitled to object.....*” G

(2) Allied to this complaint is the point taken that no Oath was taken as provided by the law, and that being the case the trial should be voided. H

In the appellant’s counsel’s submission, it is evident that he strongly believed in the accuracy of the transcript of the trial as espoused by his counsel. Given that situation, there is no where in

the record where he protested either to non-presence of the waiting member or he objected to any member's presence or evinced an intention that he could or might possibly object to the membership of whoever might be the waiting member. He was aided in his case by a counsel of his choice who should have advised him of his rights. The only inference is that he chose to waive these rights. Further to these, his counsel argued that no oath was taken by the members before the commencement of the trial of the appellant. He referred to Rosse K v. A.C.B Ltd. (1993) 8 NWLR (Pt. 312) p. 382 at 488 as applicable. With greatest respect to the view held by the learned counsel, that case does not apply here in that I do not find anything impracticable, bootless or even torperscent to describe the trial as falling within the orbit of what was enunciated in Rossek v. A.C.B Ltd. (supra) by Bello, CJN. I have carefully read the proceedings from day one of the trial of the appellant. I would like to state the full remark of the President of that Court Martial Court at the beginning of the trial.

"Judge Advocate let us commence with the other case of Lt. Col. Steve Obisi".

The impression gained is that there was a previous hearing of a case before the trial of the appellant. To my mind, it cannot be said to be the proper interpretation of the Act that regardless of the number of cases the panel might have tried on that day, the members should swear an oath in respect of every trial of any case on that day. Admitted that Section 137 made provision for the members to swear before the trial, it is my opinion and I hold that where the court had heard several trials previous or preceding the one for which the appellant had complained of no oath taking, the inference is that the court might have taken the oath previous to the new trial. Besides, I do not see any objection to the commencement of the trial without an oath being taken. This is not a question of having waived his right but not objecting so as to indicate a protest of violation of the spirit of the Act. My view is premised on the possibility that hitherto the court had taken the Oath during the time of the trial of the first case or cases. If no oath was taken, I

wonder why the appellant did not protest. In a situation like this where possibly the court is left in doubt as to speculate to the true situations of matters, the party raising the objection would fail where he fails to satisfactorily convince the court of the state of affairs of the trial.

The 2nd issue is as to whether the Court of Appeal should have affirmed the judgment of the Court Martial Court on a purported confessional statement when a trial within a trial by the Court Martial was not complied with. In the course of the proceedings, the appellant said that the investigation officer used a “subtle approach” to get an admission from him. In the context the word “subtle” was used, the message sought to be conveyed is that illegal and perhaps prohibitive method to effect confession from him which he euphemistically described as subtle was employed. If the investigating officer intimidated the appellant to make a confessional statement, the appellant had the right to tell the court what happened i.e. how he was forced to make and sign a statement he later disclaimed. **For a literate Engineer not to be able to describe graphically and with certainty how he was made to make an admission that sought to incriminate him but rather relied on equivocation and invocation of expression of doubtful meaning and connotation thereby indulging in double talk is to say the least trifling with his defence and burying his defence on words that convey no meaning to the court. The appellant insinuated and construed the expression “subtle” there to mean use of coercive force. Well, it is important for one to understand the meaning of the words. The word subtle is defined in Oxford Advanced Learner’s Dictionary to mean not very noticeable or obvious, behaving in a clever way, using indirect method to achieve an aim.** What is the complaint of the appellant to the so-called subtle method used. Let me set down part of the questions and answers in respect of the subtle methods used as contained in the record.

“Tell this court if that statement you made was yours and if it was made voluntarily.

Witness (Accused)

It was not voluntarily because that situation I was, it was humiliating I was so confused. I even went to the next office to ask what I have done. The D.N.F. ran and rushed me out of the office”.

That answer was about the voluntariness or otherwise of the statement credited to him. **The appellant did not expatiate on what he referred to as humiliating circumstance. How can any court worth its salt construe an equivocation to mean coercion. There would be need for a trial within a trial where the appellant can clearly demonstrate by the nature of the language he used to express his ordeal that the statement credited to him was obtained by force, trick or non-recognizable legal ways. In the absence of that, it will be idle for this court to forage out in an attempt to be considered to have done its duties magnificently and according to its calling.**

This issue collapses on its body.

The cross appeal is to the effect that the lower court failed to make and or reaffirm the consequential orders of refund of the various moneys allegedly made away with by the appellant/cross-respondent having been found guilty.

I note that the lower court was obviously silent on the issue of making an order of restitution and in that case failed or refused to make any order to that effect. The cross-respondent, on his own part, referred this court to the opinion of the lower court in respect of the sentences. The court below had stated this,

“The sentences are far in excess of what the law under which the three-count charge was laid stipulates. They must be reduced in conformity with the law”.

This remark by the lower court arose when it was considering the complaint of the alleged excess of sentences.

It is difficult for me to construe this statement to mean that the order of refund made by the Court Martial forms part of the expression of the sentence being excessive. **When an issue is before an appellate Court unless it is abandoned, it must be pronounced upon by the court. Now as the lower court has failed to pronounce on the issue of refund, does this court have the jurisdiction to make an order to**

that effect. The appellant was convicted under a Federal Law. The issue of restitution of property stolen is reflected or provided in Section 270 of the Criminal Procedure Act, which is a federal Law. Section 270(1) states:-

“Where any person is convicted of having stolen or having received stolen property, the court convicting him may order that such property or a part thereof be restored to the person who appears to it to be the owner thereof either on payment or without payment by the owner to the person in whose possession such property or a part thereof then is, of any sum named in such order”.

I have carefully examined the provision of Section 270 of the Criminal Procedure Act which is a federal law and I find it hard to pigeon hole the conviction of the appellant on this section as the conviction does not appear on the surface of it to relate to theft or allied offences. The conviction seems centered on purely military offences even though there is an insinuation implicit in the conviction which tends to show that the appellant’s honesty is in doubt, but essentially he was not convicted of stealing. In the circumstance, the relief sought in the cross-appeal cannot be upheld or acceded to. Accordingly, the Cross-Appeal fails and is dismissed.

On the whole, the main appeal fails and is dismissed; the Cross-Appeal also is dismissed, and the order of the Court Martial with respect to the issue of restitution is set aside.

BELGORE JSC

I agree the main appeal fails and the cross-appeal is dismissed, the order for restitution is affirmed. I therefore agree with the judgment of my learned brother, Pats-Acholonu, JSC.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Pats-Acholonu, JSC. I agree with his reasoning conclusion that the ap-

peal has no merit and ought to be dismissed. It is accordingly dismissed.

I also agree with him that there is no merit in the cross-appeal. It is not disputed that the appellant/cross-respondent was charged and convicted of a 3 count charge under Section 57(1) of the Armed Forces Decree No. 105 of 1993 for disobedience to standing orders, the punishment for which is imprisonment for a term not exceeding two (2) years or any less punishment.

He was sentenced to various terms of imprisonment and ordered to make refunds of sums of money to the Federal Government. His appeal to the Court of Appeal succeeded in part. Conviction was confirmed but sentences were reduced substantially.

The Court of Appeal in the lead judgment of Aderemi, JCA said of the sentences on page 380 of the record as follows:-

“The appellant has however complained that the sentences imposed on the appellant were far in excess of the maximum punishment stipulated by the law. I have had a second look at the provisions of Section 57(1) of the Armed Forces Decree No. 105 of 1993 under which the appellant was charged the penalty stipulated upon conviction by a court martial, is for a term not exceeding two years or any less punishment provided by the Decree. The lower court, sequel to returning a verdict of guilty on each of the three counts, sentenced him on count one to 15 years imprisonment and an order to refund the sum of N12 million to the Federal Government, on Count Two – 5 years imprisonment and on Count Three – 5 years imprisonment and an order to refund the sum of £40,000.00 to the Federal Government, the sentences are to run concurrently. The sentences are far in excess of what the law under which the three count charge was laid stipulates. They must be reduced in conformity with the dictates of the law. Accordingly, the sentences are reduced to 1½ (one and half) years imprisonment for each count. The sentences are to run concurrently.”

The Court of Appeal was, therefore, conscious of the orders of refunds of the various sums of money made against the appellant/cross-respondent but chose to be silent or say nothing about them. The respondent/cross-appellant has now asked this court to restore those orders for

refunds made by the Court Martial and which the Court of Appeal refused or failed to endorse.

I think after reducing the sentences of imprisonment, the Court of Appeal too equally had the discretion to order the appellant/cross-respondent to make refunds as it may deem fit in the circumstances. (See Section 174(3) and (4) of the Decree). The Court of Appeal did not make such an order. In my view, we have no reason to restore now in this court those orders of refunds made by the Court Martial which the Court of Appeal failed or omitted to make and or endorse. The cross-appeal therefore fails. It is hereby dismissed.

EJIWUNMI JSC

I have had the privilege of reading before now the draft of the judgment just delivered by my learned brother, Pats-Acholonu, JSC, and I agree with him for the reasons given in the said judgment that there is no merit in the appeal. This appeal and cross-appeal are against the judgment of the court below, Lagos Division (Coram Oguntade, Galadima and Aderemi, JJCA) delivered on the 25th day of June, 2001. The judgment arose from the conviction of the appellant by a General Court Martial that was held against him for the following charges:

(1) Disobedience to standing orders contrary to Section 57(1) of Decree No. 105 of 1993 – Did disobey standing orders on the code of conduct in that he engaged in private business on or about the 8th March 1996 thereby received the sum of N12,000,000 only as gratification from Agric Consult (Nig.) Ltd of Plot 182 Kofo Abayomi Street, Victoria Island being part of the proceeds realized from the sale of power plant generators belonging to the Imo State Government of Nigeria.

(2) Scandalous conduct contrary to Section 91 of Decree No. 105 of 1993 – The accused did behave in a scandalous manner unbecoming of an officer and a gentleman on or about the 11th of March 1996 when he donated the sum of N1,000,000 with Wema Bank Cheque No. 603899 to Christ Chapel International Church, Ijora which amount is beyond his legitimate income.

(3) Conduct to the prejudice of good order and discipline contrary to Section 103 of Decree No. 105 of 1993 – The accused officer acted in a manner prejudicial to good order and service discipline on or about 22nd April 1996 when he traveled out of Nigeria to London the United Kingdom without official permission and as well as lodging with Barclays Bank, London the sum of 40,000.00 pounds only in fixed deposit.

After the plea of the accused was taken and to which he pleaded not guilty to each of the counts, evidence was led in support of each of them by the prosecution. The accused was found guilty in respect of each count and sentenced accordingly. The sentences are as follows:-

“Count 1 – 15 years imprisonment with an order that the convict refund the sum of N12 million to the Federal Government.

Count 2 – 5 years imprisonment.

Count 3 – 5 years imprisonment and the convict to refund the sum of £40,000 to the Federal Government.”

It was further ordered that the findings and sentences of the court should run concurrently subject to confirmation by the appropriate authority.

As the appellant was not satisfied with the judgment and orders of the Court Martial, he appealed to the court below. Pursuant thereto, he filed a Notice of Appeal with ten grounds of appeal to the court below. That Court allowed his appeal in part. This is because his conviction by the trial court was affirmed, but the term of imprisonment thereon was reduced. That portion of the judgment of the court below, per Aderemi, JCA (with which Oguntade and Galadima, JJCA concurred) read thus:-

“The sentences are far in excess of what the law under which the three-count charge was laid stipulates. They must be reduced in conformity with the dictates of the law. Accordingly, the sentences are reduced to 1½ (one and half) years imprisonment for each count. The sentences are to run concurrently.”

Still dissatisfied with the judgment and the orders made by the court below, the appellant has appealed further to this Court. Pursuant thereto, the appellant with the leave of this Court has filed an amended Notice of Appeal. And as the respondent was also not satisfied with an

aspect of the judgment of the court below, this Court at the hearing of the appeal and with learned counsel not opposing, leave was duly granted to the respondent to cross-appeal against that aspect of the judgment of the court below as made manifest in the respondent's notice of cross-appeal. In accordance with the Rules of the court, briefs of argument were filed B and exchanged by the parties. At the hearing, learned counsel for the parties adopted and placed reliance upon their respective briefs in support of their differing positions on the appeal.

The learned counsel for the appellant, Mr. Etigwu Uwa, in the brief filed on his behalf identified the following as the issues for the determination of the appeal. These are:- C

"1. Whether the General Court Martial was competent to try the appellant in view of its composition and the condition precedent to the assumption of its jurisdiction specified in the Armed Forces Decree No. D 105 of 1993.

2. Whether the Court of Appeal was right in affirming the conviction of the appellant based mainly on his purported confessional statement when the condition precedent to the admission of the statement viz E a trial within a trial by the Court Martial was not complied with."

As the respondent in the brief filed on its behalf by its learned counsel C.I. Okpoko, Senior Legal Officer of the Federal Ministry, has set up issues that are similar with those identified above for the appellant, F I do not deem it necessary to set down herein issues identified for the respondent in its brief.

Now, from a careful reading of the appellant's brief, it is manifest that in respect of issue 1, the argument of learned counsel is mainly directed as showing that in the setting up of the General court Martial G that convicted the appellant, the provisions of Sections 137 (1) & (2) and 138 of the Armed Forces Act, 1993, were not complied with. Specifically it is his contention that these provisions stipulate (1) that the members of the Court Martial including the waiting member must be sworn in H the presence of the appellant who has a right during that process to take objection against anyone of them from trying him. Secondly, he has argued also that as he was not given the opportunity to object to any of the

members of the Court Martial including the waiting member before the commencement of his trial had he so wished, the Court martial lacked the necessary competence to try him. It is his further submission that his trial and conviction amount to a nullity in view of the incompetence of the Court Martial as argued above. In support of this submission, the cases of Rossek v. ACB (1993) 8 NWLR (Pt. 312) 382 at 488; Olatunji v. State 12 NWLR (Pt. 680) 182 at 191.

The learned counsel for the respondent replied to the contentions made for the appellant under his issue 2 in the respondent's brief. In the said brief, learned counsel for the respondent has argued that learned counsel for the appellant misconceived the principle with regard to the law guiding the concept on non-compliance with any provisions of a statute and/or Rules of Court. He then submitted that the non-appointment of a waiting member in the trial of the appellant by the Court Martial is not fundamental as to vitiate the proceedings of the Court Martial. It does also appear that it is his further submissions that a waiting member as contemplated by the provisions of the Armed Forces Decree No. 105 of 1993 (as amended) may become a sitting member of the panel when invited to replace any of the members already trying an accused is unable to continue with the hearing. It is therefore, argued that a waiting member is a mere formality in respect of on going Court Martial. In any event, argued learned counsel for the respondent, for the aforesaid non-compliance to vitiate the proceedings and render it a nullity, it must be shown that the appellant suffered a miscarriage of justice as a result of the non-compliance with the provisions which form the subject matter of the complaint of the appellant. In support of his several arguments, learned counsel invited for our consideration the following cases: Soy Agencies v. Metallum (1991) 3 NWLR (Pt. 177) 35 at 43-44; The Miscellaneous Offences Tribunal & Anor v. N.E. Okoroafor & Anor (2001) 18 NWLR (Pt. 745) 295 at 337.

Now, with regard to the second arm of the contention made for the appellant that the members of the Court Martial were not sworn before the trial commenced, counsel for the respondent submitted that that cannot be true. And in order to buttress his point, he sought the leave of

this Court to supply the record of appeal germane to the question raised by the appellant as to whether the members of the Court Martial were sworn before the appellant was tried. That additional record of appeal was admitted with the consent of the learned counsel for the appellant who informed the Court that he was not opposed to its admission. B

It is manifest from the arguments and submissions of learned counsel for the parties that the resolution of the questions raised depend on the meaning and effect of the following provisions of Sections 128, 129, 133, 137 & 128 of the Armed Forces Act No. 105 of 1993. These are:-

“128(1) The following persons may act as appropriate superior authority in relation to a person charged with an offence, that is – C

(a) the commanding officer; and

(b) any officer of the rank of Brigadier or above or officer of corresponding rank or those directed to so act under whose command the person is for the time being. D

(2) the President may make rules for the purpose of this section and those rules may confer on the appropriate superior authority power to delegate his functions in such cases and to such extent as may be specified in the rules, to officers of a class so specified. E

129. There shall be, for the purposes of carrying out the provisions of this Decree, two types of courts martial, that is,

(a) a general court martial, consisting of a president and not less than four members, a waiting member, a liaison officer and a Judge Advocate. F

(b) a special court martial, consisting of a president and not less than two members, a waiting member, a liaison officer and a Judge Advocate. G

133(1) Subject to the provisions of Sections 128 and 129 of this Decree, a court martial shall be duly constituted if it consists of the president of the court martial, not less than two other officers and a waiting member. H

137(1) An accused about to be tried by a court martial shall be entitled to object, on any reasonable grounds, to any member of the court martial or the waiting member whether appointed originally or in lieu of

another officer.

(2) *For the purpose of enabling the accused to avail himself of the right conferred by subsection (1) of this section, the names of the members of the court martial and the waiting member shall be read over in the presence of the accused before they are sworn, and the accused shall be asked whether he objects to any of those officers.*

(3) *An objection made by an accused to an officer shall be considered by the other officers appointed members of the court martial.*

(4) *If objection is made to the president of the court martial and not less than one-third of the other members of the court martial allow it, the court martial shall adjourn and the convening officer shall appoint another president.*

(5) *If objection is made to a member of the court martial, other than the president of the court martial and not less than one-half of the members entitled to vote allow it, the member objected to shall retire and the vacancy may, and if the number of members would be reduced below the legal minimum, shall, be filled in the prescribed manner by another suitable officer and in such a way always as to ensure that the membership is not reduced below the legal minimum.*

138(1) *An oath shall be administered to every member of a court martial and to any person in attendance on a court martial as judge advocate, waiting member, shorthand writers and interpreter."*

I will now consider the arguments with regard to the appellant's issue 1. I need not in this judgment discuss any further the question whether the Court Martial that tried the appellant was a Special or General Court Martial. This is because the appellant's counsel in the course of his brief later conceded it that the appellant was tried and convicted by a General Court Martial. This was constituted by the following persons and as listed at page 389 of Volume 2 – the Additional Record of Appeal. It reads:-

- H a. Commodore J.O. Ariri – Naval Drafting Command – President.
- b. Captain O. Abegunde – NHQ (EDN) - Member
- c. Captain E. Abolarin – NNS QUORRA – Member
- d. Surgeon Captain O. Afolabio O HQ NAVTRAC – Member

- e. Captain LOB Afbagh – NHQ (Plans) – Member
- f. Lieutenant Commander J.C. Ifon - Clerk of the Court
- g. Lieutenant Commander J.J. Hassan – Officer of the Court
- h. Sub-Lieutenant C.N. Anushiem – Judge Advocate.

Then at page 393 of the same additional records, the following proceed- B
ings relevant to this appeal are recorded:-

*“The President of the Court after ascertaining from the Provost
that the accused persons including the appellant were present then ad-
dressed the Judge Advocate and who replied thus:-*

*“Mr. President Sir, the stage we are now is to accord the accused C
officers the opportunity of making their objections to the respective dis-
tinguished members of this court. But before then it is the duty of the
Clerk of the Court to read the Convening Order which contains the list of D
the members to the hearing of this Court, and also to enable the accused
officers to get familiar with the members of this Court which I am sure
they have been served with all the documents.”*

After the above statement by the Judge Advocate, the Clerk of
Court duly read out the convening order following the orders of the Presi- E
dent of the court to that effect. Soon after that the accused persons
before the court including the appellant was asked individually whether
they have any objection to any of the members of the Court Martial. To
that question, the appellant was recorded to have said ‘No objection’. He F
similarly answered when asked the same question with regard to the
stenographer and typist of the Court. Each member of the Court Martial
including the stenographer were thereafter sworn individually on their
own oaths with regard to due and proper performance of their duties as G
members of the Court Martial. It is therefore manifest from the printed
record of the proceedings of the court that the members of the court that
tried the appellant were duly sworn before the trial of the appellant, and
before then he was clearly given the opportunity of objecting to any of
them trying him. It follows that I must reject the submission of learned H
counsel for the appellant that the appellant was not given the opportunity
of objecting to the members of the court, and that they were not duly
sworn on their oaths.

The other point argued for the appellant to invalidate the trial of the appellant is the contention that the court was not duly constituted, as no one was included as a waiting member of the court that tried him. In support of that submission learned counsel made reference to the provisions of Sections 129 (a) and 133 (i) of the Armed Forces Act of 1993. Now, the question that must be considered is, whether the fact that no waiting member was appointed along with the other members who actually heard and determined the case against the appellant. Beyond the argument that the provisions of sections 129 (a) and 133 (i) of the Armed Forces Act so decreed, no further argument was urged on the court for the submission that the General Court Martial, which tried the appellant, was a nullity. The question then is, whether the waiting member was expected to be one of those to try a person charged before the court. It is useful to bear in mind that though Section 129 of the Armed Forces Act specifically provided that the Court Martial shall consist of the President and not less than four members, a waiting member, a liaison officer and a judge advocate, it seems to me clear that not all these persons sit together to hear a matter at the same time. It does appear that the primary membership of the court consists of the President and four other members. The waiting member, even if so appointed could become a member of the Court if any other serving four others could not continue with the hearing of the case before the Court. It does appear to me that for the appellant to succeed in his argument that his trial was a nullity, he must show that the court was not properly constituted not only as regards members and qualifications, but that any member of the court that tried him is disqualified for one reason or the other. See Madukolu & Ors. v. Nkemdilim 1962 1 AII NLR 58 at 594.

With regard to the cross-appeal, learned counsel for cross-appellant, C.I. Okpoko, State Counsel in the Federal Ministry of Justice raised only one issue for the determination of the cross-appeal. It is:-

“Whether the learned Justices of the Court of Appeal were right in law to have failed to make and/or re-affirm the consequential orders of refund of various sums of money made against the cross-respondent by the court, having regard to the circumstances of this case.”

This cross-appeal obviously arose from the failure of the Court of Appeal, who after affirming the conviction of the appellant/cross-respondent by the Court Martial, thought it desirable that the prison sentences meted out to him by the trial court be reduced, made the necessary orders to that effect. However, it is the complaint of the cross-appellant B that the court below failed to re-affirm or make any pronouncement with regard to the consequential orders made by the Court Martial.

These are not in addition to the prison sentences imposed on the cross-respondent, in respect of counts 1 & 3, he was also ordered to refund to the Federal Government the sum of N12 million and £40,000.00 respectively to the Federal Government. C

With the clear failure of the court below to make any pronouncement in respect of these consequential orders after it reduced the prison sentences passed on the cross-respondent, the first question to consider D is, whether by its failure to make any pronouncement on the consequential orders, those orders should be regarded as no longer enforceable against the cross-respondent. I think not.

It would require in my humble view, a direct order of the court E below to set aside the lawful order of the Court Martial. In the absence of such an order and with the appeal and its records before the court, and bearing in mind that an appeal on the same subject matter is a continuation of the proceedings that commenced the trial, this court can in the F circumstances consider matters such as the one raised on appeal. This is because, it seems to me that the failure of the court below to make any pronouncement on the consequential orders made by the Court Martial ought to be regarded as a slip on the part of the court below. Be that as it G may, the next question that I need to consider is, whether the consequential orders were lawfully made by the Court Martial. It is not in doubt that the cross-respondent was not charged with the offences of stealing as envisaged in the provisions of S. 270 (1) of the Criminal Procedure Act, which reads:- H

“where any person is convicted of having stolen or having received stolen property, the court convicting him may order that such property or part thereof be restored to the person who appears to be the owner

thereof either on payment or without payment by the owner to the person in whose possession such property or a part thereof then is of any such named in such order.”

B It seems to me therefore that having regard to S. 270(1) of the Criminal Procedure Act, reproduced above, the Court Martial could not have made the consequential orders, which they made. Those orders were therefore improperly made. It follows that the cross-appeal must fail.

C In the result, the main appeal is dismissed and the cross-appeal is also dismissed for the reasons given above and the fuller reasons set out in the leading judgment of my learned brother, Parts-Acholonu, JSC.

D **MUSDAPHER JSC**

I have had the honour to have glance at the draft of the judgment of my Lord Parts-Acholonu, JSC, just delivered with which I entirely agree. The facts have been exhaustively and comprehensively set out in the aforesaid judgment and I need not repeat them for the short contribution I intend to make.

F The first issue deals with the competence of the general Court Martial to try the appellant in view of its composition and the conditions precedent to its assumption of jurisdiction as specified under the Armed Forces Decree No. 105 of 1993. The first leg of the complaint deals with the issue of the waiting member. Now Section 133(1) of the Armed Forces Decree No. 105 of 1993 provides:-

G *“Subject to the provisions of Sections 128 and 129 of this Decree, a Court Martial shall be duly constituted if it consists of the president of the Court Martial, not less than two other officers and a waiting member”.*

H It is contended by the learned counsel for the appellant, that the absence of the waiting member in the instant case rendered the Court Martial incompetent to try the appellant. I do not agree, I think the learned counsel has taken the matter too far. The non appointment of a waiting member is a mere irregularity which did not affect the real composition

of the Court Martial. Mere technical error by the convening authority which did not prejudice the appellant should not be the basis for which this Court should declare the proceedings before the General Court Martial invalid. This court, as the Court of last resort, has stated in a number of cases its abhorrence to undue regard to technicality and is always B willing to do substantial justice. I am of the view, that while the emphasis in a civil case is to ensure the determination of the rights of the parties, in a criminal case the prevailing consideration is the need to balance the interest of the society at large in the due administration of criminal justice C with the need to protect the accused person from possible oppressive trial. In Okegbu v. State (1979) 11SC 1., Irikefe, JSC said at page 6 – 7:-

“It seems to me that in deciding upon whether there has been a substantial miscarriage of justice, the Court of Appeal dealing with the D issue raised must be satisfied that it is not one of a mere technicality which had caused no embarrassment or prejudice to the appellant.”

It is also the law that an appeal court such as the Supreme Court will not interfere with the decision of the trial court on the ground of procedural irregularity where the irregularity has not occasioned a miscarriage of E justice. A waiting member is not a member of the Court Martial, his absence is a mere irregularity and could not affect the decision of the Court Martial. Substantial justice should not be allowed to be overcome by procedural irregularity. See Ekwere v. State (1981) 9 SC 4 and Okegbu F case supra.

The appellant’s other complaints have no merit, the appellant ought to have protested against the infractions with the procedure adopted at the trial before the Court Martial. A person who acquiesces to an im- G proper procedure without protesting is not permitted to complain on appeal. I resolve issue No. 1 against the appellant. It is for the above and the fuller reasons contained in the aforesaid leading judgment that, I too, dismiss the appeal and the cross-appeal.

H