

**SUPREME COURT OF NIGERIA**  
21ST MAY, 2004. SC. 71/2000  
**CORAM:- I.L. KUTIGI, U. MOHAMMED, S.U. ONU,**  
**U.A. KALGO, N. TOBI, JJSC**

1. WAYO UBWA	.....	DEFENDANT/ APPELLANT
2. TIV AREA TRADITIONAL COUNCIL)		
3. KWANDE LOCAL GOVERNMENT		
TRADITIONAL COUNCIL	.....	DEFENDANTS/
4. THE TOR TIV		RESPONDENTS
5. THE GOVT. OF BENUE STATE		
6. THE HON. ATTORNEY-GENERAL		
OF BENUE STATE		
AND		
1. JOHN BEGHA YAWEH	.....	PLAINTIFFS/
2. TYOWUA BASHI		RESPONDENTS

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COURTS - Constitution of - Judgments - Court of Appeal - For purpose of delivering judgment - Panel of 3 justices - One of whom did not hear the appeal - Is properly constituted (H1)

APPEALS - Judgment - Nullity of - Panel of the Court of Appeal - That delivered judgment - Being different from that that heard the appeal - Renders the proceedings a nullity (H2)

**FACTS**

This is an appeal against the judgment of Court of Appeal, Jos, delivered on 14-2-2000. The lead judgment dismissing appellant's appeal was delivered by Akpabio JCA with Umoren and Mangaji JJCA concurring. However, the record shows that the appeal was heard by the panel of Akpabio, Umoren and Chukwuma-Eneh JJCA on 18-11-1999 who reserved judgment till 27-1-2000. As the judgment was not ready on that Day, the case was further adjourned to 14-2-2000 by the same panel

including Chukwuma-Eneh JCA.

But judgment was now delivered on 14-2-2000 by a panel including Umoren JJCA, who delivered judgment in an appeal he never heard. Dissatisfied, appellant has further appealed to the Supreme Court raising a preliminary issue that was redrafted by the apex court.

**ISSUE FOR DETERMINATION**

*“Whether the judgments delivered by the Court of Appeal on 14/2/2000 were valid or not.”*

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

***COURTS - Constitution of - Judgments***

1. I say straight away that for the purposes of delivering judgment the court was properly constituted on 14/2/2000. Three (3) justices were present as shown above, when, in fact, even one or two justices would have been sufficient for the purpose i.e. simply to read the judgments (see Section 294(4) of the 1999 Constitution below). The real problem here therefore is that instead of reading the judgment prepared or written by Chukwuma-Eneh, JCA., who took part with two others in the hearing of the appeal on 18/11/99, it was the judgment of one Mangaji, JCA., who did not hear the appeal that was read. (p.1390 C)

***APPEALS - Judgment - Nullity of***

2. I think Mr. Okafor is right. I agree with him. The appeal must therefore succeed on this issue alone. It is hereby allowed.

The entire proceedings before the Court of Appeal were a nullity because all the members who heard the appeal and those who wrote the judgments were not the same. In other words all the members who wrote the judgment were not all present throughout the hearing of the appeal which includes delivery of judgment. The judgment of the Court of Appeal delivered on 14<sup>th</sup> February, 2000, is therefore a nullity. It is accordingly set aside. It is hereby ordered that the Appeal No. CA/J/12/95 shall be heard de novo by another panel of Jos Division of the Court of Appeal. (p. 1391 G)

**REPRESENTATION**

OFODILE OKAFOR, SAN, (WITH HIM, B.I. WAYO AND JUDE OKORO), FOR THE DEFENDANT/APPELLANT.

B.I. HOM, (WITH HIM, T. AYUA), FOR THE PLAINTIFFS/RESPONDENTS.

**CASES REFERRED TO**

Queen v. Governor-in-Council WR Ex Parte Laniyan Ojo (1962) AII NLR 149

Madukolu v. Nkemdilim (1962) AII NLR (Pt.2) 582

Mairai v. Bauchi N.A. (1957) NNLR 31

Nana Tawiah v. Kwesi Ewudzi; 3 WACA 52

Otwiwa & Anor v. Kwaseko 3 WACA 230

Chapman v. CFAO 9 WACA 181

**STATUTES REFERRED TO**

Constitution of Nigeria 1990 ss. 294(2) & (4), 247(1)

Court of Appeal Act Cap. 75 (LFN 1990) s. 9

**LEAD JUDGMENT BY KUTIGI JSC**

Because of the nature of the order which I intend to make finally in this appeal, I do not wish to say anything about the facts and or merit of the case at this stage especially when it is realised that the case may later return to this court. I will therefore confine myself to the short but decisive preliminary point of law relating to the judgments of the Court of Appeal only.

This is an appeal against the judgment of the Court of Appeal holden at Jos in Appeal No. CA/J/12/1995 delivered on the 14<sup>th</sup> day of February, 2000.

The lead judgment herein, dismissing appellant's appeal, was delivered by Akpabio, JCA., who presided and was concurred to by Umoren and Mangaji, JJCA., (see pages 240-253), of the record).

However, the record shows on page 238, that the appeal was heard

by the panel of Akpabio, Umoren and Chukwuma-Eneh, JJCA., on 18/11/99 when judgment was reserved till 27/1/2000.

On 27/1/2000, judgments were not ready and the case was further adjourned to 14/2/2000 by the panel of Akpabio, Muhammad and B Umoren, JJCA.

Dissatisfied with the judgments of the Court of Appeal the appellant has further appealed to this court. And one of the three (3) issues submitted to this court for determination is:-

C “(2) *Whether the Court of Appeal was duly constituted when the judgment, subject matter of this appeal, was delivered on the 14<sup>th</sup> February, 2000*”.

**I say straight away that for the purposes of delivering judgment the court was properly constituted on 14/2/2000. Three (3) justices were present as shown above, when, in fact, even one or two justices would have been sufficient for the purpose i.e. simply to read the judgments (see Section 294(4) of the 1999 Constitution below). The real problem here therefore is that instead of reading the judgment prepared or written by Chukwuma-Eneh, JCA., who took part with two others in the hearing of the appeal on 18/11/99, it was the judgment of one Mangaji, JCA., who did not hear the appeal that was read. So the proper question or issue to resolve is-**

F “*Whether the judgments delivered by the Court of Appeal on 14/2/2000 were valid or not.*”  
and not issue (2) of the appellant reproduced above which I have already answered in the affirmative.

G The argument of Mr. Ofodile Okafor, SAN, for the appellant, is that although a justice of the Court of Appeal who did not hear an appeal may sit in the panel to deliver a written judgment of a brother justice who heard the appeal but who is otherwise unavailable, a judgment written by a justice who did not participate in the hearing of the appeal will vitiate the proceedings and render it a nullity. That, in this case, the panel that heard H the appeal consisted of Akpabio, Umoren and Chukwuma-Eneh, JJCA., but the judgments delivered were those of Akpabio, Umoren and Mangaji, JJCA. It was pointed out that as Mangaji, JCA., did not take part in the

hearing of the appeal, he could not validly write a judgment in the case. It was a nullity and the entire proceeding was consequently a nullity. Reference was made to Section 247(1) and Section 294(2) & (4) of the 1999 Constitution.

They are as follows-

*“247(1) For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than three justices of the Court of Appeal...”*

*“294(2) Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other justice who delivers a written opinion:*

*Provided that it shall not be necessary for all the justices who heard a cause or matter to be present when judgment is to be delivered and the opinion of a justice may be pronounced or read by any other justice whether or not he was present at the hearing.”*

*“294(4) For the purpose of delivering its decision under this section, the Supreme Court, or the Court of Appeal shall be deemed to be duly constituted if at least one member of that court sits for that purpose.” (Underlining supplied by me).*

A number of cases were also cited in support including Queen v. Governor-in-Council WR Ex Parte Laniyan Ojo (1962) AII NLR 149, Madukolu v. Nkemdilim (1962) AII NLR (Pt.2) 582, Mairai v. Bauchi N.A. (1957) NNLR 31, Nana Tawiah v. Kwesi Ewudzi; 3 WACA 52 Otwiwa & Anor v. Kwaseko 3 WACA 230. Chapman v. CFAO 9 WACA 181

**I think Mr. Okafor is right. I agree with him. The appeal must therefore succeed on this issue alone. It is hereby allowed.**

**The entire proceedings before the Court of Appeal were a nullity because all the members who heard the appeal and those who wrote the judgments were not the same. In other words all the members who wrote the judgment were not all present throughout the hearing of the appeal which includes delivery of judgment. The**

**judgment of the Court of Appeal delivered on 14<sup>th</sup> February, 2000, is therefore a nullity. It is accordingly set aside. It is hereby ordered that the Appeal No. CA/J/12/95 shall be heard de novo by another panel of Jos Division of the Court of Appeal.**

B The defendant/appellant is awarded costs of N10,000 against the plaintiffs/respondents.

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**MOHAMMED JSC**

C I agree. The judgment of the Court of Appeal is a nullity since Mangaji, JCA., did not take part in hearing the appeal he cannot therefore write a judgment in the case. I too allow the appeal and send the case back to the Court of Appeal, Jos Division, for hearing de novo  
D before a different constituted panel of that court. I abide by the award made on costs.

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**ONU JSC**

E Having been privileged to read in advance the judgment of my learned brother, Kutigi, JSC., just delivered, I am in entire agreement with him that there is merit in this appeal.  
F In the result, I too allow the appeal and declare the entire proceedings in Appeal No. CA/J/12/95 before the Court of Appeal on 14<sup>th</sup> February, 2000, a nullity.  
G It is accordingly set aside and a retrial ordered before another panel of the Jos Division of the Court of Appeal with the order for costs as therein made.

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**KALGO JSC**

H I entirely agree with the judgment of my learned brother, Kutigi, JSC., just delivered by him in this appeal which I had the privilege of reading earlier. His findings and conclusion on issue 2, make it unnecessary to consider the other two issues raised by the appellant in his brief

of argument. Issue 2 reads:-

*“2. Whether the Court of Appeal was duly constituted when the judgment, subject matter of this appeal, was delivered on the 14<sup>th</sup> February, 2000.”*

By Section 247(1) of the 1999 Constitution and Section 9 of the Court of Appeal Act, Cap. 75 (Laws of Federation 1990), the Court of Appeal is duly constituted for purpose of hearing and determining any appeal, it consists of at least three justices of that court. And although a Justice of the court who did not take part in hearing an appeal may lawfully deliver a judgment or opinion of another justice who took part in hearing the appeal but is unavoidably absent, any judgment delivered by the three justices in any appeal must be by those justices who actually heard the appeal. Failure to do so, will render the judgment a nullity. See Adeigbe & Anor. v. Kushimo & Ors. (1965) All NLR (Reprint) 260 (1965) NMLR 285 at 287. Okolie Chime & Anor. v. Ofili Elikwu & Anor (1965) AII NLR (Reprint) 449. C  
D

In the instant appeal, it is very clear that on the 18<sup>th</sup> November, 1999, when this appeal was heard de novo by the Court of Appeal, the membership of the court on that day consisted of Akpabio, Umoren and Chukwuma-Ene, JJCA., and the judgment was later delivered on 14<sup>th</sup> February, 2000. But looking at pp. 240-253 of the record of appeal, it was abundantly clear that those who wrote the judgment were Akpabio, JCA., (leading), Umoren and Mangaji, JJCA., (concurring). This means that Mangaji, JCA., who did not take part in the hearing of the appeal on 18<sup>th</sup> November, 1999, wrote a concurring judgment in the appeal. And although the court was properly constituted of three justices on 14<sup>th</sup> February, 2000, the judgment which was delivered was not by those who heard the appeal on 18<sup>th</sup> November, 1999. That is contrary to the provisions of the 1999 Constitution and all principles of law and vitiates the whole proceedings. E  
F  
G

It is for the above and the more detailed reasons given by Kutigi, JSC., in the leading judgment that I agree that there is merit in this appeal on this issue alone. I accordingly allow it, set aside the decision of the Court of Appeal and order a rehearing of the appeal in the Court of Appeal H

by a different panel of that court. I abide by other consequential orders made in the leading judgment including the order as to costs.

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**TOBI JSC**

B I have read the judgment of my learned brother, Kutigi, JSC., and  
I agree with him. By Section 294(4) of the Constitution, one member of  
the Court of Appeal can deliver the decision of the court. In other words,  
the Constitution does not provide that for the purpose of delivering judgment,  
the provision does not provide that for the purpose of delivering  
C judgment, the provision of Section 247(1) must be complied with. In  
such a situation, the proviso to Section 294(2) of the Constitution provides  
an answer, read together with Section 294(4).

Section 247(1) provides that in the exercise of its jurisdiction, the Court  
D of Appeal must be duly constituted by at least three justices of the court.

This means that the minimum number of justices to constitute a panel of the Court of Appeal is three.

In this appeal, the appeal was heard by Akpabio, Umoren and  
E Chukwuma-Eneh, JJCA., on 18<sup>th</sup> November, 1999, when judgment was  
reserved to 27<sup>th</sup> January, 2000. The judgment was not ready on 27<sup>th</sup> January,  
2000 and it was further adjourned to 14<sup>th</sup> February, 2000. Came 14<sup>th</sup>  
February, 2000, the judgment was delivered by a panel of Akpabio,  
F Muhammed and Umoren, JJCA. The judgments that were delivered were  
those of Akpabio, Umoren and Mangaji, JJCA. As seen from above,  
Mangaji, JCA., was not in the panel that heard the appeal. It was  
Chukwuma-Eneh, JCA., who was in the panel with the two others and  
not Mangaji, JCA.

G In view of the fact that Mangaji, JCA., was not in the panel, he  
could not have written any judgment for delivery. In the circumstances,  
the entire proceedings in the Court of Appeal are a nullity. I set aside the  
judgment of the Court of Appeal. I hereby order that the matter be heard  
H de novo by another panel of the court. I also award N10,000.00 cost in  
favour of the plaintiffs/respondents.