

SUPREME COURT OF NIGERIA
2ND MARCH, 2007. SC. 74\2004
CORAM:- A. I. KATSINA-ALU, U. A. KALGO, N. TOBI,
M. MOHAMMED, I. F. OGBUAGU, JJSC

1. SOKOTO STATE GOVERNMENT
OF NIGERIA

2. ATTORNEY-GENERAL AND
COMMISSIONER FOR JUSTICE, APPELLANTS
SOKOTO STATE

3. STANDARD TRUST BANK LIMITED
AND
KAMDEX NIGERIA LIMITED RESPONDENT

JUDICIAL PRECEDENTS - Distinguishing - Conflict - Where two decisions are not in conflict - Question of which case to rely upon - Depends on facts and circumstances (H1)

JURISDICTION - Courts - Competence - Any defect therein is fatal - Delivery of final judgment - Is part of the hearing in a cause (H2)

CONSTITUTIONAL LAW - Appeals - Judgments - Court of Appeal - Justices that heard an appeal - Should reduce their judgment in writing - For its delivery by another Justice to be valid - Vide s. 294 1999 Constitution (H3)

JUDGMENTS - Appeals - Court of Appeal panel - Proper Constitution of - Delivery of own judgment by a justice - Who did not participate in the hearing - Renders the proceedings a nullity (H4)

FACTS

The plaintiff/respondent filed three separate suits before the trial Lagos State High Court against the appellants. Plaintiff claimed various sums of money from the 1st and 2nd appellants who were the defen-

dants in the suits. After hearing the parties, judgment was given in favour of the plaintiff in the three suits which gave rise to three separate appeals in the Lagos Division of the Court of Appeal by the appellants who were not satisfied with the trial court's judgment. The appeals were consolidated and heard by the Court of Appeal which in its judgment dismissed the appeal.

Still dissatisfied, the appellants have now appealed to the Supreme Court. The major issue of controversy is centered on the fact that it was not the same panel of Court of Appeal Justices which heard the appeal that delivered judgment in the appeal.

ISSUES FOR DETERMINATION

Whether a panel of Justices different from the panel of Justices that heard argument from the parties, examined the Record of Appeal, asked, vital questions on the 5th November, 2003 can deliver a valid judgment in this appeal on the 22nd day of January 2004?

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

JUDICIAL PRECEDENTS - Distinguishing

1. In resolving this issue, let me start by agreeing entirely with the learned counsel to the Respondent that the decision of this court in *Ubwa v. Tiv Area Traditional Council* (supra) delivered on 21-5-2004 and the earlier decision in *Shuaibu v. Nigerian Arab Bank Ltd.* (supra) delivered earlier on 24-4-1998, which were cited by the learned counsel for the parties in their respective briefs of argument, are not in conflict. The facts and circumstances leading to the two decisions are entirely different.

Thus, as there, is no conflict whatsoever in these decisions relied upon by the learned counsel on both sides in this appeal, the question of which of the two decisions to rely upon depends entirely on the facts and circumstances in the present case that led to the delivery of the judgment of the court below now on appeal. (p. 1241 H/ 1242 H)

Courts - Competence

2. Looking at the issue from another-angle, the law is well settled that the competence of a court is an essential element determining its jurisdiction.

In *Gabriel Madukolu & Ors v. Johnson Nkemdilim & Ors* (1962) All NLR 587, the Federal Supreme Court discussed at some length, the issue competence and held that any defect in competence is fate the proceedings are a nullity however well conducted decided. Proceedings at the hearing of a case of course cover or start from the commencement thereof up to and including delivery of final judgment. In other words, the delivered judgment in a cause or matter, is part of the hearing of that cause or matter. (p. 1244 B)

CONSTITUTIONAL LAW - Appeals - Judgments

3. In compliance with the above provisions of section 294 of the 1999, Constitution, each of the Justices of the court below who heard the appellants' appeal, ought to have reduced his judgment or opinion in writing for delivery in person or by any of the other Justices of the Court on the date fixed for the delivery of the judgment. This is because although a Justice of the Court who did not take part in the hearing of an appeal may lawfully sit on a panel of the court and participate in delivering a judgment or written opinion of another Justice who actually took part in the hearing of the appeal or matter but is unavoidably absent, I must stress however that for such judgment delivered to be valid, it must have been put in writing for delivery by all the members of the panel of the Justices that participated at the hearing of the appeal which in law culminates in the determination of the cause or matter by the delivery of the judgment. Failure to comply with these fundamental requirements of the Constitution and the law as expounded in the various decisions of our courts, renders the judgment a nullity. I am bound by the recent decision of this court in *Ubwa v. Tiv Traditional Council and Others* (2004) 11 NWLR (pt.884) 427 at 436 where Kutigi JSC (as he then was) faced with similar proceedings of the Court of Appeal Jos as in the present appeal, declared the proceedings a nullity in allowing the appeal. (p. 1245 F)

Court of Appeal panel - Proper Constitution of

4. Firstly, the judgment is not a complete judgment of the Court of Appeal because one of the Justices who heard the appeal had not reduced his

judgment or opinion in writing capable of being delivered on the day fixed for the delivery as required by sub-section (2) of section 294 of the 1999 Constitution which makes it necessary for the judgments or opinions of the three Justices who heard the appeal to be produced in writing before
 B a complete judgment, of the court could validly emerge. Secondly, the judgment of the court of 22-1-2004, was affected by another deadly virus, which destroyed it resulting in turning it into something else other than a judgment of the Court of Appeal. The judgment delivered by
 C Galadima JCA who did not sit with the panel of the Justices that heard the parties in this appeal on the date fixed for the hearing of the appeal, certainly affected the competence of the court in the proceedings conducted in the delivery of the judgment which in law is part and parcel of the proceedings in the hearing and determination of the appellants' appeal.
 D This is because an improperly constituted court as regards its members, such that no member is disqualified for one reason or another, is not capable in law of exercising the jurisdiction of the court in delivering a valid judgment. The reason of course is that any defect in competence
 E is fatal as the proceedings are a nullity however well conducted and decided. See *Madukolu & Ors v. Nkemdilim & Ors* (supra). Obviously, a judicial officer, who had not sat in court in that capacity to exercise the jurisdiction of the court in hearing a cause or matter, cannot have the
 F capacity in law to sit in court and write a judgment or opinion to determine a dispute which he did not participate in the hearing. (p. 1246 D)

NOTABLE POINTS OF INTEREST

TOBI JSC

G *1. Appeals - Null judgment cannot be salvaged*

Where the Constitution provides for a minimum number of Justices form a Panel and sit in the Court of Appeal, anything short of that minimum will make the Panel incompetent and will result in the nullity of the proceedings however ably conducted. A court is competent when *inter alia* it is properly constituted as regards membership and qualification of the members of the bench and no member is disqualified for one reason or another.

Learned counsel urged the court to accept the decisions of Justices Aderemi and Chukwuma-Eneh as the majority opinion. I am not with counsel. One can talk of a majority opinion in a situation where the judgment delivered is valid and competent. One cannot talk of a majority opinion in situation where the judgment delivered is invalid and a nullity *ab initio*. B

The issue in this appeal is that the involvement of Justice Galadima in 5th November, 2003 decision of the court makes the judgment a nullity. There cannot be a majority opinion in a judgment, which is a nullity, other words, one cannot procure or salvage a majority opinion from a judgment, which is a nullity. That is a legal impossibility. (1251E/ 1252A) C

OGBUAGU JSC

2. Need for Senior/Leading counsel to vet briefs D

Honestly, what has disturbed me, is that the Respondent's Brief, comes from or was prepared in MESSRS RICKEY TARFA & CO. Chambers. Tarfa Esqr., (SAN), is a solid and brilliant Advocate. To have allowed this Brief, which bears his name, to be filed and adopted in this Court, is most regrettable and unfortunate to say the least. I will say no more about the said Brief. I plead with Senior or Principal/Leading Counsel in the various Chambers, to please, vet the Briefs prepared in their names or Chambers, before they are filed in court. They should not take cover in the settled principle of law about the attitude of the two Appellate Courts, to an Inelegant Brief- i.e. to use it for whatever it is worth. (p. 1260 B) E F

REPRESENTATION

A. B. Ogunbe Esq., with him S. N. Ekwueme Esq., for the 1st and 2nd Appellants. G

O. A. R. Ogunde Esq., for the 3rd Appellant.

O. Jolawo Esq., with him K. Olowookere Esq., and W. Chukwuonye (Mrs.) for the Respondent. H

CASES REFERRED TO

Ubwa v. Tiv Traditional Council and Others (2004) 11 NWLR (pt.884)

1236 Sokoto State v. Kamdex (2007) 3 KLR Mohammed JSC

427 at 436

Shuaibu v. Nigerian Arab Bank Ltd. (1998) 5 NWLR (pt.551) 582

Gabriel Madukolu & Ors v. Johnson Nkemdilim & Ors (1962) All NLR 587

B Jeremiah Akoh & Ors v. Ameh Abuh (1988) 3 NWLR (pt.85) 696 at 713

Maiwa v. Abdu (1986) 1 NWLR (Pt.17) 437

Ajao v. Alao (1986) 5 NWLR (pt. 45) 802

The Attorney-General of Anambra State v. The Attorney-General of the Federation (1993) 6 NWLR (Pt.302) 692

C Tukur v. The Government of Taraba State & 2 ors. (1997) 6 NWLR (Pt.510) 549 (a) 569; (1997) 6 SCNJ. 81

Gurara Securities & Finance Ltd. v. T. I. C. Ltd. (1999) 2 NWLR (pt.589) 29 (a) 42-43 C.A.

D Sofolahan & 5 ors. v. Chief Folakan & 12 ors. (1999) 10 NWLR (Pt.621) 86 @ 96 C.A.

Okino v. Obanebira & 4 ors. (1998) 12 SCNJ. 27

Adeigbe & anor. v. Kusimo & ors. (1965) All NLR (1990) (Reprint) 260

E (a) 263

Nana Tawiah III v. Kwasi Ewudzi (1936) 3 WACA 52 (5), 54-55

Disu & 13 ors. v. Alhaji Ajilowura (2006) 14 NWLR (Pt.1000) 783 @ 809

F

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999 ss. 247(1) & 294(2 - 4)

G

LEAD JUDGMENT BY MOHAMMED JSC

H The respondent in this appeal was the plaintiff at the trial Lagos State High Court of Justice where it instituted three suits, LD/3843/1999, LD/3844/1999 and LD/3846/1999, claiming various sums of money from the 1st and 2nd appellants who were the defendants in the suits. After hearing the parties, judgment was entered for the plaintiff/respondent in the three suits, which gave rise to three separate appeals numbers CA/L/108/2001, CA/L/109/2001 and CA/L/110/2001 in the Lagos Division of

Court of Appeal by the 1st and 2nd defendants/appellants who were not satisfied with the judgments of the trial High Court.

These appeals were consolidated and heard by the Court of Appeal, which in its judgment delivered on 22-1-2004 dismissed the appeal. Still aggrieved with the judgment of the Court of Appeal, the defendants/ B appellants have now appealed to this Court.

In the 1st and 2nd appellant's brief of argument, the following three issues were formulated from the grounds of appeal:

“(i) *Whether a panel of Justices different from the panel of Justices that heard argument from the parties, examined the Record of Appeal, asked, vital questions on the 5th November, 2003 can deliver a valid judgment in this appeal on the 22nd day of January 2004?* C

(ii) *Whether in view of the circumstances of this suit and the arguments canvassed by the 1st and 2nd appellants on the issue of jurisdiction in their Brief of Argument, the Lagos High Court has jurisdiction to entertain the actions and whether Court of Appeal is not bound to make specific pronouncement on the challenged jurisdiction of the Lagos High Court to hear and determine this suit?* D E

(iii) *Whether service of the Originating Processes can be properly effected on the 1st and 2nd appellants (Sokoto State Government of Nigeria and its Attorney General and Commissioner for Justice) in Lagos to wit: - 7, Adeola Odeku Street Victoria Island, Lagos and an adjunct to same whether the said allegedly effected service at 7 Adeola Odeku Street Victoria Island, Lagos ought not to be set aside in view of the contradiction in the actual address on which service was effected and the fact that the 2nd appellant is a natural person?” F G*

In the brief of argument filed by the plaintiff now respondent in this appeal, three issues were identified as in the appellant's brief of argument but differently framed to suit the respondent's case. The issues are:

“(i) *Whether the judgment of the Court of Appeal delivered on January 22, 2004 by their lordships Coram: Suleiman Galadima, P. O. Aderemi and C. M. Chukwuma-Eneh JJCA became invalid by reason of the fact that Honourable Justice J. O. Ogebe who participated at the* H

hearing of the appeal was not on the panel that delivered the judgment.

(ii) *Whether the service of the Originating Processes in the suits leading to this appeal on the appellants at their liaison office in Lagos is valid service in law.*

B (iii) *Whether the findings, pronouncement and resolution by the lower court of issues 1, 2 and 3 identified by the appellant and issues 1, 2, 4 and 5 identified by the respondents do not finally dispose of the issue of jurisdiction as raised and argued in the lower court.”*

C The first issue for determination is virtually the same in both the appellant’s and the respondent’s briefs of argument. However before proceeding to consider this issue, it is very important to state what actually happened in the proceedings’ fore the Court of Appeal from 5-11-2003, when the appellant’s appeal was heard in that court, to the 22- 1-2004, D when judgment in the appeal was delivered. This is because it is the facts that transpired during this period that gave rise to the appellant’s ground (a) of the grounds of appeal from which this issue was distilled. The record of this appeal at page 101 show that the consolidated appeals E numbers CA /L/1 08/2001; CA/L/109/2001; CA/L/110/2001 and CA/L/ 111/2001 between the same parties in the present appeal came up for hearing before a panel of Justices of the court below comprising of Hon. Justice J. O. Ogebe - Presiding Justice, Hon. Justice P.O. Aderemi - F Justice Court of Appeal ,Hon. Justice C. M. Chukwuma-Eneh - Justice Court of Appeal.

On 5-11-2003. The record of that day reads; -

G “Mr. A. B. Ogunba with Messrs. G. C. Duru and O. F. Efurikomaiya for 1st and 2nd appellants. Mr. R. Abijo for 3rd appellant. Mr. R. Tarfa SAN with J. Odubela, A Malgwi & Mrs D. Ademue-Eteh for the respondent.

Court: Only appeals No. 108, 109 and 110 will be taken. Appeal 111 is adjourned to abide the result of the consolidated appeals.

H Mr. Ogunba: We filed the brief on 4/7/01. We also (sic) reply brief on 10/5/02. I adopt them. I urge the court to allow the appeal.

Mr. Abijo: I filed 3rd appellant’s brief on 16/10/01 and reply brief on 9/7/02. I adopt them. I urge the court to allow the appeal.

Mr. Ricky Tarfa: We filed brief in respect of appeal by 1st and 2nd appellants on 14/2/02. I adopt it. The appeal is against the refusal to set aside the order. I urge the court to dismiss the appeal. As regard 3rd appellant appeal, we filed brief on 2/5/02. There is also a preliminary objection and 3rd appellant filed a reply. I urge the court to uphold the preliminary objection.

Court: The appeal is adjourned to 22/1/04 for Judgment.

(SGD)

J. O. Ogebe

Justice, Court of Appeal”

The record of this appeal at page 102 and subsequent pages does contain any court proceeding to show that the court sat on 22-1-2004 to deliver the judgment in the appellants’ appeal adjourned to that date. However, pages 102 to 129 of the record contain the lead judgment of Aderemi JCA (as he then was) in appeal No.CA/L/108/2001 between the parties in this appeal supported by the concurring judgments of Suleiman Galadima JCA and C. M. Chukwuma-Eneh JCA (as he then was), unanimously dismissing the appellants’ appeal. The panel of justices shown on the face of the leading judgment at page 102 of the record as having heard the appeal and delivered the unanimous judgment is made up of S. Galadima JCA, P.O. Aderemi JCA (as he then was), and C. M. Chukwuma-Eneh CA (as he then was). This appeal number CA/L/108/2001, the judgment in which was delivered by the Hon. Justice Galadima led panel, was one of the consolidated appeals heard and specifically adjourned to 22-1-2004 for judgment by the Hon. Justice Ogebe led panel. The record of this appeal also shows that Hon. Justice Galadima who did not participate in the hearing of appeal No.CA/L/108 with Hon. Justice Ogebe, Aderemi and Chukwuma-Eneh on 5-11-2003 actually wrote and delivered a concurring judgment to Hon Justice Aderemi’s lead judgment delivered on 22-1-2004. Meanwhile the record of the appeal does not contain the concurring or dissenting opinion as case may be of Hon. Justice Ogebe JCA who presided at the arising of the appellants’ appeal on 5-11-2003.

From these rather glaring undisputed facts in the record of this appeal, the real question to be determined from the first issue arising for

determination is whether or not the judgment of the court below delivered on 22-1-2004, in the circumstances is valid. Learned counsel to the appellants referred to Sections 247(1) and 294(2) of the 1999 Constitution and argued that the; combined effect of the sections, is that the panel of Justices of the Court of Appeal that heard an appeal, shall be the same panel that will deliver their opinion in writing as it relates to the judgment of any particular suit; that the absence of the written opinion of Hon. Justice James O. Ogebe in the judgment of the court of Appeal delivered on 22-1-2004, invalidates the said judgment and makes it a nullity, as the parties were not ‘fairly’ heard because a judge who did not ‘hear’ them made a pronouncement against them resulting in denial of fair hearing enshrined in chapter 4 of the 1999 Constitution. The case of *Madukolu & Ors v. Nkemdilim & Ors* (1962) 2 SCNLR 34 was relied upon in support of this argument. Learned counsel further referred to a number of cases such as, *Queen v. Governor-In-Council W.R. Exparte Laniyan Ojo* (1962) 1 All NLR 147; *Mai Rai v. Banchi N.A.* (1957) NNLR 31; *Nana Tawiah v. Kwesi Ewudzi* 3 WACA 52; *Otwiwa & Anor v. Kwaseko* 3 WACA 230; *Chapman v. C.F.A.O.* 9 WACA 181; *Orugbo v. Una* (2002) 16 NWLR (pt.792) 175 at 199 and particularly the recent decision of this court in *Ubwa v. Tiv Traditional Council* (2004) NWLR (pt.884) 427, which is on essentially similar facts with the present case, and submitted that once an appellate court comes to the conclusion that there is a breach of the principles of fair hearing, the proceedings cannot be salvaged as they are null and void ab-initio.

On the decision of this court in *Shuaibu v. Nigerian Arab Bank Ltd.* (1998) 5 NWLR (pt.551) 582 heavily relied upon by the learned counsel to the Respondent in the Respondent’s brief argument, learned counsel observed that that decision is clearly distinguishable with the decision of this court in *Ubwa v. Tiv Area Traditional Council* (supra) as the facts and circumstances arriving at the decisions in the two cases are not the same. Learned counsel concluded his argument by urging is court to allow the appeal on this issue, set aside the judgment of the court below of 22-1-2004 for having been delivered contrary to the provisions of the Constitution.

For the Respondent however, its learned counsel contended that from the record of this appeal, it is undisputed that three, justices of the Court of Appeal heard the appellants' appeal on the day the appeal was heard. Equally not in dispute is the fact that on the day the judgment in the appeal was delivered, three Justices of that court sat and delivered the judgment. Learned Counsel maintained that on the face of the record, the provision of the Constitution regarding the quorum of the court below was fully satisfied with three Justices hearing the appeal and three Justices delivering the judgment of the court. Referring to the fact that Hon. Justice Suleiman Galadima who did not participate in the hearing of the appeal but all the same delivered a judgment concurring with the lead judgment, learned respondent's counsel regarded that as a mere irregularity incapable of nullifying the judgment. Heavy reliance was placed by the learned counsel on the decision of this court which he described as arising from similar facts in *Shuaibu v. Nigerian Arab Bank Ltd.* (1998) 5 NWLR (pt.551) 582, and urged this court to hold that the appellants having acquiesced to the irregularity in the judgment delivered, which, did not occasion any miscarriage of justice, cannot be heard to complain. This argument according to the learned counsel, is supported by the decisions in cases of *Ashiru Noibi v. R. J. Fikolani* (1987) 1 NWLR (pt.52) 619 at 625-626 and *Ezomo v. Oyakhire* (1985) 1 NWLR (pt.2) 195 which warn that technicalities will not be allowed to override substantial justice.

On the decision of this court in *Ubwa v. Tiv Area Traditional Council* (supra), learned counsel disagreed with the appellant that the decision is in conflict with the earlier decisions in *Shuaibu v. Nigerian Arab Bank Ltd.* (supra) and therefore concluded by urging this court to hold that the mix up in the judgment delivered in the present case by the court below, only an irregularity which is not enough to nullify the judgment now on appeal.

In resolving this issue, let me start by agreeing entirely with the learned counsel to the Respondent that the decision of this court in *Ubwa v. Tiv Area Traditional Council* (supra) delivered on 21-5-2004 and the earlier decision in *Shuaibu v. Nigerian Arab Bank*

Ltd. (supra) delivered earlier on 24-4-1998, which were cited by the learned counsel for the parties in their respective briefs of argument, are not in conflict. The facts and circumstances leading to the two decisions are entirely different. In *Shuaibu v. Nigerian Arab Bank*, it is quite clear from the record of appeal that the panel of Ndoma Egba, Mukhtar and Okezie JJCA, which actually heard the appeal, was the same panel that delivered the judgment that came on appeal to this court. Hon. Justice Adio who did not take part in the hearing of the appeal nor participated in the delivery of the judgment, his judgment was inadvertently included in the record of the appeal which the appellant used in that case in challenging the competence of the judgment on appeal. The decision of this court in that case was that irrespective of how the judgment of Hon. Justice Adio JCA got into the record of appeal, the fact that the same panel that heard the appeal was the same panel that delivered the judgment of the court, the judgment of the Court of Appeal cannot be described as a nullity because what happened in the proceedings of that court was a mere irregularity.

However the situation is entirely different in *Ubwa v. Tiv Area Traditional Council* (supra) where the panel that heard the appeal comprised Akpabio, Umoren and Chukwuma-Eneh JJCA while the panel that wrote and delivered the judgment was made up of Akpabio JCA who read the leading. Judgment with Umoren and Mangaji JJCA delivering the concurring judgments. This means that Mangaji JCA (of blessed memory) who did not take part in the hearing of the appeal on 18-11-1999, also wrote a concurring judgment in the appeal, which was delivered on 14-2-2000. This shows that although the court was properly constituted by three Justices on the day the judgment of the court was delivered, the judgment that was delivered was not by the members of the same panel that heard the appeal on 18-11-1999. It was this situation that resulted in the judgment of this court in that appeal declaring the judgment of the Court of Appeal delivered on 14-2-2000, a nullity. **Thus, as there, is no conflict whatsoever in these decisions relied upon by the learned counsel on both sides in this appeal, the question of which of the two decisions to rely upon depends entirely on the facts and cir-**

cumstances in the present case that led to the delivery of the judgment of the court below now on appeal.

The status of a judgment given by a court improperly constituted in the sense that the court was differently constituted during the hearing of the case, had been determined in many decisions of superior courts including this court and the West Africa Court of Appeal. In *Adeigbe & Anor v. Kusimu & Ors* (1965) 1 All NLR (Reprint) 260 at 263, Ademola CJN (of blessed memory) had this to say on the subject: -

“We are in no doubt about the correctness of what the learned appeal judge said in his judgment that there are abundant decisions in the High Court and the West Africa Court of Appeal on the point that *where a court is differently constituted during the hearing of a case, or on various occasions when it met, or where one member did not hear the whole evidence, the effect on the proceedings is to render them null and void.* The learned judge obviously had in mind, among others, the following cases *Egba N.A. V Adeyanju* (1936) 13 NLR 77; *Tawiah III v. Ewudzi* 3 WACA 52; *Otwiwa v. Kwaseko* 3 WACA 230; *Damoah v. Taibil* 12 WACA 167; *Runka v. Kastina N.A.* 13 WACA 98:”

Similarly, the pronouncement of Kingdom, Chief Justice of Nigeria sitting on the bench of the West African Court of Appeal with Betrides, Chief Justice of Gold Coast and Webber, Chief Justice of Sierra Leone, on the subject of judgment delivered by an improperly constituted court is quite illuminating. In his leading judgment, in the case of *Nana Tawiah III v. Kwasi Ewudzi* (1936) WACA 52 at 54-55 the learned Chief Justice said: -

“It is unnecessary for me now to go in detail into merits of the case on the facts, owing to the submission which the defendant/appellant/respondent’s counsel made to the court at the last moment when he realized that he had little hope of successfully resisting the plaintiff/respondent/appellants’ contention that the Provincial Commissioner ought not to have reversed the Tribunal on the facts.

This was to the effect that the whole proceedings before the Tribunal were a nullity, because all the members who sat upon the case and gave judgment were not present throughout the hearing. xxxxx In the

present case it is clear that *at least two of the Tribunal members who gave judgment were not present throughout the proceedings, and did not hear all the evidence. This vitiates the whole trial, and in my opinion this court has no option but to declare the whole proceedings before the Tribunal and the Provincial Commissioner's court a nullity, and direct that the case be heard de novo in the Tribunal.*"

Looking at the issue from another-angle, the law is well settled that the competence of a court is an essential element determining its jurisdiction. In *Gabriel Madukolu & Ors v. Johnson Nkemdilim & Ors* (1962) All NLR 587, the Federal Supreme Court discussed at some length, the issue competence and held that any defect in competence is fate the proceedings are a nullity however well conducted decided. Proceedings at the hearing of a case of course cover or start from the commencement thereof up to and including delivery of final judgment. In other words, the delivered judgment in a cause or matter, is part of the hearing of that cause or matter. See *Jeremiah Akoh & Ors v. Ameh Abuh* (1988) 3 NWLR (pt.85) 696 at 713.

In the instant case, to answer the question of whether the court below was properly constituted from the date the appellant's appeal was heard on 5-11-2003, right to the judgment of the court was delivered on 22-1-2004 necessary to determine from the record whether the proceedings of the court complied with the provisions of Sections 247(1) and 294(2) and (4) of the 1999 Constitution.

Section 247 (1) says: -

"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 xxxxx."

There is no doubt whatsoever in the instant case that when the appellants' appeal was heard by the court below on 5-11-2003 by a panel of Justices of that court made up of Ogebe, Aderemi and Chukwuma-Eneh JJCA, that court was properly constituted for the purpose of exercising the jurisdiction conferred upon it to hear the appellants' appeal.

However, whether the constitution of that court which heard the

appellants' appeal was maintained throughout the hearing of the appeal up to the date of the delivery of the judgment on 22-1-2004, is what the record of this appeal answered in the negative. This of course is quite contrary to the provisions of Section 294(1), (2), (3) and (4) of the Constitution of the Federal Republic of Nigeria 1999 which state as follows: -

"294 (1) Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final address and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.

(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 judgment:

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 another Justice whether or not he was - present at the hearing.

(3) A decision of a court consisting of more Saffron judge shall be determined by the opinion of the majority of its members.

(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."

In compliance with the above provisions of section 294 of the 1999, Constitution, each of the Justices of the court below who heard the appellants' appeal, ought to have reduced his judgment or opinion in writing for delivery in person or by any of the other Justices of the Court on the date fixed for the delivery of the judgment. This is because although a Justice of the Court who did not take part in the hearing of an appeal may lawfully sit on a panel of the court and participate in delivering a judgment or written opinion of another Justice who actually took part in the hearing of the appeal or matter but is unavoidably absent, I must stress however that for

such judgment delivered to be valid, it must have been put in writing for delivery by all the members of the panel of the Justices that participated at the hearing of the appeal which in law culminates in the determination of the cause or matter by the delivery of the judgment. Failure to comply with these fundamental requirements of the Constitution and the law as expounded in the various decisions of our courts, renders the judgment a nullity. I am bound by the recent decision of this court in *Ubwa v. Tiv Traditional Council and Others* (2004) 11 NWLR (pt.884) 427 at 436 where Kutigi JSC (as he then was) faced with similar proceedings of the Court of Appeal Jos as in the present appeal, declared the proceedings a nullity in allowing the appeal. That case is on all fours with the instant appeal now under consideration in which I have no option but to declare the judgment of the Court below delivered by the panel of Justices comprising of Galadima, Aderemi and Chukwuma-Eneh JJCA on 22-1-2004, also a nullity. I have two reasons for coming to this conclusion. Firstly, the judgment is not a complete judgment of the Court of Appeal because one of the Justices who heard the appeal had not reduced his judgment or opinion in writing capable of being delivered on the day fixed for the delivery as required by sub-section (2) of section 294 of the 1999 Constitution which makes it necessary for the judgments or opinions of the three Justices who heard the appeal to be produced in writing before a complete judgment, of the court could validly emerge. Secondly, the judgment of the court of 22-1-2004, was affected by another deadly virus, which destroyed it resulting in turning it into something else other than a judgment of the Court of Appeal. The judgment delivered by Galadima JCA who did not sit with the panel of the Justices that heard the parties in this appeal on the date fixed for the hearing of the appeal, certainly affected the competence of the court in the proceedings conducted in the delivery of the judgment which in law is part and parcel of the proceedings in the hearing and determination of the appellants' appeal. This is because an improperly constituted court as regards its members, such that no member is disqualified for one reason or

another, is not capable in law of exercising the jurisdiction of the court in delivering a valid judgment. The reason of course is that any defect in competence is fatal as the proceedings are a nullity however well conducted and decided. See *Madukolu & Ors v. Nkemdilim & Ors* (supra). Obviously, a judicial officer, who had not sat in court in that capacity to exercise the jurisdiction of the court in hearing a cause or matter, cannot have the capacity in law to sit in court and write a judgment or opinion to determine a dispute which he did not participate in the hearing. For this reason, this issue is resolved in favour of the appellant in that the judgment of the court below delivered on 22-1-2004, is hereby declared a nullity. The judgment is set aside and the appellants' consolidated appeals numbers CA/L/108/2001, CA/L/109/2001 and CA/L/110/2001, heard by the court below on 5-11-2003, are hereby remitted to the court below for hearing de novo by another panel of Justices of the Lagos Division of the Court of Appeal.

The appeal is accordingly hereby allowed. The appeal having succeeded on the first issue for determination alone, and having regard to the orders I have made remitting the consolidated appeals to the lower court for hearing, I do not find it necessary to go into the remaining issues.

There shall be N10,000.00 costs to the appellants against the respondent.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Mahmud Mohammed, JSC. I agree with it and, for the reasons he has given I also allow the appeal and remit the case to the court below for hearing. I abide by the order as to costs.

KALGO JSC

I have read in advance the judgment just delivered by my learned brother Mohammed JSC and I entirely agree with him that there is merit in

appeal and it ought to be allowed.

The most important issue raised by both parties to the appeal and which was extensively argued in their respective briefs, concerned the Coram of Justices of the Court of Appeal who delivered the judgment now appealed against. In the appellant's brief the issue (1) reads: -

"whether a panel of justices different from the panel of Justices that heard argument from the parties, examined the record of appeal, asked vital questions on the 5th of November 2003 can deliver a valid judgment in this appeal on the 22nd day of January 2004".

The respondent's issue (a) is substantially the same as that of the appellants above even though differently worded.

By S. 247 (1) of the 1999 Constitution, for the purpose of hearing appeals before it, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court of Appeal. This provision gives a minimum only as it could be more in other appeals or matters depending on nature and circumstances of the appeal or the matter before the court.

This was an appeal from the decision of the High Court of Lagos State and was heard by three Justices of the Court of Appeal Lagos Division on 5th of November 2003, and judgment was reserved to the 22nd January 2004. From the record of appeal (p.101) the justices that heard the appeal were Ogebe, JCA (Presiding), Aderemi JCA (as he then was) and Chukwumah-Eneh JCA (as he then was). But on the 22nd of January; 2004, the Justices who delivered the judgment (p.102 of the record) were Galadima JCA and Aderemi JCA (as he then was) and Chukwuma-Eneh JCA (as he then was). This clearly means that Galadima JCA who did not take part in the hearing of the appeal on 5th November 2003, when it was adjourned for judgment wrote and delivered a judgment concurring with the leading judgment of Aderemi JCA (as he then was). I have read the said judgment of Galadima JCA (p. 126 of record) and it appears to me that he dealt with the main issues in controversy between the parties to the appeal even though he did not participate in the hearing therein. This is not acceptable in judicial adjudication; And although section 247 (1) of the Constitution gives a minimum of three

Justices in this type of appeal, it lot open for any other Justice who did not take part in hearing an appeal to just appear either in substitution for or in addition to those who heard the appeal to write and deliver a judgment in the appeal. This will breed justice and miscarriage of justice may, in my respectful view, likely occur. This is because a person or B authority that did not give you a hearing on a complaint brought before him against you, may not likely determine or tide your case justly and fairly. The principle of fair hearing which is fundamental in judicial process is also breached. See. Orugbo V. Una. (2002) 16 NWLR (pt.792) C 175 at 199.

It is also well established and trite law that a decision of a court is valid only when that decision was made by a competent court. The question then is, was the Court of Appeal competent when it delivered the appeal on 2nd January 2004 in this appeal? In the case of Madukolu V. D Nkemdilim (1962) 1 All NLR 587, this court held that a court is competent when-

“(1) It is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one E reason or the other.

(2) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(3) The case comes before the court initiated by due process of F law, and upon fulfillment of any condition precedent to the exercise of jurisdiction”.

The court ended this by saying that-

“Any defect on competence is fatal, for the proceedings are a nul- G lity however well conducted and decided; the defect is extrinsic to adjudication”.

From the above, points (1), (2) and (3) go together. In the circumstances of this case, points (2) and (3) are fully satisfied as the court H is jurisdiction and the appeal is competent and properly filed. But point (1) which is very important cannot be satisfied in this case because although three Justices of the court are qualified to hear and determine the

appeal, one them is not qualified because he never heard the appeal and for that reason one, he is disqualified. This is a defect in the competence of the court and therefore the proceedings of the court with him taking part, are a nullity however well conducted. I accordingly so hold and
B resolve this issue in our of the appellants. I also agree that with the resolution of this issue, it lot necessary to consider other issues raised in the appeal.

For the above, and the more detailed reasons given by my learned
C brother Mohammed, JSC in the leading judgment, I also find merit in the Deal and I allow it; I set aside the decision of the Court of Appeal and order a rehearing of the appeal by another panel of the Court of Appeal. I abide by the order of costs in the said judgment.

D

TOBI JSC

I have read in draft the judgment of my learned brother, Mohammed, JSC and I agree with him that this appeal should be allowed.

E The relevant facts only relate to the proceedings in the Court of Appeal. On 5th November, 2003, Justices J. O. Ogebe, P. O. Aderemi and C. M. Chukwuma-Eneh heard oral argument on the appeal and reserved judgment. On 22nd January, 2004, judgment was delivered by Justices
F Suleiman Galadima (Presiding), P. O. Aderemi and C. M. Chukwuma-Eneh.

The crux of the dispute is that the changing of hands by Justices Ogebe and Galadima invalidated the judgment and made it a nullity. This is the position taken by the appellants. They relied on *Ubwa v. Tiv Area*
G *Traditional Council* (2004) 11 NWLR (Pt. 884) 427. The respondent has taken a different position and it is the opposite position. It is that the judgment is valid and not a nullity. Reliance is placed on *Shuaibu v. Nigerian-Arab Bank Ltd.* (1998) 5 NWLR (Pt. 551) 582.

H Section 247(1) of the 1999 Constitution provides in part that for the purposes of exercising any jurisdiction conferred upon the Court of Appeal By the Constitution or any other law, the court shall be constituted by not less than three Justices. The word *shall* in section 247(1) of

the constitution has the force or carries the force of command, obligation and peremptory. The word in the subsection does not convey or admit a discretion in the sense that a lesser number of Justices can make up the panel. In other words, for the purposes of exercising the jurisdiction of the court, the court must be constituted of not less than three Justices. That is minimum. Although the word “shall” could in certain circumstances construed as “may”, section 247(1) is not such circumstance, as the section conveys the mandatory “shall”.

Section 294(2) of the Constitution provides that 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. By section 294(3), a decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members. In the context of the Court of Deal and in the context of this case, the majority opinion is that of two members of the Panel. For the purpose of delivering decision under section 294, the Supreme Court or the Court of Appeal shall be deemed to duly constituted if at least one member of that court sits for that suppose. That is the provision of section 294(4) of the Constitution. In other words, a judgment of the Court of Appeal can be delivered by a single Justice.

Where the Constitution provides for a minimum number of Justices form a Panel and sit in the Court of Appeal, anything short of that minimum will make the Panel incompetent and will result in the nullity of the proceedings however ably conducted. A court is competent when *inter alia* it is properly constituted as regards membership and qualification of the members of the bench and no member is disqualified for one reason or another. See Madukolu v. Nkemdilim (1962) All NLR 587. See also Maiwa v. Abdu (1986) 1 NWLR (Pt.17) 437; Ajao v. Alao (1986) 5 NWLR (pt. 45) 802; The Attorney-General of Anambra State v. The Attorney-General of the Federation (1993) 6 NWLR (Pt.302) 692.

Learned counsel for the respondent relied on sections 247(1), 294(2), (3) and (4) of the Constitution and submitted that the Court of Appeal at all relevant times had jurisdiction to hear and deliver the judg-

ment, the subject of this appeal.

Learned counsel urged the court to accept the decisions of Justices Aderemi and Chukwuma-Eneh as the majority opinion. I am not with counsel. One can talk of a majority opinion in a situation where the judgment delivered is valid and competent. One cannot talk of a majority opinion in situation where the judgment delivered is invalid and a nullity *ab initio*.

The issue in this appeal is that the involvement of Justice Galadima in 5th November, 2003 decision of the court makes the judgment a nullity. There cannot be a majority opinion in a judgment, which is a nullity, other words, one cannot procure or salvage a majority opinion from a judgment, which is a nullity. That is a legal impossibility.

I am at one with my learned brother and learned counsel for the respondent that the case of *Squib v. Nigerian-Arab Bank Ltd.*, is distinguishable from that of *Subway v. TV Area Traditional Council* (supra). I should perhaps extend this to say that Shuaibu is clearly distinguishable this case. In Shuaibu, the following is recorded at page 584 on the facts:

“On 21/2/91, the appeal was argued before Hon. Justices Ndoma Egba, Mukhtar and Okezie and judgment was reserved to 10/4/91. On the said 10/4/91, the same three Justices again sat and the judgments of the court were read and the appeal allowed. However, the judgments that were read were those of Hon. Justices Ndoma-Egba, JCA, Y. O. Adio, JCA who was not in the panel that heard the appeal in which he wrote as follows... and signed same and that of Hon. Justice Okezie, JCA who also concurred with the leading judgment.”

The above scenario is different from that of Ubwa and this case. In Ubwa, Justices Akpabio, Umoren and Chukwuma-Eneh heard the appeal I reserved judgment. The judgment was delivered by a panel of justices Akpabio, Umoren and Mangaji. Delivering the lead judgment of this court, Kutigi, JSC (as he then was) said at page 436:

“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 judgments were not all present throughout the hearing of the

appeal, which includes delivery of judgment. The judgment of the Court of Appeal delivered on 14th 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

Kalgo, JSC said at page 437:

“In the instant appeal, it is very clear that on the 18th of 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-Eneh JJCA and the judgment was later delivered on 14th 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 18th November, 1999, wrote a concurring judgment in the appeal. And although the court was properly constituted of three Justices on 14th February, 2000, the judgment which was delivered was not by those who heard the appeal on 18th November, 1999. That is contrary to the provisions of the 1999 Constitution and all principles of law and vitiates the whole proceedings.”

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I said at page 438:

“In this appeal, the appeal was heard by Akpabio, Umoren and Chukwuma-Eneh, JJ.CA on 18th November, 1999 when judgment was reserved to 27th January, 2000. The judgment was not read on 27th January, 2000 and it was further adjourned to 14th February, 2000. On 14th February, 2000, the judgment was delivered by a panel of Akpabio, Mangaji 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. 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.”

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As in Ubwa, where Justices Chukwuma-Eneh and Mangaji unknowingly changed places, so in this appeal where Justices Ogebe and Galadima unknowingly changed places. The Justices cannot be blamed in the light of the very crowded daily cause list and the resultant work load on the Justices.

Learned counsel called in aid the case of Disu v. Ajilowura (2006)14 NWLR (Pt.1000) 783 where this court delivered the opinion held by Pats-Acholonu, JSC in conference before he died. He argued that as in this case, “*the panel that delivered the judgment of the court was not the same as the panel that heard the appeal in the sense that only six of the seven justices contributed and read the written judgments in court and the seventh justice did not write any judgment.*” Disu is distinguishable from this case in two aspects. First, the seventh member of the panel, Pats-Acholonu, died before the judgment was delivered. By our rules of court, his brother Justices are competent to pronounce his opinion at conference and this was what Kutigi, JSC (as he then was) did. Second, in this case, Justice Galadima did not deliver the judgment of or for Justice Ogebe. He delivered the judgment for himself in an appeal that he did not participate.

It is for the above reasons and the more detailed reasons of my learned brother, Mohammed, JSC that I too allow the appeal. I order that the appeal be sent back to the Court of Appeal for rehearing. I award N10,000.00 costs in favour of the appellants.

OGBUAGU JSC

This is an appeal by the 1st and 2nd Appellants against the Judgment of the court of Appeal, Lagos Division, (hereinafter called “*the court below*”), delivered on 22nd January, 2004, dismissing the 1st and 2nd Appellants’ appeal and affirming the trial court’s Judgment which dismissed the 1st and 2nd appellants’ appeal seeking to set aside, the trial court’s judgment.

Dissatisfied with the said Judgment, the 1st and 2nd Appellants, have appealed to this Court on two (2) grounds of appeal which without

their particulars, read as follows:

“(a) The Panel of Justices of the Court of Appeal that delivered Judgment in this suit on the 22nd day of January, 2004 erred in Law in delivering the said Judgment not being the same panel of Justices that heard argument, listened to submissions and asked vital questions from all counsel on record on the 5th day of November, 2003. B

(b) The Learned Justices of the Court of Appeal erred in Law in not making any specific pronouncement on the challenged jurisdiction of the Lagos High Court to adjudicate over the suit in view of the highlighted feature of the case “. C

I note that on 4th December, 2006 when this appeal came up for hearing, Ogunde, Q.A.R., Esqr., - who announced his appearance for the 3rd Respondent, told the court that they did not file any Brief, but that they are supporting the 1st and 2nd Appellants. D

Although, the 1st and 2nd Appellants have formulated three (3) issues for determination, while the Respondent, also formulated three (3) issues for determination, but in my respectful view, Issue i. of both parties, is actually, the crucial and important one that will take care of this instant appeal. For the avoidance of doubt, I will reproduce the respective issue, which are substantially similar but differently couched. E

For the 1st and 2nd Appellants,’ their issue (i) reads as follows:

“Whether a panel of Justices different from the panel of Justices that heard argument from the parties, examined the Record of Appeal, asked vital questions on the 5th of November, 2003 can deliver a Valid Judgment in this Appeal on the 22nd day of January, 2004? “ F

This issue is covered by ground (a) of the grounds of appeal. On the part of the Respondent, its issue i, reads as follows: G

“Whether the judgment of the Court of Appeal delivered on January 2, 2004 by their Lordships Coram: Suleiman Galadima, P.O. Aderemi and C. M. Chukwuma Eneh, JJCA became invalid by reason of the fact that Honourable Justice J. O. Ogebe who participated at the hearing of the appeal was not on the panel that delivered the judgment”. H

The facts in this appeal, are not in dispute. Three consolidated appeals Nos. CA/L/108/2001; CA/L/109/2001 and CA/L/110/2001, were

heard by a Panel of Justices of the court below: Coram - Hon. Justice Ogebe - Presiding, Hon. Justices Aderemi and Chukwuma-Eneh (both now of this Court) on 5th November, 2003 and who reserved Judgment to 22nd January, 2004. But surprisingly, on that 22nd January, 2004, the Panel that delivered the Judgment of the court, were made up of Justices Galadima, Aderemi and Chukwuma-Eneh. Aderemi, JCA (as he then was), delivered the lead Judgment, while Galadima, JCA, delivered his concurring Judgment which appear at pages 126 and 127 of the Records. Chukwuma-Eneh, JCA (as he then was), also delivered his concurring Judgment, which appear at pages 128 and 129 of the Records. I note that in the said concurring Judgment of Galadima, JCA, the following appear, inter alia:

"I have read in advance the lead Judgment of my learned brother ADEREMI, JCA. He has exhaustively dealt with the essential principles, applicable Laws, practice and procedure governing garnishee proceeding in this Country and in England. I make this emphasis as well

In this vein I agree with' the lead judgment that the appeal lacks merit and it should be dismissed. I abide by order made as to costs contained in the lead judgment"

[The underlining mine]

It is not in dispute that Galadima JCA, was never in the Panel that heard the appeal on 5th November, 2003. How he came to preside and write and deliver in the open court, a Judgment in an appeal he never heard or ever saw the learned counsel who appeared at the hearing to argue the appeal, has not been, explained in the Records. Why Ogebe, JCA who presided at the said hearing, never wrote any Judgment in respect of the very appeal that was argued before him and his two colleagues, is one of the unexplained wonders or puzzles glaring before us in this appeal. What is more worrisome to me, is that this appeal, is being contested on this simple and uncontestable issue by the learned counsel for the Respondent who has been winning in the two lower courts. His unacceptable reason and which with respect, is grossly misconceived, is his reliance on the provisions of Section 294(2), (3) & (4) of the 1999

Constitution which read as follows:

“Section 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”.

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“Section 294 (3)- A decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members”.

“Section 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”.

C

For Section 294 (3), the learned counsel for the Respondent, cites and relies on the case of Shuiabu v. Nigeria-Arab Bank Ltd. (1998) 5 NWLR (Pt.551) 582; (it is also reported in (1998) 4 SCNJ. 109) - per Ogundare, JSC (of blessed memory) and Wali, JSC. In my respective view, the above case is distinguishable from the instant case; - the fact and circumstance, are not and cannot be the same.

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Section 294 (4) has been given judicial support in the case of Okino v. Obanebira & 4 ors. (1998) 12 SCNJ. 27 - per Iguh, JSC, while referring to Section 258(2) of the 1979 Constitution. In other words, it will not be necessary, for all the Justices that heard an appeal, to be present during the delivery of the Judgment. Indeed and in fact, one Justice, can deliver the Judgment of the Justices in the Panel that heard the appeal.

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I want to state straightaway, with respect, that the submission in the Respondent's Brief by Olusegun O. Jolaawo, Esqr., that because three Justices, heard the appeal and that on the day of the judgment, three Justices sat and delivered the judgment”, the provision regarding quorum., was fully satisfied, is completely misconceived and it amounts to a gross lack of appreciation of what is the real issue or the crux of the Appellants' complaint, and what it is all about. That three Justices sat and delivered the judgment, is certainly not the issue in controversy. In fact and indeed, this does not arise. The point that is; not in dispute and is conceded by the learned counsel for the Respondent, is that Galadima,

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JCA who did not participate in the hearing of the appeal, wrote a concurring judgment in an appeal that he never saw the counsel for the parties and did not listen to their respective addresses. Is it right? I or one may ask the learned counsel for the Respondent. Does the learned counsel for
 B the Respondent, as a member of the Legal profession and who is also a minister in the temple of justice, in defense of his integrity, have the moral and professional conscience, not to support something or an act, that is an antithesis of justice? It will not cost him anything including
 C his fees, I believe, to advise his client, that what happened; is/was really unfortunate. It was inadvertent. Every one of us at one time or the other, make human mistakes. The pressure of work or workload in the Appellate courts, is *responsible* for such mistakes which I concede is not a slip. If the Appellants I had acquiesced to the “irregularity” as con-
 D tended by the learned counsel for the Respondent, why then this appeal? I or one may ask him.

However, it is now settled that a Judgment delivered by a Panel, where one of them, did not hear the argument nor was he/she present at
 E the hearing, is a nullity. Period! See the cases of Adeigbe & anor. v. Kusimo & ors. (1965) All NLR (1990) (Reprint) 260 (a) 263 - per Ademola, CJN, citing other cases therein and Ubwa v. The Traditional Council (2004) 11 NWLR (Pt.884) 427 (a) 436 - per Kutigi (JSC, now CJN). I
 F wish to add, that what happened in the said Judgment of the court below, is/was not an irregularity. It is/was a fundamental error that amounts/ amounted to a nullity, i.e. it is null and void. See also the case of Nana Tawiah III v. Kwasi Ewudzi (1936) 3 WACA 52 (5), 54-55 - per King-
 G dom, CJN.

Before concluding this Judgment, I must confess that my reading of the Respondent’s Brief and the totality of the submissions therein, raises my eye-brow. I have mentioned some of the features or submission therein. The last one I wish to mention, is the submission in para-
 H graph 4.1.9 to 4.2.7. It is submitted that because there was a “*Pro-nouncement*” of the opinion of Pats-Acholonu, JSC (of blessed memory) pursuant to the Proviso in Section 294 (2) of the said Constitution, in the case of *Disu & 13 ors. v. Alhaji Ajilowura* (2006) 14 NWLR (Pt.1000)

783 @ 809. (it is also reported in (2006) 7 SCNJ. 134 @ 157 and (2006) 7 S.C (Pt.II) 1 that,

“4.22 What is of great relevance here is that the panel that, delivered the judgment of the court was not the same as the panel that heard the appeal in the sense that only six of the seven justices (sic) contributed B and read their written judgments in court, and the seventh justice did not write any judgment”.

“4.2.3 the said judgment was read and has since been reported in series of law reports in the country. This was because your lordships were convinced that the available judgments and the opinion of the seventh C justice which was not reduced into writing was sufficient to constitute a valid judgment”.

“4.2.4 Your Lordships in pronouncing the opinion of your deceased learned brother Ignatius Chukwudi Pat (sic), Acholonu, JSC, (of D blessed memory) as expressed at the conference relied on the provisions of Section 294 (2) of the constitution of the Federal Republic of Nigeria 1999”. -

“ 4.2.5. It would not have been possible to deliver the judgment had E your Lordships allowed the technical Interpretation of the said provision to prevail over the liberal interpretation which leaned in favour of substantial justice and which saved a lot of judicial time without working any hardship on the parties or occasioning any miscarriage of justice” F
Learned counsel then reproduced the provision of Section 294(2) in full including the PROVISIO and continued thus:

“4.2.6. we respectfully submit that credence can only be lent to the above decision of this Honourable Court if the interpretation which G we urge oh this Court of Section 294 (3) is correct”.

“4.2.7. We shall therefore respectfully urge your Lordships to hold that the decision .of the lower court in the circumstances of this Appeal is valid”.

Now, the said PRONOUNCEMENT, reads/appears as follows: H

“PRONOUNCEMENT (Section 294(2) of the Constitution): Hon Justice I. C. Pats-Acholonu who participated in the appeal agreed at the conference to dismiss the appeal”.

[the underlining mine]

This pronouncement or reading, may be by another Justice whether or not he was present at the hearing. I or one may ask again, how can the said pronouncement or reading, have any relevance with/to the real issue in this appeal? Honestly, what has disturbed me, is that the Respondent's Brief, comes from or was prepared in MESSRS RICKEY TARFA & CO. Chambers. Tarfa Esqr., (SAN), is a solid and brilliant Advocate. To have allowed this Brief, which bears his name, to be filed and adopted in this Court, is most regrettable and unfortunate to say the least. I will say no more about the said Brief. I plead with Senior or Principal/Leading Counsel in the various Chambers, to please, vet the Briefs prepared in their names or Chambers, before they are filed in court. They should not take cover in the settled principle of law about the attitude of the two Appellate Courts, to an Inelegant Brief- i.e. to use it for whatever it is worth. See the cases of *Tukur v. The Government of Taraba State & 2 ors.* (1997) 6 NWLR (Pt.510) 549 (a) 569; (1997) 6 SCNJ. 81; *Gurara Securities & Finance Ltd. v. T. I. C. Ltd.* (1999) 2 NWLR (pt.589) 29 (a) 42-43 C.A. and *Sofolahan & 5 ors. v. Chief Folakan & 12 ors.* (1999) 10 NWLR (Pt.621) 86 @ 96 C.A.

It is from the foregoing and the fuller and detailed reasoning and conclusion in the lead Judgment of my learned brother, Mohammed, JSC, that I too, allow the appeal which is meritorious and declare the said Judgment of the court below delivered on 22nd January, 2004, a nullity. I also set aside the said Judgment and do hereby also, remit to the court below, the said consolidated suits to be heard *de novo* by another Panel of that court. I abide by the consequential order in respect of costs.

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