

SUPREME COURT OF NIGERIA

27th APRIL 2007, SC. 287/2002

**CORAM:- S. U. ONU, U. A. KALGO, M. A. MUKHTAR,
M. MOHAMMED, I. F. OGBUAGU, JJSC**

FEDERAL REPUBLIC OF NIGERIA APPELLANT
AND
SENATOR OLAWOLE JULIUS ADEWUNMI RESPONDENT

CRIMINAL PROCEDURE - Charges - Fiat - Failed bank cases - Where a private counsel was authorized by A-G Federation - To prosecute failed bank cases - His signing and filing the charge sheet in 1977 was in order (H1)

CRIMINAL PROCEDURE - Charges - Amendment - Statutes - Failed Banks Tribunal - Where the original charge before Tribunal was validly instituted - Amendment of it before the court - Pursuant to new statutory provisions - Does not make it a new charge - As was wrongfully held by Court of Appeal (H2)

CRIMINAL PROCEDURE - Power to institute - Under the 1999 Constitution - Lies on the Attorney-General - Who may exercise it through officers of his department (H3)

CRIMINAL PROCEDURE - Charges - Validity - Signing of - Failed Bank cases - Charge signed by a legal officer in Federal DPP's office - And countersigned by a private counsel that has A-G's fiat - Is not invalid (H4)

FACTS

By an 18 count charge sheet dated 24-3-1997, the appellant instituted this action against the respondent before the Failed Banks Tribunal sitting at Enugu. The charge sheet was signed by Emeka Ngige Esq., a private legal practitioner that has the Federal Attorney-General's fiat un-

der Decree 18 of 1994 to prosecute failed banks cases. The respondent's trial at the Tribunal was commenced based on the said charge. Upon a change in Government, the 1994 Decree was repealed and a new 1999 Decree was promulgated by which all matters pending before Failed Banks Tribunal were transferred to the Federal High Court or State High Court. Respondent's case was then transferred to the Federal High Court Lagos, to start de novo.

Accordingly, on 27-10-1999, an amended charge against the respondent was filed before the said Federal High Court. The charge was jointly signed by a Senior State Counsel and the private legal practitioner that had a fiat on behalf of the Hon. A-G of the Federation. Respondent pleaded to the charge without any objection and bail was granted to him. One day to the date the case was adjourned for definite trial after two previous adjournments, respondent filed a Summons on Notice Supported by an affidavit. He prayed the trial court to strike out the charge for not being constitutional and in accordance with due process of law. His contention is that the charge is a new charge and that under s. 174 of the new 1999 Constitution, the A-G cannot delegate his power to initiate criminal proceedings to a private legal practitioner. The trial court ruled that the charge was valid and that he had jurisdiction to try respondent. Respondent's appeal to the Court of Appeal was allowed. Aggrieved, appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(i) Was it not wrong of the Court of Appeal to hold that the amendment of the charge against the respondent after the commencement of the 1999 Constitution makes the amended charge a new one and the initiation of which was invalidated by the provisions of that Constitution; notwithstanding that the charge was unquestionably valid at the time of its filing in 1997.

(ii) If Section 174 of the 1999 Constitution forbids the Attorney-General of the Federation from instructing a private Legal Practitioner to initiate criminal prosecution (s) as decided by the Court of Appeal, but not conceded by the Appellant, has the signature of a state counsel on the amended charge not foreclosed any question about its validity regardless

of whether or not it was countersigned by a private legal practitioner authorised by the Attorney-General to do so?

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

Charges - Fiat - Failed bank cases

1. By a letter dated 3rd August, 1995, and signed by the then Attorney-General of the Federation (Chief M. A. Agbamuche SAN) Emeka Ngige was appointed a prosecuting counsel for the Failed Banks Tribunal Lagos Zone and given the fiat to prosecute cases arising from the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1994. Therefore the signing and Tiling of the charge sheet before the Failed Banks Tribunal Enugu in 1977 by Emeka Ngige Esq., was perfectly in order. The Court of Appeal properly recognised this when it said:-

“There is no doubt that under the scheme of things in 1977, the Attorney-General of the Federation could in appropriate circumstances authorise a private legal practitioner to undertake the persecution of offences under Decree No. 18 of 1994. It is also noteworthy that only the Attorney-General of the Federation could at that time raise questions as whether or not such authority to prosecute was properly given.”

I entirely agree with the Court of Appeal on this. (p. 1585 A)

Charges - Amendment - Statutes

2. It seems to me, that the intention of making this provision is to make it possible for the receiving court, be it Federal High Court, or the State High Court, to accept in toto any charge, claim or court process from the Failed Banks Tribunal without anything at all. If it is a criminal charge, as in this case, the charge shall be deemed to be amended as to title of what Tribunal it was first filed and as to venue and any appropriate action to give effect to the section. In the instant case, the charge sheet filed by the prosecution against the respondent in the Failed Banks Tribunal Enugu and signed by Emeka Ngige Esq. appears to me to be the same charge on the same criminal matter as the one termed ‘amended charge’ filed by Mrs. Fatunde and Emeka Ngige on 27/10/99. The only slight difference is the addition of one count thereon which for all intents and purposes

formed part of the same criminal charge against the respondent which originated in the Failed Banks Tribunal, Also since the original charge was properly and validly instituted before the Failed Banks Tribunal Enugu under Decree No. 18 of 1994, it would be deemed to be validly instituted B by filing it in the Federal High Court pursuant to the Decree No. 62 of 1999 even though called amended charge. It is not and cannot in my view be called a fresh or a new charge in the circumstances of this case.

It is my respectful view that the Court of Appeal was wrong to C hold that the amended charge filed on 27th October, 1999 in the Federal High Court Lagos was a new charge as far as the respondent was concerned and that the charge as signed by Mrs. M. O. Fatunde, Assistant Chief Legal Officer of the Federal Ministry of Justice and Emeka Ngige Esq., a legal practitioner was invalid, incompetent and unconstitutional. I D therefore resolve the 2 issues for determination in favour of the appellant. (p. 1586 E/1588 F)

CRIMINAL PROCEDURE - Power to institute

E 3. There is no doubt at all that the power to institute criminal proceedings against any person in the 1999 Constitution lies on the Attorney-General of the State or the Federation as the case may be, but such power may be exercised by the Attorney-General himself or through any officers of his F department. See sections 174 and 211 of the 1999 Constitution. These sections, though very similar in content, do not require that the officers can only exercise the power to institute criminal proceedings if the Attorney-General expressly donated his power to them. The provisions of the G sections presume that any officer in any department of the Attorney-General's office is empowered to initiate criminal proceedings unless it is proved otherwise. (p. 1587 B)

Charges - Validity - Signing of

H 4. Mrs. Fatunde, an Assistant Chief Legal Officer in the Federal Ministry of Justice, D.P.P. Office, is an officer in one of the departments of the Attorney-General of the Federation and is highly qualified to institute criminal proceedings against the respondent. She has therefore validly and

properly, in my view, signed the amended charge filed on 27th October, 1999. On the signature of Mrs. Fatunde alone, the charge was properly laid and filed in the Federal High Court, Lagos without more. The signature of Emeka Ngige was not necessary for this purpose and can be struck out. But Emeka Ngige's signature can be allowed to stay since it was valid on the original charge in the Failed Banks Tribunal and by the provisions of Section 1(3) of the Decree No. 62 of 1999, the Federal High Court can accept the charge with appropriate amendment. There is also no existing law I am aware of invalidating the charge as it stands and the respondent has not cited any legal authority challenging the validity of the charge with the signature of Mrs. Fatunde and Emeka Ngige thereon. (p. 1587 F)

NOTABLE POINTS OF INTEREST

OGBUAGU JSC

1. When objection to a charge is deemed waived

From the foregoing, the Respondent's learned counsel knew and was aware of the signatories on the charge sheet. He never took objection to the said charge either before or after the reading of the charge to the Respondent. After the Respondent had enjoyed his bail, from 28th October, 1999, in April, 2000, (about six (6) months) thereafter, he filed the said application that has led to the instant appeal. As reproduced above, the learned counsel did not oppose the amended charge containing the signatures of both the Assistant Legal Officer/Senior State Counsel and Ngige, Esq. The learned trial Judge noted that after the said plea, that the Respondent is presumed to have put himself on trial. The Respondent and his learned counsel, never appealed against that holding. The said application in my respectful view, was a subterfuge and an after thought made to truncate his trial.

Now, Section 167 of the CPA (Criminal Procedure Act) Cap. 112 Laws of the Federation, 1990 provides as follows:

"Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later".

[the underlining mine]

It can be seen that the provision, is mandatory. Therefore, it is the duty of counsel in particular and of an accused person who is defending himself personally, to promptly, take any objection to every perceived irregularity to the charge including the type of objection in respect of the said charge in the instant case.

However, having pleaded to the charge and the said amendment, was not opposed as I have shown in this Judgment, the Respondent and his learned counsel, had in fact, waived, so to speak, their right to complain. They acquiesced and participated in the “irregularity” (and there was none), the purported “irregularity”, did not vitiate the charge. I so hold. (p. 1592 G/1598 A)

D 2. *Authority of counsel to handle civil or criminal cases*

But having regard to the said issues of the parties, I will now deal with the same. Firstly, when or where counsel announces that he is appearing for a party, it is now firmly settled that it is not for the court, to start an enquiry into his authority and the court never does. See the case of *Adewunmi v. Plastic Ltd. (1986) 3 NWLR (Pt.32) 767 @ 784; (1986) 6 S.C. 214 @ 223*. Once a Counsel appears in a case and announces his appearance, the court assumes, that he has the authority of his client for the conduct of the case. Once he is instructed and he announces his appearance in court, and he is so instructed, it raises a presumption of his authority and he assumes full control of the conduct of his client’s case. Even if the above authority relates to a civil matter, in the case of *Ibrahim & anor. v. The State (1988) 2 S.C. 91 @, 93*, it was held -per Obaseki, JSC, that in institution of criminal proceedings, delegation- of/ by that State/Attorney-General under Section 191 of the 1979 Constitution empowering such delegation, was held to be Constitutional and valid. (p. 1593 F)

H REPRESENTATION

Mr. F. C. A. Okoli for the Appellant.
Respondent and counsel absent.

CASES REFERRED TO

- Adewunmi v. Plastic Ltd. (1986) 3 NWLR (Pt.32) 767 @ 784;(1986) 6 S.C. 214 @ 223
- Ibrahim & anor. v. The State (1988) 2 S.C. 91 @, 93 B
- A-G Kaduna State v. Hassan [1985] 2 N.W.L.R. (pt. 8) 483
- Comptroller, Nigeria Prison Services & Ors v. Dr. Femi Adekanye & Ors. (No.1) 2002 15 N.W.L.R. (pt. 790) 318
- Okaroh v. The State (1990) 1 NWLR (Pt.125) 128 @ 136-137; (1990) C SCNJ. 124
- Adio v. The State (1986) 4 S.C 194 @ 212-213
- Emelike v. The State (1970) 1 ANLR 55
- The State v. Gwonto & 4 ors. (1983) 3 S.C. 62 @ 84
- The State v. Ilori (1983) 1 SCNLR 94 @ 110 D
- The State v. Collins Aibamgbe & anor. (1988) 3 NWLR (Pt.84) 548 @ 578
- DPP v. Akozor (1962) 1 ANLR 235
- Nafiu Rabi v. Kano State (1980) 8-11 S.C. 130 E
- Col. Rotimi v. Macgregor (1974)11 S.C. 133
- The Nigerian Air Force v. James Ex-Wins Commander (1) (2002) 18 NWLR (Pt.798) 295; (2002) 12 SCNJ. 379

F

STATUTES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1999 s. 174
- Criminal Procedure Act ss. 164(4) & 167
- Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 S. 24 G
- Law Officers Act s. 2
- Tribunals (Certain Consequential Amendments etc.) Decree 1999 ss. 1(3), 24(2)
- Federal High Court Act s. 56(1) H

LEAD JUDGMENT BY KALGO JSC

This is an appeal against the decision of the Court of Appeal, Lagos

Division delivered on 13th June 2002.

For a clear understanding of the facts and circumstances giving rise to this case, I find it necessary to give the background history of the events culminating to this appeal. By a charge sheet dated 24th March B 1997 containing eighteen (18) counts, the Appellants instituted this action before the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal sitting in Enugu. The charge sheet was signed by Mr. Emeka Ngige private Legal Practitioner. Later, on the order of the Tribunal the original charge sheet containing 18 counts was filed on the same C day. It was also signed by Emeka Ngige Esq.

The trial of the respondent commenced at the tribunal on the said counts charges, but could not be completed before the coming into effect of the 1999 Constitution on the 29th of May 1999. With the advent of D civilian administration in 1999 Decree No. 18 of 1994, was repealed and Decree No. 62 of 1999 titled "Tribunals (Certain Consequential Amendments, etc.) Decree 1999, which came into effect on 28th of May 1999, was promulgated under which all matters pending before any Failed Banks E Tribunal, were transferred to the Federal High Court or State High Court as the case may be.

Pursuant to the provisions of the said Decree No. 62 of 1999, the amended charge against the respondent was consequently transferred to F the Federal High Court Lagos from the Enugu Failed Banks Tribunal for trial de novo. Accordingly on the 27th of October 1999 the amended charge jointly signed by Mrs. M. O. Fatunde, a Senior State Counsel with the rank of Assistant Chief Legal Officer and Emeka Ngige Esq., a private G legal practitioner on behalf of the Hon. Attorney-General of the Federation was filed. It was accepted by the trial court and (he counts on the charge sheet were read and explained to the respondent who pleaded not guilty to all of them. The respondent was on his application granted bail pending trial and the case adjourned to 17/11/99 for hearing and later to H 29/3/2000 and finally to 19/4/2000 for definite trial on 19/4/2000.

On the 18/4/2000, the respondent filed a Summons on Notice supported by an affidavit praying the trial court to strike out the charge filed against him for want of jurisdiction on the grounds that the charge was

not instituted in accordance with the due process of law and the requisite provisions of the Constitution. The summons was then heard by the trial court and in a considered ruling, the learned trial judge Marden J, held that the charge was regular, competent, valid and in accordance with the constitution. He therefore had the jurisdiction to try the respondent on B the charge. Dissatisfied with this ruling, the respondent appealed to the Court of Appeal which after hearing the appeal, allowed the appeal and struck out the charge against the respondent. It held that:-

“..... *The amended charge brought against the; appellant C (now respondent) on 28th October 1999 constitutes a new charge and that the provisions of the 1999 Constitution apply to it and must be observed.*”

This appeal is from that decision.

In this court, parties filed and exchanged their respective briefs. The appellant formulated two issues for the determination of this court D which read:

“(i) *Was it not wrong of the Court of Appeal to hold that the amendment of the charge against the respondent after the commencement of the 1999 Constitution makes the amended charge a new one and the E initiation of which was invalidated by the provisions of that Constitution; notwithstanding that the charge was unquestionably valid at the time of its filing in 1997.*

(ii) *If Section 174 of the 1999 Constitution forbids the Attorney- F General of the Federation from instructing a private Legal Practitioner to initiate criminal prosecution (s) as decided by the Court of Appeal, but not conceded by the Appellant, has the signature of a state counsel on the amended charge not foreclosed any question about its validity regardless G of whether or not it was countersigned by a private legal practitioner authorised by the Attorney-General to do so?*

The respondent in his brief also adopted all the two issues raised by the appellant, which I shall consider in this appeal.

In the Summons on Notice dated 13/4/2000 and filed on 18/4/ H 2000 in the trial at the Federal High Court, the respondent prayed the court for an order striking out the charge against the respondent for want of jurisdiction of the court to entertain the charge on the grounds that the

charge was not instituted in accordance with due process of law and requisite Constitutional provision. The summons was further explained by the affidavit in support in the following paragraphs:-

B “4. That the charge instituted against the Accused Person/Applicant was signed on behalf of the Attorney-General of the Federation by Mr. Emeka Ngige Esq., a Private Legal Practitioner.

C 5. That I am informed by Chief Afe Babalola SAN whom I verily believe that the Attorney-General cannot delegate his power to initiate criminal proceedings to a Private Legal Practitioner.

6. That I verily believe that Mr. Emeka Ngige lacked authority in law and in fact to sign on behalf of the Attorney-General of the Federation.”

D As I stated earlier the learned trial judge, after hearing parties on the said summons, decided that the said charge was competent valid and constitutional and that he had jurisdiction to entertain it. But on appeal, the Court of Appeal held that the charge was a new charge and therefore not valid before the trial court. Looking at the 2 issues of the appellant, E it appears to me clearly that they are interwoven in many respects and I therefore intend to consider them together.

F The original charge was filed in the Failed Bank Tribunal Enugu on 24th March 1997. The charge sheet was signed by Emeka Ngige Esq., a legal practitioner on behalf of the Attorney-General of the Federation 25 pursuant to the provisions of Section 24(2) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 which provides:-

G “24(a) Prosecutions for Offences under this decree shall be instituted before the Tribunal in the name of the Federal Republic of Nigeria by the Attorney-General of the Federation or such other Officer in the Federal Ministry of Justice as he may authorise so to do, and addition thereto he may

H (b) If a Tribunal so directs or if the Central Bank of Nigeria, or the Nigeria Deposit Insurance Corporation so request, authorised any other legal practitioner in Nigeria, to undertake any such prosecution directly or assist therein.

(c) The question whether any or what authority has been given in pursuance of sub-section (2) of this section shall not be inquired into by any person other than the Attorney-General of the Federation.”

(Underlining Mine)

By a letter dated 3rd August, 1995, and signed by the then Attorney-General of the Federation (Chief M. A. Agbamuche SAN) Emeka Ngige was appointed a prosecuting counsel for the Failed Banks Tribunal Lagos Zone and given the fiat to prosecute cases arising from the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1994. Therefore the signing and Til- ing of the charge sheet before the Failed Banks Tribunal Enugu in 1977 by Emeka Ngige Esq., was perfectly in order. The Court of Appeal properly recognised this when it said:-

“There is no doubt that under the scheme of things in 1977, the Attorney-General of the Federation could in appropriate circumstances authorise a private legal practitioner to undertake the persecution of offences under Decree No. 18 of 1994. It is also noteworthy that only the Attorney-General of the Federation could at that time raise ques- tions as whether or not such authority to prosecute was properly given.”

I entirely agree with the Court of Appeal on this:

In 1999, just before the advent of the civil regime in Nigeria, the Failed Banks Decree 18 of 1994 was repealed by the Tribunals (Certain Consequential Amendments etc.) Decree No. 62 of 1999 which came into operation on the 28th of May 1999. By this new Decree all matters pending before the Failed Banks Tribunals shall be transferred to the Federal High Court or State High Courts as the case may be for trial de novo. Accordingly in this case, the proceedings were transferred from the Failed Banks Tribunal Enugu to the Federal High Court Lagos, and an amended charge containing 19 counts was filed on 27-10-99 and accepted on 28/10/99 by that court. The charge sheet was signed by (p. 51 of the Record)

*“Mrs. M.O. Fatunde
Assistant Chief Legal Officer,
Federal Ministry of Justice,*

D.P.P. Office, Lagos.

and

Emeka Ngige Esq.,

Prosecutor

B *For: The Hon Attorney-General of the Federation*
27/29 Martins Street
4th Floor, Lagos.”

C It is clear therefore that the amended charge was filed in the Federal High Court after the coining into operation of the 1999 Constitution. What then is the position of that charge? According to the provisions of Section 1(3.) of the Decree No. 62 of 1999 -

D “A charge, claim or court process filed before a Tribunal established under any of the enactments specified in the schedule to this Decree shall be deemed to have been duly filed or served before the Federal High Court or High Courts of a State, as the case may be and as such a charge, claim and court process shall be deemed amended as to title, venue and such other matters as may be appropriate to give effect to this
 E sub-section without further assurance than this Decree.”

F There is no doubt, it seems to me, that the intention of making this provision is to make it possible for the receiving court, be it Federal High Court, or the State High Court, to accept in toto any charge, claim or court process from the Failed Banks Tribunal without anything at all. If it is a criminal charge, as in this case, the charge shall be deemed to be amended as to title of what Tribunal it was first filed and as to venue and any appropriate action to give effect to the section. In the instant case, the charge sheet filed by
 G the prosecution against the respondent in the Failed Banks Tribunal Enugu and signed by Emeka Ngige Esq. appears to me to be the same charge on the same criminal matter as the one termed ‘amended charge’ filed by Mrs. Fatunde and Emeka Ngige on 27/
 H 10/99. The only slight difference is the addition of one count thereon which for all intents and purposes formed part of the same criminal charge against the respondent which originated in the Failed Banks Tribunal, Also since the original charge was properly and validly

instituted before the Failed Banks Tribunal Enugu under Decree No. 18 of 1994, it would be deemed to be validly instituted by filing it in the Federal High Court pursuant to the Decree No. 62 of 1999 even though called amended charge. It is not and cannot in my view be called a fresh or a new charge in the circumstances of this case. B

As set out earlier in this judgment, the so called amended charge was then signed jointly by Mrs. M. O. Fatunde and Emeka Ngige Esq., instituting the criminal charge against the respondent. **There is no doubt at all that the power to institute criminal proceedings against any person in the 1999 Constitution lies on the Attorney-General of the State or the Federation as the case may be, but such power may be exercised by the Attorney-General himself or through any officers of his department. See sections 174 and 211 of the 1999 Constitution. These sections, though very similar in content, do not require that the officers can only exercise the power to institute criminal proceedings if the Attorney-General expressly donated his power to them. The provisions of the sections presume that any officer in any department of the Attorney-General's office is empowered to initiate criminal proceedings unless it is proved otherwise.** This will not be in conflict with our decision in A-G Kaduna State v. Hassan [1985] 2 N.W.L.R. (pt. 8) 483, where the main controversy was that there was no incumbent Attorney-General who could have donated the power to discontinue criminal prosecution in the case concerned. There is also no doubt in my mind that **Mrs. Fatunde, an Assistant Chief Legal Officer in the Federal Ministry of Justice, D.P.P. Office, is an officer in one of the departments of the Attorney-General of the Federation and is highly qualified to institute criminal proceedings against the respondent. She has therefore validly and properly, in my view, signed the amended charge filed on 27th October, 1999. On the signature of Mrs. Fatunde alone, the charge was properly laid and filed in the Federal High Court, Lagos without more. The signature of Emeka Ngige was not necessary for this purpose and can be struck out. But Emeka Ngige's signature can be allowed to stay since it** C D E F G H

was valid on the original charge in the Failed Banks Tribunal and by the provisions of Section 1(3) of the Decree No. 62 of 1999, the Federal High Court can accept the charge with appropriate amendment. There is also no existing law I am aware of invalidating the charge as it stands and the respondent has not cited any legal authority challenging the validity of the charge with the signature of Mrs. Fatunde and Emeka Ngige thereon. Most of the cases cited by the learned counsel for the parties in their briefs are either on the interpretation of a section of the constitution which is different from the one being considered or on decided cases on the old Decree 18 of 1994 which was repealed and whose provisions were overtaken by those of the 1999 Constitution. They are therefore in my respectful view, irrelevant and cannot be useful in this appeal. The case of A.G. Kaduna State v. Hassan (supra) which I earlier mentioned is clearly distinguishable from this case. In that case, there was no incumbent Attorney-General who could possibly be presumed to donate the power and the subject matter was discontinuance of criminal prosecution and not initiation thereof as is the case here. The case of Comptroller, Nigeria Prison Services & Ors v. Dr. Femi Adekanye & Ors. (No.1) 2002 15 N.W.L.R. (pt. 790) 318 and many others cited by the appellant's counsel, substantially dealt with the appearance of private legal practitioner in criminal cases on behalf of the Attorney-General and not the initiation of such criminal proceedings, to that extent, they are irrelevant here.

From all what I have stated above, it is my respectful view that the Court of Appeal was wrong to hold that the amended charge filed on 27th October, 1999 in the Federal High Court Lagos was a new charge as far as the respondent was concerned and that the charge as signed by Mrs. M. O. Fatunde, Assistant Chief Legal Officer of the Federal Ministry of Justice and Emeka Ngige Esq., a legal practitioner was invalid, incompetent and unconstitutional. I therefore resolve the 2 issues for determination in favour of the appellant.

Accordingly, this appeal is meritorious. I allow it, set aside the IS decision of the Court of Appeal and restore that of the trial Federal High

Court. The case is remitted to the Federal High Court for trial.

ONUJSC

Having been privileged to read before now the judgment of my learned brother, Kalgo, J.S.C. I am in entire agreement with him that the appeal is meritorious and must therefore succeed. Consequently I allow the appeal and order the case to be remitted to the Federal High Court for trial.

C

MUKHTAR JSC

I have read in advance the lead judgment delivered by my learned brother Kalgo, JSC. I am in full agreement with him that the appeal has merit and deserves to succeed. In this vein, I also allow the appeal, and abide by the consequential order made therein.

E

MOHAMMED JSC

I have read before today the leading judgment just delivered by my learned brother Kalgo, JSC. I am in complete agreement with him that there is merit in this appeal which deserves to succeed. Therefore for the reasons advanced in the leading judgment which I hereby adopt as mine, I also allow this appeal, set aside the decision of the Court below striking out the charges against the Respondent and restore the decision of the trial Court. The case is remitted to the trial Federal High Court Lagos to continue with the trial of the Respondent on the charges against him.

G

OGBUAGU JSC

This is an Interlocutory appeal against the decision of the Court of Appeal, Lagos Division (hereinafter called “the court below”) delivered on 13th June, 2002 allowing the appeal by the Accused Person/Respondent against the Ruling of the Federal High Court, Lagos Division which

had dismissed his application, to strike out the amended charge on the ground that it was irregular, incompetent, invalid and unconstitutional. There are three (3) grounds of appeal and the Appellant, has formulated two (2) issues for determination, namely,

B “(i) *Was it not wrong of the Court of Appeal to hold that the amendment of the charge against the Respondent after the commencement of the 1999 Constitution makes the amended charge a new one and the initiation of which was invalidated by the provisions of that Constitution, notwithstanding that the charge was unquestionably valid at the*
C *time of its filing in 1997?*

 ii) *If Section 174 of the 1999 Constitution forbids the Attorney-General of the Federation from instructing a private legal practitioner to initiate criminal prosecution(s) as decided by the Court of Appeal, but*
D *not conceded by the Appellant, has the signature of a state counsel on the amended charge not foreclosed any question about its validity regardless of whether or not it was countersigned by a Legal Practitioner authorized by the Attorney-General to do so?”.*

E I note that the Respondent, has adopted in its entirety, the above issues of the Appellant. I will therefore, confine myself in this Judgment even briefly, to the relevant facts in the case that led to this appeal. The Respondent, was originally arraigned before the Failed Banks (Recovery
F of Debts) and Financial Malpractices in Banks Tribunal sitting in Enugu. The trial commenced but was not concluded because of the promulgation of Tribunals (Certain Consequential Amendments, etc.) Decree No. 62 of 1999) which came into force on 28 May, 1999. Consequently, the charge against the Respondent, was transferred from Enugu, to the Lagos
G Division of the Federal High Court. On 27th October, 1999, an amended charge was filed at the said High Court and was signed by a Staff/Officer of the Federal Ministry of Justice - Mrs. O.O. Fatunde - a Senior State Counsel with the rank of an Assistant Chief Legal Officer and also signed
H by Emeka Ngige, Esq. - a Private Legal Practitioner and who was the Prosecutor at the Tribunal on the Authority of the Attorney-General of the Federation and who in fact, applied for the commencement of the trial of the Respondent for the offences with which he was charged.

(See page 19 of the Records).

On 28th October, 1999, the Respondent appeared in that court or was arraigned. The amended charge of now nineteen (19) counts, (instead of the original eighteen (18) counts), was read to the Respondent who pleaded “Not Guilty” to all the counts. His learned counsel, applied B for bail which was granted without any objection. By a Summons on Notice dated 13th April, 2000, the Respondent, sought an order striking out the charge for want of jurisdiction on the grounds that,

“the charge was not instituted in accordance with due process of C law and requisite constitutional provision”.

In other words, that the charge was invalid by the fact that it was Ngige, Esq., who initiated it and not Mrs. Fatunde and that he could not do so on behalf of the Attorney-General- of the Federation being a Private D Legal Practitioner. After hearing arguments from the learned counsel to the parties on 19th June, 2000, the learned trial Judge, in a considered Ruling, dismissed the application/objection. Dissatisfied with the said decision, the Respondent appealed to the court below which as I stated earlier in this Judgment, allowed the appeal and set aside the said Ruling E and in its place, granted the said application of the Respondent by striking out the charge, hence the instant appeal.

Before going into the merits of this appeal, I note at page 52 of the Records, that the proceedings before the trial, court on 28th October, F 1999, appear inter alia, as follows:

“Accused Person present in Court. Emeka Ngige Esq., with E.J. Kachukwu Esq., for the Prosecution. O. Oluborode Esq., for the Accused Person.

Prosecutor: This is a transferred matter from the Failed Bank Tri- G bunal and Federal High Court Enugu Division. This is a matter that was part heard before the dissolution of the Tribunal which has now become vested in this Court by virtue of Decree 62 of 1999. The matter will have to be started de novo by virtue of that Decree. In the mean time we have H filed an amended charge on 27/10/99. If it pleases the court we shall order the registrar to read the charge and thereafter the issue of bail would follow. In effect we are asking the court to substitute the charge

dated the 24/03/97 with the one of 27/10/99. We are making this application pursuant to Section 162 and 163 of the C.P.A. (sic).

Court: Do you wish to say anything?

Oluborode Esq., We were served with an amended charge just this morning. There was never any formal application to amend but we shall not be opposing.

[the underlining mine]

Court: The amended charged (sic) filed and dated 27/10/99 is hereby accepted”.

After pleading to the charge to all the counts, the following appear inter alia, at page 55 of the Records:

“Emeka Ngige Esq., Having taken his plea he may raise the issue of his bail.”.

At page 56 thereof on the same date, the following appear, inter alia, as follows:

“CourtHaving said this, I am aware that it is the agreement of both counsel that the accused person is entitled to bail. Moreso that he pleads not guilty to all the charges against him. He is presumed to have put himself on trial and that is where the very principle of the accused presumption of innocence begins and that makes the accused person automatically entitled to bail since the charges he is standing trial for are not capital offences”.

[the underlining mine]

I have taken pains to reproduce part of what transpired on the date the Respondent was arraigned before the trial court and when and after he took his plea and then his learned counsel applied for bail, which was not opposed. From the foregoing, the Respondent’s learned counsel knew and was aware of the signatories on the charge sheet. He never took objection to the said charge either before or after the reading of the charge to the Respondent. After the Respondent had enjoyed his bail, from 28th October, 1999, in April, 2000, (about six (6) months) thereafter, he filed the said application that has led to the instant appeal. As reproduced above, the learned counsel did not oppose the amended charge containing -the signatures of both the Assistant Legal Officer/Senior State Counsel and

Ngige, Esq. The above underlined by me, are clear and unambiguous. The learned trial Judge noted that after the said plea, that the Respondent is presumed to have put himself on trial. The Respondent and his learned counsel, never appealed against that holding. The said application in my respectful view, was a subterfuge and an after thought made to truncate his trial. B

Now, Section 167 of the CPA (Criminal Procedure Act) Cap. 112 Laws of the Federation, 1990 provides as follows:

“Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later”. C

[the underlining mine]

It can be seen that the provision, is mandatory. Therefore, it is the duty of counsel in particular and of an accused person who is defending himself personally, to promptly, take any objection to every perceived irregularity to the charge including the type of objection in respect of the said charge in the instant case. See the case of *Okaroh v. The State* (1990) 1 NWLR (Pt.125) 128 @ 136-137; (1990) SCNJ. 124. Since the Respondent and his learned counsel, did not comply, or avail themselves with this mandatory provision of the Act, they were not entitled to raise the objection in the said application. On this ground alone, this appeal, in my respectful view, succeeds. This is because, the issue is a matter of settled law. D E F

But having regard to the said issues of the parties, I will now deal with the same. Firstly, when or where counsel announces that he is appearing for a party, it is now firmly settled that it is not for the court, to start an enquiry into his authority and the court never does. See the case of *Adewunmi v. Plastic Ltd.* (1986) 3 NWLR (Pt.32) 767 @ 784;. (1986) 6 S.C. 214 @ 223 . Once a Counsel appears in a case and announces his appearance, the court assumes, that he has the authority of his client for the conduct of the case. Once he is instructed and he announces his appearance in court, and he is so instructed, it raises a presumption of his authority and he assumes full control of the conduct of his client’s case. See also the case of *Alhaji Tukur v. Governor of Gondola State* (1988) 1 G H

NWLR (Pt.68) 39; (1988) 1 SCNJ. 54; (1988) 1 S.C. 78 @ 96-98; (1988) All NLR 42. Even if the above authority relates to a civil matter, in the case of *Ibrahim & anor. v. The State* (1988) 2 S.C. 91 @, 93, it was held -per Obaseki, JSC, that in institution of criminal proceedings, delegation- of/by that State/Attorney-General under Section 191 of the 1979 Constitution empowering such delegation, was held to be Constitutional and valid. See also the cases of *Adio v. The State* (1986) 4 S.C 194 @ 212-213 citing the case of *Emelike v. The State* (1970) 1 ANLR 55; *The State v. Gwonto & 4 ors.* (1983) 3 S.C. 62 @ 84 and *The State v. Ilori* (1983) 1 SCNLR 94 @ 110.

In the case of *The State v. Collins Aibamgbe & anor.* (1988) 3 NWLR (Pt.84) 548 @ 578; (1988) 7 SCNJ. (P1.1) 128 @ 137, 153 which dealt with the propriety of a Private Legal Practitioner instituting and undertaking a criminal prosecution within the meaning of Section 191 of the 1979 Constitution, now Section 174 of the 1999 Constitution, this Court, - per Eso, JSC, stated that the Court had had occasion to rule before, that institution and undertaking of a Criminal Prosecution within the meaning of Section 191 of the 1979 Constitution, mean the Attorney-General and his staff and that they, can commence and make themselves responsible for a criminal prosecution and not that, they cannot brief private Practitioners to appear on behalf of the Attorney-General either alone or together with a member of the Attorney-General's staff. The cases of *DPP v. Akozor* (1962) 1 ANLR 235 and *Nafiu Rabi'u v. Kano State* (1980) 8-11 S.C. 130, were referred to.

See also Brett & Mclean Commentary in Article 202 at page 54. In the case of *Alhaji Tukur v. Government of Gongola State* (supra), this Court - per Oputa, JSC, citing the case of *DPP v. Akozor* (supra), held that the DPP, had the power having regard to Section 97 of the Constitution, to instruct a Private Legal Practitioner to appear in a criminal case on his behalf and that the DPP or a member of his staff, can or could also appear with a private Legal Practitioner so instructed. This is why, in practice, a Fiat issued by the Attorney-General, is always produced in Court by the Private Legal Practitioner before the commencement of any arraignment or trial as evidence of the instructions or Authority to so

represent.

Incidentally, or significantly, the court below, acknowledged this fact, when His Lordship - Oguntade, JCA, (as he then was), and who wrote the lead Judgment, stated at page 182 of the Records inter alia, as follows:

“There is no doubt that under the scheme in 1997, the Attorney-General of the Federation could in appropriate circumstances authorize a private legal practitioner to undertake the prosecution of offences under Decree No. 18 of 1994. It is also noteworthy that only the Attorney-General of the Federation ‘could at the lime raise questions as to whether or not such authority to prosecute was properly given.’”

In *Nafiu Rabiu v. Kano State* (supra), a Private Legal Practitioner - Kehinde Sofola (SAN), (now of blessed memory), appeared with Miss O. Sofola and Miss O. Ogundipe for the Respondent - Kano State.

In *The State v. Salihu Mohammed Gwonto & ors* (supra) another Private Legal Practitioner - G.O.K. Ajayi (SAN), appeared with Miss A.K. Debi & 3 ors. for Plateau State.

Just recently, in the case of *The Federal Republic of Nigeria v. George Osahon & 7 ors.* (2006) 5 NWLR (Pt.973) 361 @ 405, 410-411 (2006) 2 SCNJ. 348 @ 372-373; (2006) 2 S.C. (Pt.11) 1 @ 20 -21 - per Kutigi, JSC (as he then was now CJN), Sections 56 (1) of the Federal High Court Act, 1990 and Section 174 (l)(a), (b) & (c) of the 1999 Constitution, were considered.

Section 56(1) of the Federal High Court (hereinafter called “the Act”) provides as follows:

“In the case of prosecution by or on behalf of the Government of the Federation or by any Public Officer in his official capacity the Government of the Federation or that office may be represented by a law officer, state counsel or by any legal practitioner duly authorized in that behalf by or on behalf of the Attorney-General of the Federation”.

[the underlining mine]

I am aware that this Act, is a Federal Act, but the Constitution, is supreme to it. It is also clear or plain to me, that the Act has not closed the category of those who could prosecute criminal “cases in that court.

If it had purported to do so, certainly, it will be in conflict with Section 174(1) of the 1999 Constitution.

Kutigi, JSC (as he then was now CJN), stated inter alia, as follows:

B *“From the provisions of the Acts and the Constitution cited above, which in my view are clear and unambiguous, it is evident that the following persons have the right to practice in the Federal High Court —*

(1) All persons admitted as legal practitioners to practice in Nigeria (subject to the provisions of the Constitution and the Legal Practitioners, Act (See Section 57).

(2) Law Officers (See Section 56(1)

(3) State Counsel (see Section 56(1);

(4) Any legal practitioner duly authorized in that behalf by or on behalf of the Attorney-General of the Federation (see Section 56(1)

(5) Police Officers (see Section 23 of the Police Act)

(6) Any other authority or persons (see Section 174 (1)(b) & (c) of the 1999 Constitution).

E *One can safely say that the people mentioned under (2), (3) & (4) above, must also necessarily be persons admitted as legal practitioners to practice, in Nigeria just as it is under (1). Those under (5) & (6) need not be legal practitioners at all. But if they are, the better”.*

F *[the underlining his]*

From (4) above, in my respectful view, that objection by the Respondent’s learned counsel at the trial court, amounted to an attempt of drawing wool or a red-herring in the “eyes” of that court. Afterwards,

G I note that the charge in the Tribunal pursuant to Section 24(2) (b) of the Decree, was signed by Ngige, Esq., as the Prosecutor on behalf of the Attorney-General of the Federation and the case was even part-heard.

Now, a substitution, is the same thing as an amendment and an amendment whenever made by the court, relates back to the original date H of the document so amended. See the cases of *Col. Rotimi v. Macgregor* (1974)11 S.C. 133 and *The Nigerian Air Force v. James Ex-Wins Commander (1)* (2002) 18 NWLR (Pt.798) 295; (2002) 12 SCNJ. 379. See also Section 164(4) of the Criminal Procedure Act. The court below, I

agree with the submission at paragraph 4.05 of the Appellant's Brief, was wrong in its interpretation of Section 1(3) of the said Decree 62 of 1999 which clearly provides that after the coming into force of the 1999 Constitution, a charge filed before a Tribunal, shall be deemed to have been duly and properly filed or served before the Federal High Court or in fact, B shall be deemed amended without the need to bring a formal application to amend.

If I or one may ask. What was wrong with Mrs. Fatunde and Mr. Ngige signing the charge? In my respectful view, if Mrs. Fatunde alone C signed, it was alright and valid. In that case, the signature of Ngige, (he did not counter sign. He also signed) was of no moment. If Ngige signed it alone, he had a FIAT of the Attorney-General, at least, and on the authorities referred to by me in this Judgment and in particular that of *The Republic v. Osohon & ors.* (supra), he was entitled to so sign as the D Prosecutor - a position which" was not challenged both at the Tribunal and during the time the Respondent, pleaded to the charge. Since a staff of either the DPP or the Attorney-General, could appear with a Private Legal Practitioner so authorized - See *DPP v. Kano State* and *Alhaji E Tukur v. Govt. of Gongola State* (supra), that a. Senior State Counsel/ Assistant Chief Legal Officer. - Mrs. Fatunde signed, certainly, cannot or could not vitiate and/ or invalidate the charge. I so hold.

In any case, the Respondent and his learned counsel, did not at the F trial court, the court below, or in this Court, show what prejudice or embarrassment the Respondent suffered or any miscarriage of justice occasioned by the two persons, signing the charge. In fact, I note that the Respondent and his learned counsel, insisted that it was Mr. Ngige, G who indeed initiated the charge and not Mrs. Fatunde. Even if that were so, I have held that as the Prosecutor, he was entitled to sign the charge as a representative of the Attorney-General. At worst, the two signatures, may be accommodated *ex abundate cautela*. But it was not necessary. At worst, it was a surplusage. Surprisingly to me, the court below, both at H pages 187 and 188 of the Records, stated that Mrs. Fatunde, did not show proof of her authorization to initiate the prosecution. An Assistant Chief Legal Officer or Senior State Counsel in the Federal Ministry of

Justice to show proof of her authority? Wonderful! I will not say a word about this because, with respect, I don't think it is right in the least. See *The Republic v. Osohon & ors.* (supra) and Section 2 of the Law Officers Act and Section 174 (2) of the 1999 Constitution.

B However, having pleaded to the charge and the said amendment, was not opposed as I have shown in this Judgment, the Respondent and his learned counsel, had in fact, waived, so to speak, their right to complain. They acquiesced and participated in the "irregularity" (and there was none), the purported "irregularity", did not vitiate the charge. I so
C hold.

The court below, was, with respect, wrong, when it allowed the appeal of the Respondent and struck out the charge. Oguntade, JCA (as he then was) stated at page 189 of the Records, inter alia, as follows:

D "In the final conclusion, this appeal is immensely meritorious....."

On the contrary and with respect, that appeal, was hopelessly unmeritorious. It was meant to play for time and delay the expeditious hearing and determination of the case. I wish the Rules of this Court had
E permitted me, to award costs against the Respondent and I should have readily done so. I believe that if bail was not granted to the Respondent, or it was later cancelled, this case by now, should have long been completed.

F In concluding this Judgment, my answer to Issue 1 is in the Affirmative while I hold that Issue 2, is a none issue. It is, with respect, speculative and the Court is not allowed to deal with speculations. I had the advantage and privilege of reading before now, the lead Judgment of my learned brother, Kalgo, JSC. From the foregoing and the fuller reasoning and conclusion in the lead Judgment, it is my respectful view, that
G the merit of this appeal, is unassailable. It succeeds and I too allow it. I also set aside the said decision of the court below and in its stead, affirm the decision of the trial court. The Respondent should now (after the
H unwarranted "skirmishes") so to say, go and stand his trial without further ado.