

COURT OF APPEAL
KADUNA DIVISION
7TH APRIL, 2005. CA/K/37/C/2005
CORAM:-M. MOHAMMED (OFR), B. A. BA'ABA,
A. A. JEGA, K. M. O. KEKERE-EKUN, JJCA

| | |
|--------------------------------|-------------------|
| AWE ODESSA | APPELLANT |
| V. | |
| 1. FEDERAL REPUBLIC OF NIGERIA | |
| 2. CHIEF JOSHUA CHIBI DARIYE | |
| 3. LAWSON A. OMOKHODION | |
| 4. DOROTHY UKO | RESPONDENTS |
| 5. DUATE P. IYABI | |
| 6. ALL STATES TRUST BANK PLC | |
| 7. ADONYE ROBERTS | |

APPEALS - Parties - Preliminary objection by 2nd respondent - That his name be struck out from the appeal - As not being a party - Is struck out for being unfounded (H1)

JUDGMENTS - Appeals - Sustenance - Obiter dictum - Cannot sustain an appeal - Present appeal being based on court's decision and not obiter - Is sustained (H2)

CRIMINAL PROCEDURE - Fair hearing - Is a right that avails accused - From point of taking plea until delivery of judgment - Being guaranteed by s. 36 of 1999 Constitution - It cannot be waived or acquiesced (H3)

FAIR HEARING - Definition and scope - Affords a party opportunity to present his case - It lies in the procedure not in the correctness of the decision (H4)

CONSTITUTIONAL LAW - Fair hearing - Charges - Validity of - Suo motu raising of issue by trial court - Without giving appellant a hearing -

Violates natural justice principles - Enshrined in s.36 of 1999 Constitution (H5)

COURTS - Jurisdiction - Where objection to the Court's jurisdiction is raised - It should be determined before proceeding with the trial - Since anything done without jurisdiction is a nullity (H6)

FAIR HEARING - Denial - Effect - Lack of jurisdiction - It is immaterial that same decision would have been reached - In the absence of fair hearing - The entire decision and subsequent proceedings in the matter - Will be nullified (H7)

APPEALS - Issues - Propriety - Issue that did not arise before trial court - And one that will be determined as case is remitted for fresh trial - Should not be determined by appeal court (H8)

FACTS

Before the Federal High Court Kaduna, the appellant and the 2nd to 7th respondents were arraigned on a two count charge that relate to money laundering, on 7-12-2004. Appellant pleaded not guilty to the two counts. The trial Judge refused appellant's oral application for bail and adjourned the case to 13-12-2004 for definite trial. As the case came up on that date, there was a preliminary objection to the trial court's jurisdiction to try 1st accused who was the Governor of Plateau State along with the appellant/other accused persons. Application for bail was also before the court. The court firstly commenced the trial by hearing the evidence of the PW1 and adjourned to 16-12-2004 for cross examination, ruling on the preliminary objection and the bail application. In its ruling, the court suo motu formulated 3 issues in respect of its jurisdiction to try 1st accused along with the other accused persons. It held that by virtue of immunity conferred by s. 308 of the 1999 Constitution, the 1st accused cannot be tried along with the other accused persons. It struck out charges that solely affected 1st accused person and deleted his name from charges wherein he was jointly charged with others.

Being aggrieved with part of the trial court's ruling, appellant has now appealed to the Court of Appeal. It was contended that the trial Judge, without granting appellant hearing was wrong in holding that there was "no challenge to the validity of the charge against the other accused persons." Appellant sought to establish that his right to fair hearing was breached.

ISSUES FOR DETERMINATION

"1. Whether the holding by the learned trial Judge that there being no challenge to the validity of the charges against the other accused persons was not a denial of the appellants right to fair hearing.

2. Whether the trial Judge had jurisdiction to continue adjudicating/trial of the appellant having struck out the 1st accused person having regards to the remaining offences/charges before the court."

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

APPEALS - Parties - Preliminary objection

1. It is quite clear therefore from this ground of appeal that the 2nd respondent is a proper party in this appeal because he was a party at the lower court on 16/12/2004 in the ruling of that day which gave rise to the appeal. See *Green v. Green* (2001) 45 WRN 90; (1987) 3 NWLR (Pt. 61) 480. The fact that the name of the 2nd respondent was struck out from the proceedings in the case in the decision arrived at by the trial court in that ruling, his name remained on the record of the trial court as part of the ruling being appealed against by the appellant. Certainly, the 2nd respondent being one of the beneficiaries of the ruling cannot now turn round to say that he was not a party in the criminal trial before the trial court on 16/12/2004 when the ruling was delivered. It is not surprising therefore that apart from the appellant none of the respondents paid attention to the 2nd respondent's preliminary objection. Accordingly the objection is hereby over ruled. (p. 4106 F)

Appeals - Sustenance - Obiter dictum

2. It is indeed the law that a mere statement or observation made by a court in its decision which is not related to the issue before that court for

resolution in the case, cannot sustain any appeal being an *obiter dictum* as stated by the Supreme Court in *Abacha v. Fawehinmi* (2001) 1 WRN 29; (2000) 6 NWLR (Pt. 660) 228 at 351. An opinion expressed by a court which does not affect its decision in a suit is an “*obiter dictum*”

B This is because such statement or observation in the form of obiter dictum does not qualify as a decision within the meaning of that word under section 277(1) of the 1979 Constitution.

The position in the present case is certainly different from that in C *Abacha v. Fawehinmi (supra)* in which the observation made by the justice of this court was a mere observation which played no part in the decision reached in that case. In the present case however, the decision of the trial court being appealed against, is a determination on the validity of counts 1 and 2 in charge No 143/C as they affected the appellant and D other accused persons being jointly tried after striking out the name of the 1st accused now 2nd respondent from the trial.

With utmost respect, this part of the ruling of the trial court cannot be described as a mere statement or observation which played no role E in the decision of the court. It certainly constitutes a determination of that court on the validity of counts 1 and 2 in charge No 143/C in relation to the appellant and other accused persons who were being tried along with the 1st accused person now 2nd respondent whose name had been F struck out which, in my view, is a decision within the meaning of that word under section 308 of the 1999 Constitution. This decision is therefore capable of sustaining this appeal and I so hold. (p. 4112 E)

G ***Fair hearing - Is a right that avails accused***

3. The trial of an accused person commences on his arraignment in court and the taking of his plea to the charge or charges against him. Therefore the right of the accused person to fair hearing will commence from the H time the accused person is brought before a court and his plea is taken. This right to fair hearing shall continue to avail the accused person right through the trial until the delivery of judgment. Participation in trial by appellant cannot constitute waiver of right to fair hearing. Being right

guaranteed under section 36 of the 1999 Constitution, it cannot be waived or acquiesced. (p. 4113 G)

FAIR HEARING - Definition and scope

4. No doubt the right to fair hearing is a fundamental and constitutional B right of a party to a dispute to be afforded an opportunity to present his case to the adjudicating authority. That right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in the case. In relation to a criminal trial, the Supreme Court held in *Whyte v. C.O.P.* (1966) NMLR 215 at 217, that it can C hardly be stated that an accused has not had a fair hearing as intended by the Constitution when the trial court had followed the procedure laid down for such hearing and has not violated the principle of natural justice. The Supreme Court had also stated in several of its decisions that D fair hearing in relation to a case means that the trial of a case or the conduct of the proceedings therein, is in accordance with the relevant laws and rules of court. (p. 4114 C)

Fair hearing - Charges - Validity of

5. The issue of fair hearing may also arise where a court raises issue *suo motu*. When a court raises an issue *suo motu*, the parties before it in the matter must be given an opportunity of being heard on the issue, particularly the party that may be affected adversely by the result of the determination on the issue so raised. F

What was before the trial court was the validity of the charge as it relates to the 1st accused now 2nd respondent alone. It was on that issue alone that the trial court gave the parties including the appellant in this G appeal, a hearing on 13/12/2004 when the preliminary objection was heard. It follows therefore that on 13/12/2004 when the 1st accused now 2nd respondent's preliminary objection was heard, the issue on the question relating to the validity of counts 1 and 2 in charge No.143C as affecting H the appellant was not before the court for adjudication and determination to give the court the opportunity to proceed with the trial of the appellant immediately the name of the 2nd respondent was struck out from the

charge. The trial court therefore having raised the issue on the validity of the charge against the appellant who did not raise it himself and nor was it raised by the other parties, and without giving the appellant a hearing before the determination that the charge was valid in relation to him to allow the court to proceed with the trial of the appellant, constitutes a violation of the principles of natural justice enshrined in section 36 of the 1999 Constitution which gives the appellant the right of fair hearing. (pp. 4114 G/4116 A)

C Where objection to the Court's jurisdiction is raised

6. The action of the trial court on that day in commencing the trial by allowing the 1st prosecution witness to be called upon to testify while the 1st accused now 2nd respondent's notice of preliminary objection to the jurisdiction of the trial court to try him on the charges also filed the same day was pending, appears to have put the trial court off the track. One would have thought that the issue of jurisdiction of the court to which the attention of the court was drawn by one of the learned senior counsel before the court ought to have been tackled first and put to rest before embarking on the trial as required by several decisions of the Supreme Court. Some of these decisions include *Onyema & Ors. v. Oputa & Ors.* (1987) 3 NWLR (Pt. 60) 259 (1987) 2 NSCC 900, A-G, of *Federation & Ors. v. Sode & Ors.* (1990) 1 NWLR (Pt. 128) 500 and *Nalsa & Team Associate v. NNPC* (1996) 3 NWLR (Pt. 439) 621 at 633; (1996) 3 SCNJ 50, where the Supreme Court said that it is in the interest of the best administration of justice that where the issue of jurisdiction is raised in any proceeding before any court of law, it should be dealt with at the earliest opportunity and before the trial or a consideration of any other issues raised in the cause as anything done without or in excess of jurisdiction by any court established under the Constitution is a nullity. (p. 4116 G)

H FAIR HEARING - Denial - Effect

7. Coming back to the issue of the denial of fair hearing, it should be noted that while at the hearing of the preliminary objection of the 1st

accused at the trial, the trial court rightly decided the effect of section 308 (1) and (2) of the 1999 Constitution on the 2 counts in charge 143C in relation to the 1st accused person, the trial court in my view, is without jurisdiction to extend that determination on the charge to cover the appellant without giving him a hearing. B

The effect of the violation of the principles of natural justice in arriving at a decision is trite. If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of natural justice. Thus the decision arrived at in consequence of denial of fair hearing is indeed a nullity. In the result, the decision of the trial court in the instant case on the validity of counts I and 2 in charge No 143C on which the trial of the appellant proceeded before the trial court having arrived at without giving the appellant a hearing is hereby declared a nullity. In addition, all proceedings in the trial subsequent to the ruling denying the appellant fair hearing delivered on 16/12/2004, shall also be a nullity. (p. 4117 D) D

E

Issues - Propriety

8. Therefore to consider whether the appellant can be tried on what remained in the charge 143C in counts 1 and 2 after striking out the name of the 1st accused person from the charge is to fall into the same trap in which the trial court found itself in determining the validity of the charge against the appellant without affording him a hearing. The issue cannot therefore be determined at this stage by this court in this appeal. This is what the trial court shall be allowed to do when the case is remitted to it for a fresh trial to give the appellant a hearing on the validity of the charge against him before deciding in a fresh decision if the appellant can be tried on what remained in charge 143/C, counts 1 and 2 after removing all aspects of the offences involving the 1st accused, now 2nd respondent who is no longer subject to jurisdiction of the trial court. F G H

On the question raised by the appellant that his right to fair hearing will be affected in the course of his trial in view of the provision of section 308 (1) and (2), Constitution which will deny him the opportu-

nity to call the 1st accused, now 2nd respondent as a witness, the issue did not arise in the course of the proceedings from which this appeal arose. It cannot therefore arise for determination in this appeal. In any case, the proceedings subsequent to the ruling being appealed against B having been declared a nullity thereby necessitating the parties to go back, to the trial court for fresh trial, the Issue now being raised by the appellant is no longer alive. (p. 4120 A)

C **REPRESENTATION**

Prince A.A Kayode SAN with B.K Abu and B.J. Bulama for the appellant. Chief Okoroma with M. Bello, A. Uwais, I.K. Okonjo for the 1st respondent.

P. Erokoro with R. Ogbe (Miss) J. Kanyip for the 2nd, 4th, 6th and 7th D respondents.

D.D. Dodo SAN with O.O Giwa Osagie and Chinedu Umeh for the 5th respondent.

E **CASES REFERRED TO**

- Sanusi v. Modu (1994) 5 NWL`R (Pt. 347) 732 at 735
- William v. Nwosu (1994) 3 NWLR (Pt. 331) 156 at 171
- UNTHMB v. Nnoli (1994) 8 NWLR (Pt. 363) 376 at 402
- F Abacha v. State (2002) 5 NWLR (Pt. 761) 668
- Ebri v. State (2005) 6 WRN 1; (2004) 11 NWLR (Pt.885) 589 at 604
- Adigun v. A -G Oyo State (1987) I NWLR (Pt. 53) 678
- Adejumo v. David Hughes & Co. Ltd. (1989) 5 NWLR (Pt. 120) 146
- Eholor v. Osayande (1992) 6 NWLR (Pt. 249) 524; (1992) 7 SCNJ 217
- G FRN v. Ifegwu (2003) 45 WRN 27; (2003) 15 NWLR (Pt. 842) 194
- Balogun v. A-G, Ogun State (2002) 6 NWLR (Pt.763) 512 at 531-542
- Nwachukwu v. State (2002) 12 NWLR (Pt.782) 543 at 570
- Owhonda v. Ekpechi (2003) 17 NWLR (Pt. 849) 326 at 351
- H Ahbras v. Solomo (2001) 15 NWLR.(Pt.735)144 at170
- Otapo v. Sunmonu (1987) 5 SCNJ 56; (1987)NWLR (Pt. 58) 587
- Salu v. Egeibon (1994) 6 SCNJ 233; (1994) 6 NWLR (Pt. 348) 23 at 44

STATUTES & RULES REFERRED TO

Money Laundering Decree No. 3 of 1995 ss. 13 (2), 15 (1)(f), 16

Constitution of Nigeria 1999 ss. 36, 308(1) & (2), 318

Constitution of Nigeria 1979 s. 277 (1)

Evidence Act Cap. 112 LFN 1990 ss.190, 191

B

Criminal Procedure Act Cap. C41 LFN 2004 s. 33

Court of Appeal Rules 2002 O. 3 r.15

LEAD JUDGMENT BY MOHAMMED JCA

C

On 7/12/2004, the Appellant in this appeal together with the 2nd to the 7th respondents were charged before the Federal High Court Kaduna on charge No. FHC/KD/143C/04 containing the following two counts.

"Count 1

That you, Chief Joshua Chibi Dariye Governor of plateau state of Nigeria. Awe Odessa being a former Deputy General Manager/Regional Manager (North) of All State Trust Bank Plc and a former Relationship Manager of Ebenezer Retna Ventures Account with All States Trust Bank Plc. Wuse Abuja and presently a Deputy General Manager of E Liberty Bank Plc. Dorothy Uko a former Area Manager of All States Trust Bank Plc. Abuja and presently Deputy General Manager of All States Trust Bank Plc. Abuja. Duate P. lyabi former Managing Director of All States Trust Bank Plc and presently the Managing Director International Trust Bank Plc, Lawson A. Omokhodion Former Executive Director All States Trust Bank Plc and presently the Managing Director of Liberty Bank Plc, All States Trust Bank Plc. a financial institution licensed to transact banking business in Nigeria and Adonye Roberts being an officer of All States Trust Bank Plc. Wuse, Abuja, on or about December 1999 at Abuja within the jurisdiction of the Federal High Court conspired among yourselves to commit a felony to wit; not to verify the identity and address of Ebenezer Retman Ventures, a customer of All States Trust Bank Plc. before opening an account for it and thereby committed an offence contrary to section 16 of the Money Laundering Decree No. 3 of 1995 and punishable under section 15(2) of the same Decree as amended by the Tribunals (Certain Consequential

D
E
F
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H

Amendments etc) Decree No .62 of 1999.

Count 2

That you Chief Joshua Chide Dariye Governor of Plateau State of Nigeria. Awe Odessa being a former Deputy General Manager/Regional Manager (North) of All States Trust Bank Plc. and a former relationship Manager of Ebenezer Retnan Ventures account with All States Trust Bank Plc. Wuse Abuja and presently a Deputy General Manager of Liberty Bank Plc.. Dorothy Uko a former Area Manager of All States Trust Bank Plc Abuja, Duate P. Iyabi former Managing Director of All States Trust Bank Plc. and presently the Managing Director International Trust Bank Plc, Lawson A. Omokhodion former Executive Director All States Trust Bank Plc. and presently the Managing Director of Liberty Bank Plc; All States Trust Bank Plc. a financial institution licensed to transact banking business in Nigeria, Adonye Roberts being an officer of All States Trust Bank Plc. Wuse, Abuja, on or about December 1999 at Abuja within the jurisdiction of the Federal High Court failed to verify the identity and address of Ebenezer Retnan Ventures, operated by Chief Joshua Dariye a customer of All States Trust Bank Plc before opening an account for it and thereby committed an offence contrary to section 5 (1)(f) of the Money Laundering Decree No.3 of 1995 and punishable under section 15(2)(b) of the same Decree as amended by the Tribunals (Certain Consequential Amendments etc) Decree No. 62 of 1999.”

These two counts contained in the charge were duly read and explained to the appellant who stated that he understood the charge. The appellant in his response to questions on each of the two counts separately by the trial court pleaded not guilty to each of the two counts before the case was adjourned to 13/12/2004 for definite trial after the learned trial judge refused the appellant’s oral application for bail.

On 13/12/2004 when the case came up for hearing, there was also pending before the trial court a preliminary objection to the jurisdiction of the trial court to try the 1st accused person along with the appellant and the other accused persons. The objection by the 1st accused person was rooted in the provisions of section 308 of the Constitution

of the Federal Republic of Nigeria 1999. The application for bail by the appellant and other accused persons in the case was also before the trial court on 13/12/2004 for hearing. However the learned trial Judge decided first to commence the trial by hearing the first witness for the prosecution who testified in chief before his cross-examination was adjourned to 16/12/2004 when the trial in the case was to continue. B

Meanwhile on the same day 13/12/2004, the learned trial judge heard the preliminary objection to the trial being proceeded with the 1st accused person on the charge before the trial court having regard to the provisions of section 308 of the 1999 Constitution of the Federal Republic of Nigeria. The appellant's application for bail together with the other accused persons present in court was also subsequently heard on the same day before rulings in the two matters were adjourned to 16/12/2004, the date on which the trial of the appellant and the other accused persons on the charges was also to continue. C D

When the trial resumed at the trial court on 16/12/2004, a considered ruling on the preliminary objection to the jurisdiction of the trial court to try person along with the appellant and the other accused persons on the charges and the appellant and other accused persons' application for bail, was delivered by the learned trial Judge. Part of the ruling on the preliminary objection of the 1st accused person based on the application of section 308 (1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria at pages 128 and 137 of the record of this appeal, which is relevant for determination of the appeal reads- E F

"At this stage, it is important to narrow down the arguments of counsel and form out issues arising from them for determination in this ruling. I think with due respect they are:- G

1. What is the scope of section 308 of the 1999 Constitution and to what extent is the scope of its applicability limited by the provision of subsection (2) thereof.

2. Having regards to the nature and content of the two charges before the court relating to the 1st accused are they vitiated by the effect of the provision of section 308(1) and (2) of the 1999 ... Constitution.

3. What is the proper order to make in the circumstances in

of this ease. xxxxxxxxxxxx

It is my view however, having regard to the facts and circumstances of this ease, the charge before me, it is plain that the 1st accused does not appear in all the counts of the charge to be a nominal party. He is a principal offender in charge No. FHC/KD/I43C/04. the 1st accused in count 1 and 2 is is (sic) charge along with others with conspiracy and money laundering contrary to section 16 and 5(1)(i) respectively of the Money Laundering Decree No.3 of 1995. In charge No I44C the 1st accused is charged alone in count 1 and 4 of the charge. The 1st accused in all counts is charged as a principal accused and not as a nominal accused and accordingly, the charges having regard to section 308 of the Constitution cannot stand. I accordingly strike out count 1 and 4 in charge No. I44C. However in count I and 2 in charge No. I43C, the 1st accused is jointly charged with others and there being no challenge to the validity of the charge against the other accused persons, I will apply the blue pencil rule to strike out the portions in the charge that relate to the first accused. Accordingly, I order that the name of 1st accused therein and all allegations relating to him shall be struck out.”

The appellant who is the 2nd accused person in counts 1 and 2 of charge No. FHC/KD/I43C/2004 was aggrieved with part of the decision of the trial court of 16/12/2004 and therefore had appealed against it upon 3 grounds of appeal contained in his notice and grounds of 35 appeal dated 26/1/2005 and filed the same day at the trial court.

Briefs of argument comprising the appellant’s brief of argument, the appellant’s reply brief and all the respective respondents’ briefs of argument were duly filed within the time abridged by this court on the application of the parties through their learned senior and other counsel before the appeal came up for accelerated hearing on 7-3- 2005. However, at the hearing of the appeal, a notice of preliminary objection in accordance with order 3 rule 15 of the Court of Appeal Rules 2002, was filed on behalf of the 1st accused on the charge giving rise to the appeal and who is now the 2nd respondent in this appeal by his learned counsel. I shall therefore deal with this preliminary objection first before going on with the substantive appeal.

The notice of the preliminary objection dated 15/27-2005 and filed in this court the same day reads

“Take notice that the 2nd respondent/applicant herein named intends at the hearing of this appeal, to rely upon the following preliminary objection notice whereof is hereby given to you viz:

Chief Joshua Chibi Dariye is not a proper party in this appeal.

And take notice that the grounds of the said objection are as follows:

(a) On the 16th of December 2004, the trial court struck out Chief Joshua Chibi Dariye’s name from the proceedings.

(b) The court found as a matter of law that no proceedings could be brought against the (Governor.

(c) There is no appeal by the appellant against the said order of the lower court.”

The arguments in support of this objection are contained in the joint respondents’ brief of argument filed on behalf of the 2nd. 4th. 6th and 7th respondents in the substantive appeal on 15/2/2005. the same day the preliminary objection was filed.

It was argued that the trial court having struck out the name of the 2nd respondent from the proceedings in its ruling of 16/12/2004, he ceased to be a party in the proceedings, particularly in an interlocutory appeal filed after his name had been struck out. That as the present appeal is not against the order striking out the name of the 2nd respondent, he is not a proper party in the appeal. In further argument in support of the preliminary objection, learned counsel to the 2nd respondent relying on the case of *Sanusi v. Modu* (1994) 5 NWLR (Pt. 347) 732 at 735, pointed out that the name of the 2nd respondent having been struck out from the charge, he drops away from the proceedings for all time as such the names of the parties on any appeal thereafter have to correspond with the names of the parties on the record of the lower court. That as the 2nd respondent had ceased to be a party in the proceedings at the trial court, he has no interest to the outcome of this appeal and therefore this court was urged to strike out his name. There was response to the preliminary objection in the form of a reply brief from the appellant who contended that the 2nd respondent is a proper party to the appeal. There is no reaction to this

preliminary objection in the respondents' brief of argument filed on behalf of the 1st and 5th respondents.

This appeal is against part of the ruling of the trial court delivered on 16/12/2004. That ruling contains a number of decisions of the trial court including decisions on the preliminary objection by the 2nd respondent as the 1st accused on the charge No FHC/KD/143C/04 and the appellant and other and the appellant and other accused person's application for bail. While it is clear from the notice and grounds of appeal filed by the appellant against the ruling of 16/12/2004 that there is no appeal against the decision of trial court in that ruling of 16/12/2004 granting bail to the appellant and other accused persons charged along with him in counts 1 and 2 in the charge No. 143C/04, it is not correct to say that this appeal is not concerned with the striking out of the name of the 2nd respondent from the charge. This can be seen from ground one without the particulars, of the appellant's 3 grounds of appeal contained in his notice of appeal which reads:

"Ground 1,

The trial court erred in law when (sic) he held -

"That the 1st accused/applicant person having jointly charged with others in counts 1 and 2 of charge No. FHC/KD/ 143/04 and there being no challenge to the validity of the charge against the other accused persons, the name of the 1st accused person and all allegations relating to this portion of the charge are hereby struck out."

It is quite clear therefore from this ground of appeal that the 2nd respondent is a proper party in this appeal because he was a party at the lower court on 16/12/2004 in the ruling of that day which gave rise to the appeal. See *Green v. Green* (2001) 45 WRN 90; (1987) 3 NWLR (Pt. 61) 480. The fact that the name of the 2nd respondent was struck out from the proceedings in the case in the decision arrived at by the trial court in that ruling, his name remained on the record of the trial court as part of the ruling being appealed against by the appellant. Certainly, the 2nd respondent being one of the beneficiaries of the ruling cannot now turn round to say that he was not a party in the criminal trial before the trial

court on 16/12/2004 when the ruling was delivered. It is not surprising therefore that apart from the appellant none of the respondents paid attention to the 2nd respondent's preliminary objection. Accordingly the objection is hereby over ruled.

I shall now proceed to consider the substantive appeal. In the B
appellant brief of argument, two issues were distilled from the 3 grounds
of appeal filed by the appellant. The issues are:

"Issue 1

*Whether the holding by the learned trial Judge that there being no C
challenge to the validity of the charges against the other accused persons
was not a denial of the appellants right to fair hearing.*

Issue 2

*Whether the trial Judge had jurisdiction to continue adjudicating/D
trial of the appellant having struck out the 1st accused person having
regards to the remaining offences/charges before the court."*

In the 1st respondent's brief of argument, the 2nd issue as formu-
lated in the appellant's brief of argument was adopted after framing the
1st issue for determination in this appeal as follows - E

*"Whether the holding by the learned trial Judge that there being
no challenge to the validity of the charges against the other accused
persons was a denial of the appellant's right of fair hearing."*

However in the respondents' brief of argument filed on behalf of F
the 2nd, 4th, 6th and 7th respondents by their learned counsel, the fol-
lowing 2 issues were formulated' from the 3 grounds of appeal filed by
the appellant the issues are -

1. Whether the finding of the learned trial Judge of there being no G
challenge to the validity of the charges against the appellant, without
hearing the appellant on the issue, was not a violation of appellant's right
to fair hearing.

2. Whether the learned trial Judge had jurisdiction to continue with H
the hearing of the case after the discharge of Chief Joshua Dariye from
the matter."

In the respondent's brief of argument filed on behalf of the 5th
respondent by his learned senior counsel, not only the issues for determi-

nation in the appellant's brief of argument were adopted in that respondent's brief but that the entire arguments in support of the appellant's appeal were entirely adopted.

B Having regard to the nature of this appeal in which all the respondents except one are behind the appellant, it is safer to determine this appeal on the issues for determination as identified in the appellant's brief of argument. The first issue to be determined therefore is whether the holding by the learned trial Judge that there being no challenge to the validity of the charges against the other accused persons was not a denial C of the appellant's right to fair hearing.

In support of this first issue for determination, the learned counsel for the appellant in his oral submission and the arguments in the appellant's brief of argument, had observed that the issue before the trial court on D 16/12/2004, was a ruling on the applicability of section 308 of the Constitution and nothing more. That from the proceeding of 7/12/2004 to the date of the ruling, 16/12/2004, the position of the 1st accused remain unsettled until that day. It was not therefore possible to challenge the E validity of the charges when the 1st accused person was yet to be struck out. That at that stage, the learned trial Judge ought to have invited address on the propriety of proceeding with the joint trial after striking out the name of the 1st accused person. The learned senior counsel for the F appellant stressed that for the learned trial Judge to hold at that stage that there being no challenge, is a clear case of breach of the appellant's right of fair hearing because it was that decision that prompted the learned trial Judge to proceed with the continuation of the hearing. This order, contended the learned senior counsel, flew from issues 2 and 3 which the G learned trial Judge formulated *suo motu* without any address from counsel. That the order is also a decision within the meaning of that word in the case of *William v. Nwosu* (1994) 3 NWLR (Pt. 331) 156 at 171.

H On counts 1 and 2 on which the appellant is being charged with other accused persons, the learned senior counsel observed that the name of the 1st accused, now 2nd respondent in this appeal whose name had been struck out, is still featuring in the 2 counts. This, according to learned senior counsel, had made it impossible for the appellant to have a

fair trial because of his connection with Ebenezer Retnan Venture operated by the 1st accused/2nd respondent who on account of his immunity under section 308 of the 1999 Constitution, cannot be summoned as a witness to testify for the appellant to confirm or deny the transaction. That as there was no application for separate trials when the charges B have not been amended to excise the 1st accused person, the action of the learned trial Judge in deciding to proceed with the trial without giving the appellant a hearing amounts to the violation of the appellant's right to fair hearing under section 36 of the 1999 Constitution.

On the continuation of the trial of the appellant on counts in the present charges which still refer to the name of the 1st accused who the appellant cannot call as a witness, learned senior counsel argued, constitutes a denial of fair hearing to the appellant having regard to sections 190 and 191 of the Evidence Act Cap 112 Laws of the Federation of Nigeria D 1990 and a number of cases including *UNTHMB v. Nnoli* (1994) 8 NWLR (Pt. 363) 376 at 402 and *Abacha v. State* (2002) 5 NWLR (Pt. 761) 668; (2002) FWLR (Pt. 118) 1224 at 1276.

On whether or not the appellant by participating in the trial after E the ruling of 16/12/2004 had waived his right to fair hearing, learned senior counsel pointed out that the constitutional right to fair hearing cannot be waived or acquiesced as stated in the cases of *Menakaya v. Menakaya* (2001) 43 WRN 1; (2001) 16 NWLR (Pt.738) 203 at 236 and F *Ogundoyin v. Adeyemi* (2001) 33 WRN 1; (2001) FWLR (Pt.91) 1741; (2001) 13 NWLR (Pt.750) 403 at 422. That by virtue of section 308 of the 1999 constitution and the cases of *Tinubu v. IMB* (2002) 7 NWLR (Pt.767)581 at 600-601, the first accused, now 2nd respondent cannot G be summoned as a witness by the appellant in his trial, the continuation of the trial on the charges before the court will constitute a breach of his right to fair hearing under section 36 of the 1999 constitution. That in any case the trial court having struck out the names of the 1st accused H from the portion of the counts charges against the appellant and the other accused persons, there is nothing remaining in the charge for the appellant to face in his trial and by virtue of the decision in the case of *Ebri v. State* (2005) 6 WRN 1; (2004) 11 NWLR (Pt.885) 589 at 604, the trial

ought to have been terminated after striking out the 1st accused from the proceedings. In concluding his argument in support of the this issue, learned senior counsel for the appellant urged this court to allow the appeal .In his submission on this issue, learned counsel to the 1st respondent, who is also the prosecutor before the trial court in his brief of argument and oral submission, asserted that having regard to the proceedings before the trial court, the claim by the appellant that the trial judge suo motu formulated 3 issues for determination has no basis at all as those issues formulated by the learned trial judge were derived from the submissions of counsel which that court has power to make. Several cases, particularly the cases of Fabiyi v. Adeniji (2000) FWLR (pt.18) 196; (2000) 6 NWLR (Pt.662) 532 at 546 and Kotoye v. Saraki (1994)7-8 SCNJ (Pt.3) 524; (1994) 7 NWLR (Pt.357) 414 at 456 were relied upon. That it was after considering the issues arising from the application of section 308 of the Constitution that the trial court struck out the name of the 1st accused person.

On the contention of the appellant that the decision of the trial court to proceed with the trial of the case after striking out the name of the 2nd respondent after commenting that there was no challenge to the validity of the charge against the appellant and the other accused persons is a decision *sub silentio*, learned counsel for the 1st respondent said there is no basis for the contention as the case of *Williams v. Nwosu (supra)* is not applicable in the present case. It is the stand of counsel that the statement being appealed against is mere *obiter* which cannot on the authority of *Abacha v. Fawehinmi* (2001) 1 WRN 29; (2000) 6 NWLR (Pt. 660) 228 at 351, support an appeal. Learned counsel further observed that as the date of the delivery of the ruling of 16/12/2004 was also a date for the continuation of the trial which began on 13/12/2004, the issue of the address and ruling on the application of section 308 of the 1999 Constitution was only a side issue. That in any case, the appellant through his learned senior counsel had the chance of applying to address the court *on* whether or not the trial should continue after striking out the name of the 2nd respondent but that the appellant failed to do so and chose to participate in the trial on 16/12/2004, only to turn round later to

file this appeal. On these facts, emphasized the learned counsel, the complaint of the appellant on the alleged denial of fair hearing is baseless if the case of *FRN v. Ifegwu* (2003) 45 WRN 27; (2003) 15 NWLR (Pt. 842) 194 is taken into consideration particularly where the principles of fair hearing dealt with in the case of *UNTHMB v. Nnoli* (*supra*) are not applicable to the present case. B

On the question of whether the appellant can be tried on the offences in the 2 counts having regard in particular to the charge on conspiracy in the absence of the 2nd respondent described as ‘principal party’ by the trial Judge, learned counsel argued that having regard to the cases of *Balogun v. A-G, Ogun State* (2002) 6 NWLR (Pt.763) 512 at 531-542 and *Nwachukwu v. State* (2002) 12 NWLR (Pt.782) 543 at 570, the prosecution *can* still proceed against the appellant in the absence of the 2nd respondent if the case of *Ikemson v. State* (1989) 3 NWLR (Pt. 110) 455 at 466; (1989) 1 CLRN 1 and *Kasa v. State* (1994) 5 NWLR (Pt. 344) 269, are applied to the present case. This is because, according to learned counsel, the case of *Ebri v. State* (*supra*) heavily relied upon by the appellant does not apply in the present case. D E

Having regard to the argument of the appellant that his inability to call the 2nd respondent following the protection under section 308 of the Constitution will deny the appellant fair hearing, the learned respondent’s counsel argued that the decision of this court in *Media Tech (Nig) Ltd. v. Adesina* (2005) 1 NWLR (Pt.908) 461 at 476 – 477 F had put that fear to rest. With this, the learned counsel to the 1st respondent urged this court to resolve this issue in favour of the 1st respondent.

In a joint respondents’ brief of argument filed by the 2nd 4th, 6th and 7th respondents and the oral submission of their learned counsel, this set of respondents fully supported the case of the appellant in this appeal and urged this court to resolve this issue in favour of the appellant. That the decision of the trial court being appealed against is wrong both on the facts and the law, and also constituted a denial of fair hearing to the appellant. Among the several cases cited and relied upon in support of this argument are, *Union Bank v. Nwaokolo* (1995) 6 NWLR (Pt. 400) 127 at 149; (1995) 4 SCNJ 93 and *Akulega v. Benue State Civil Service* G H

Commission (2001) 12 NWLR (Pt.728) 524. That what brought out the denial of fair hearing in this case quite clearly is the fact that the issue leading to it was raised *suo motu* by the trial court as was the case in several cases particularly *Abbas v. Solomon* (2001) 15 NWLR (Pt.735) B 144, *Adegoke v. Adibi* (1992) 5 NWLR (Pt. 242) 410 at 420 and *Ugo v. Obiekwe* (1989) 1 NWLR (Pt. 99) 566 at 581. Learned counsel pointed out that even denial of the right to address the court had been held in *Okafor v. A-G, Anambra State* (1991) 6 NWLR (Pt. 200) 659 at 678 as amounting to denial of fair hearing capable of occasioning a miscarriage C of justice not to talk of a situation where a court decides a point not raised by the parties and without hearing them.

Learned senior counsel for the 5th respondent in his brief of argument and oral submission also supports the case of the appellant and D urged the court to allow the appeal.

Before proceeding to resolve the 1st issue for determination in this appeal, I think there is need to consider and dispose off the argument of the 1st respondent in its brief of argument which is in the nature E of a preliminary objection that the decision being appealed against, is a mere *obiter* which is not appealable in law. **It is indeed the law that a mere statement or observation made by a court in its decision which is not related to the issue before that court for resolution in the F case, cannot sustain any appeal being an *obiter dictum* as stated by the Supreme Court in *Abacha v. Fawehinmi* (2001) 1 WRN 29; (2000) 6 NWLR (Pt. 660) 228 at 351. An opinion expressed by a court which does not affect its decision in a suit is an “*obiter dictum*” see *Akibu v. Oduntan* (2002) 10 WRN 48; (2000) 13 NWLR (Pt.685) 446 and G *Owhonda v. Ekpechi* (2003) 17 NWLR (Pt. 849) 326 at 351. This is because such statement or observation in the form of *obiter dictum* does not qualify as a decision within the meaning of that word under section 277(1) of the 1979 Constitution. See *Eliochin (Nig.) Ltd H v. Mbadiwe* (1986) 1 NWLR (Pt.14) 47 at 72; (1986) 1 S.C 99.**

The position in the present case is certainly different from that in *Abacha v. Fawehinmi* (*supra*) in which the observation made by the justice of this court was a mere observation which played no

part in the decision reached in that case. In the present case however, the decision of the trial court being appealed against, is a determination on the validity of counts 1 and 2 in charge No 143/C as they affected the appellant and other accused persons being jointly tried after striking out the name of the 1st accused now 2nd respondent from the trial. That part of the ruling of the trial court of 16/12/2004 reads:

“However, in counts 1 and 2 in charge No 143/C, the 1st accused is jointly charged with others and there being no challenge to the validity of the charge against the other accused persons, I shall apply the blue pencil rule to strike out the portions in the charge that relate to the first accused. Accordingly, I order that the name of the 1st accused therein and allegations relating to him shall be struck out.”

With utmost respect, this part of the ruling of the trial court cannot be described as a mere statement or observation which played no role in the decision of the court. It certainly constitutes a determination of that court on the validity of counts 1 and 2 in charge No 143/C in relation to the appellant and other accused persons who were being tried along with the 1st accused person now 2nd respondent whose name had been struck out which, in my view, is a decision within the meaning of that word under section 318 of the 1999 Constitution. This decision is therefore capable of sustaining this appeal and I so hold.

Going to the merit of the appeal, the issue for determination now is whether the decision of the trial court that “there being no challenge to the validity of the charges against the other accused persons”, was not a denial of fair hearing to the appellant under section 36 of the 1999 Constitution. The trial of an accused person commences on his arraignment in court and the taking of his plea to the charge or charges against him. See unreported judgment of the Supreme Court in *SC. 68/1966 delivered on 17/10/1966, Oyeyemi v. Commissioner for Local Government, Kwara State* (1992) 2 NWLR (Pt. 226) 661 and *Asakitikpi v. State* (1993) 5 NWLR (Pt. 296) 652. Therefore the right of the accused person to fair hearing will commence from the time the ac-

cused person is brought before a court and his plea is taken. This right to fair hearing shall continue to avail the accused person right through the trial until the delivery of judgment. Participation in trial by appellant cannot constitute waiver of right to fair hearing.

B **Being right guaranteed under section 36 of the 1999 Constitution, it cannot be waived or acquiesced** having regard to cases of *Menakaya v. Menakaya* (2001) 43 WRN 1; (2001) 16 NWLR (Ft. 738) 203 at 236 and *Ogundoyin v. Adeyemi* (2001) 33 WRN 1; (2001) FWLR (Pt.71) 1741; (2001) 13 NWLR Pt.750) 403 at 422.

C **No doubt** the right to fair hearing is a fundamental and constitutional right of a party to a dispute to be afforded an opportunity to present his case to the adjudicating authority. That right lies in the procedure followed in the determination of a case and not in

D the correctness of the decision arrived at in the case. See *United Bank for Africa Ltd and Anor v. Mrs. Ngozi Achoru* (1990) 6 NWLR (Pt.156) 254; (1990) 10 SCNJ 93. In relation to a criminal trial, the Supreme Court held in *Whyte v. C.O.P.* (1966) NMLR 215 at 217,

E that it can hardly be stated that an accused has not had a fair hearing as intended by the Constitution when the trial court had followed the procedure laid down for such hearing and has not violated the principle of natural justice. The Supreme Court had also

F stated in several of its decisions that fair hearing in relation to a case means that the trial of a case or the conduct of the proceedings therein, is in accordance with the relevant laws and rules of court. Some of these decisions include *Mohammed v. Kano N.A* (1968)

G 1 All NLR 424, *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23; (1994) 6 SCNJ 233. *Mohammed v. Olawnmi and Ors.* (1990) 2 NWLR (Pt.133) 458 and *union Bank of Nigeria Plc v. Nwaokolo* (1995) 6 NWLR (Pt. 400) 127 at 149.

The issue of fair hearing may also arise where a court raises H issue *suo motu*. When a court raises an issue *suo motu*, the parties before it in the matter must be given an opportunity of being heard on the issue, particularly the party that may be affected adversely by the result of the determination on the issue so raised. See *Odiase*

v. Agho (1972) 1 All NLR (Pt. 1) 170; (1972) 3 S.C 71; (1998) 9 NWLR (Pt 566) 217, *Ugo v. Obiekwe* (1989) 1 NWLR (Pt. 99) 566 *Oje v. Babalola* (1991) 4 NWLR (Pt. 185) 267, *Umaru v. Abdu-Mudallabi* (1998) 11 NWLR (Pt. 573) 247 *Kotoye v. Central Bank of Nigeria* (2000) 16 WRN 71; (1989) 1 NWLR (Pt. 98) 419 and *Osasona v. Ajayi* (2004) 4 B NWLR (Pt. 894) 527 at 547.

In the case at hand, the ruling of the trial court of the 16/12/2004 part of which gave rise to the appeal, arose from the preliminary objection filed in that court by the 1st accused person now 2nd respondent in respect of charge No FHC/KD/143C/04 dated 13/12/2004 and heard by the trial court the same day. That objection is termed as follows:

"Take notice that the 1st accused/applicant hereby raises a preliminary objection to this charge and accordingly seeks the following reliefs:

1. *An order quashing the information preferred against the 1st accused/applicant herein as the honorable court lacks jurisdiction to entertain this charge as relates to the 1st accused and that the name of the 1st accused person be struck out of the charge.*"

It is quite clear that the preliminary objection of the 2nd respondent above is in the nature of challenging the jurisdiction of the trial court on the charge No. FHC/KD/143/C/04 as that charge relates to him alone. The preliminary objection therefore does not extend to the charges as it relates to the appellant. Therefore in the consideration of the case of the 2nd respondent on his objection to the jurisdiction of the trial court to try him along with the appellant and the other accused persons jointly charged along with him, the trial court has no business to look into the case of the appellant who by law is not entitled to the immunity from prosecution under section 308 of the 1999 Constitution being claimed by the 2nd respondent in his preliminary objection.

Unfortunately, this is exactly what the trial court did in its ruling on the preliminary objection on 16/12/2004 when it said:
However in count 1 and 2 in charge No.

"However in count 1 and 2 in charge No 143C, the 1st accused is jointly charged with others and there being no challenge to the validity

of the charge against the other accused persons, I will apply the blue pencil rule to strike out the portions in the charge that relate to the first accused."

What was before the trial court was the validity of the charge as it relates to the 1st accused now 2nd respondent alone. It was on that issue alone that the trial court gave the parties including the appellant in this appeal, a hearing on 13/12/2004 when the preliminary objection was heard. It follows therefore that on 13/12/2004 when the 1st accused now 2nd respondent's preliminary objection was heard, the issue on the question relating to the validity of counts 1 and 2 in charge No.143C as affecting the appellant was not before the court for adjudication and determination to give the court the opportunity to proceed with the trial of the appellant immediately the name of the 2nd respondent was struck out from the charge. The trial court therefore having raised the issue on the validity of the charge against the appellant who did not raise it himself and nor was it raised by the other parties, and without giving the appellant a hearing before the determination that the charge was valid in relation to him to allow the court to proceed with the trial of the appellant, constitutes a violation of the principles of natural justice enshrined in section 36 of the 1999 Constitution which gives the appellant the right of fair hearing. See *Offiom v. State* (1995) 1 NWLR (Pt. 373) 507 at 582 and *Osasona v. Ajayi* (2004)4 NWLR (Pt. 894) 527 at 547.

The step taken by the trial court on its journey resulting in the violation of the appellant's right of fair hearing intact started right from 13/12/2004, when the trial of the appellant began. This is because the action of the trial court on that day in commencing the trial by allowing the 1st prosecution witness to be called upon to testify while the 1st accused now 2nd respondent's notice of preliminary objection to the jurisdiction of the trial court to try him on the charges also filed the same day was pending, appears to have put the trial court off the track. One would have thought that the issue of jurisdiction of the court to which the attention of the court was

drawn by one of the learned senior counsel before the court ought to have been tackled first and put to rest before embarking on the trial as required by several decisions of the Supreme Court. Some of these decisions include *Onyema & Ors. v. Oputa & Ors.* (1987) 3 NWLR (Pt.60) 259 (1987) 2 NSCC 900, *A-G, of Federation & Ors. v. Sode & Ors.* (1990) 1 NWLR (Pt.128) 500 and *Nalsa & Team Associate v. NNPC* (1996) 3 NWLR (Pt. 439) 621 at 633; (1996) 3 SCNJ 50, where the Supreme Court said that it is in the interest of the best administration of justice that where the issue of jurisdiction is raised in any proceeding before any court of law, it should be dealt with at the earliest opportunity and before the trial or a consideration of any other issues raised in the cause as anything done without or in excess of jurisdiction by any court established under the Constitution is a nullity.

Coming back to the issue of the denial of fair hearing, it should be noted that while at the hearing of the preliminary objection of the 1st accused at the trial, the trial court rightly decided the effect of section 308 (1) and (2) of the 1999 Constitution on the 2 counts in charge 143C in relation to the 1st accused person, the trial court in my view, is without jurisdiction to extend that determination on the charge to cover the appellant without giving him a hearing.

The effect of the violation of the principles of natural justice in arriving at a decision is trite. If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of natural justice. Thus the decision arrived at in consequence of denial of fair hearing is indeed a nullity. See *Adigun v. A -G Oyo State* (1987) 1 NWLR (Pt. 53) 678. In the result, the decision of the trial court in the instant case on the validity of counts I and 2 in charge No 143C on which the trial of the appellant proceeded before the trial court having arrived at without giving the appellant a hearing is hereby declared a nullity. In addition, all proceedings in the trial subsequent to the

ruling denying the appellant fair hearing delivered on 16/12/2004, shall also be a nullity. See the recent decision of the Supreme Court in *Afro-Continental (Nig.) Ltd & Anor. v. Cooperative Association of Professionals Inc.* (2003) 17 WRN 1 09; (2003) 5 NWLR (Pt.813) 303 at B 3 17-318.

The 2nd issue for determination is whether the trial Judge had jurisdiction to continue adjudicating/trial of the appellant having struck out the 1st accused person having regard to the remaining offences/charges before the court. Learned senior counsel for the appellant had argued that the trial court lacked jurisdiction to continue with the trial of the appellant having struck out the 1st accused person's portion in the two counts. That the trial court having raised issues 2 and 3 *suo motu* and proceeding to resolve them without hearing the appellant robbed the trial court of its jurisdiction. A number of cases relied upon in support of this submission include *Adejumo v. David Hughes & Co. Ltd.* (1989) 5 NWLR (Pt. 120) 146 and *Eholor v. Osayande* (1992) 6 NWLR (Pt. 249) 524; (1992) 7 SCNJ 217. It was further argued that when the issue of the legal disability in prosecuting the 1st accused person surfaced and was ruled upon, a feature has arisen which prevents the court from exercising its jurisdiction on the authority of *Madukolu v. Nkemdilim* (2001) 46 WRN 1: (1962) 1 All NLR (pt.4) 587; (1962) I SCNLR 341 and *Chevron Nig Ltd v. Warri North Local Government Council* (2003) 5 NWLR (Pt. 81-2) 28 at 44. That the nature of the two counts makes it impossible for the trial to proceed after striking out the name of the 1st accused because of the disability of the appellant will face in trial regarding the calling of the 1st accused person as a vital witness. The case of *Ebri v. State (supra)* was relied upon.

On the application of the 'blue pencil' rule to the two counts, learned senior counsel for the appellant referred to the case of *A-G, Abia State v. A-G, Federation* (2002) 17 WRN 1; (2002) 6 NWLR (Pt. 763) H 264 at 436 where the rule was applied to legislation to say that the rule is not applicable in the present case pointing out that having regard to the facts already alluded to in the charges and processes, the discharge of the 1st accused person must lead to the discharge of the appellant having

regard to the role of the 1st accused in the charge as was the situation in *Onafowokan v. State* (1987) 2 NSCC 1101 at 1112; (1987) 3 NWLR (Pt.61) 538; (1987) 7 SCNJ 233.

For the 1st respondent, it was argued that there is nothing in counts 1 and 2 to prevent the appellant from being tried on them as the blue pencil rule was correctly applied to the charge by the trial court as was the case in *Onifade v. Olayiwola* (1990) 7 NWLR (Pt. 61) 130 at 158, where it was applied to grounds of appeal. Counsel therefore urged this court to resolve the 2nd issue in the positive.

Learned counsel to the 2nd, 4th, 6th and 7th respondents along with the learned senior counsel to the 5th respondent who argued the two issues in this appeal jointly, have urged this court to resolve the present issue in the negative.

Having regard to the arguments advanced by the learned senior counsel for the appellant in his oral submission and the contents of the appellant's brief of argument on issue No. I, there is hardly anything left to advance in support of the issue No.2 now under consideration. The raising of the issue for determination on the validity of the charge No.143C and resolving the same in relation to the appellant in the course of the ruling on the preliminary objection of the 1st accused on 16/12/2004, without affording the appellant a hearing is not at all in doubt. The result of this action on the part of the trial court having been determined in the resolution of issue No. I in this appeal as constituting a denial of fair hearing to the appellant, what remained to be determined in this issue is hardly relevant to the appeal. It is obvious mat the appellant will have to be accorded a hearing before the determination of the validity of the charge against him for the trial court to decide whether or not to proceed with, the trial of the appellant on the two counts in their present form. Therefore the proceedings in the trial of the appellant on 16/12/2004 after the ruling of the same day denying him fair hearing are proceedings embarked upon without jurisdiction. Until the defect or obstacle is removed by granting the appellant a hearing on the validity of the charge against him embarking on his trial on the charge will be an exercise in futility. This is because after the ruling denying the appellant fair hearing-had

been delivered on 16-12-2004, all the proceedings in the trial that follows are also a nullity.

Therefore to consider whether the appellant can be tried on what remained in the charge 143C in counts 1 and 2 after striking out the name of the 1st accused person from the charge is to fall into the same trap in which the trial court found itself in determining the validity or the charge against the appellant without affording him a hearing. The issue cannot therefore be determined at this stage by this court in this appeal. This is what the trial court shall be allowed to do when the case is remitted to it for a fresh trial to give the appellant a hearing on the validity of the charge against him before deciding in a fresh decision if the appellant can be tried on what remained in charge 143/C, counts 1 and 2 after removing all aspects of the offences involving the 1st accused, now 2nd respondent who is no longer subject to jurisdiction of the trial court.

On the question raised by the appellant that his right to fair hearing will be affected in the course of his trial in view of the provision of section 308 (1) and (2), Constitution which will deny him the opportunity to call the 1st accused, now 2nd respondent as a witness, the issue did not arise in the course of the proceedings from which this appeal arose. It cannot therefore arise for determination in this appeal. In any case, the proceedings subsequent to the ruling being appealed against having been declared a nullity thereby necessitating the parties to go back, to the trial court for fresh trial, the Issue now being raised by the appellant is no longer alive.

In the result this appeal succeed and it is hereby allowed. The decision of the trial court in its ruling of 16/12/2004 that the charge No 143/C in counts 1 and 2 in particular are valid in relation to the appellant whose trial on the charge proceeded after striking out the name of the 1st accused now 2nd respondent having been raised suo motu and determined by the trial court without affording the appellant a hearing, is hereby declared a nullity. So also are the proceedings subsequent to the ruling. The case is hereby remitted to the trial court to afford the appellant a

hearing on the validity of that charge No 143/C in relation to him before deciding on whether or not the appellant can be tried on that charge having regard to its contents after all the necessary requirements of the Criminal Procedure Act Cap C41 Laws of the Federation of Nigeria 2004, which is applicable to the trial by virtue of section 33 of the Federal High Court Act Cap F12 of the Laws of the Federation of Nigeria 2004. B

BA'ABA JCA

I have had the privilege of reading the judgment just delivered by my learned brother Mohammed JCA and I am in total agreement with him that this appeal has merit and should be allowed. C

On what really amounts, to a denial of fair hearing, the Supreme Court of Nigeria held in *Otapo & Ors. v. Summonu & Ors* (1987) 2 NWLR (Pt. D 58) 587 at 605; (1987) 5 SCNJ 56 at 75 (*per* Obaseki, JSC) as follows:

“A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing, or not given opportunity to be heard, the hearing cannot qualify as fair hearing... Without fair hearing, the principles of natural justice are abandoned...”

Any judgment or ruling based on breach of the constitutional provision of fair hearing in section 36 of the 1999 Constitution will not be allowed to stand on appeal. It is fatal to the judgment appealed against on the said ground. F

For these and fuller reasons contained in the leading judgment, I, too, allowed the appeal. I abide by the consequential orders contained in the leading judgment. G

JEGA JCA

I read before now the judgment of my learned brother Mohammed, JCA, OFR. I agree with him that the appeal is meritorious and ought to succeed. Accordingly, it succeeds and it is hereby allowed. I abide by the consequential orders made in the leading judgment. H

KEKERE-EKUNJCA

I have read in draft the lead judgment of my learned brother
B Mahmud Mohammed, JCA just delivered. He has comprehensively set
out the facts leading to this appeal and meticulously resolved the issues.
I agree with his reasoning and conclusion.

I proffer the comments below merely for emphasis.

C The appellant's first issue for determination raises the issue of fair
hearing. There is no doubt that fair hearing is the bed rock of any adjudi-
cation. In the case of: *Salu v. Egeibon* (1994) 6 SCNJ 233; (1994) 6
NWLR (Pt. 348) 23 at 44 His Lordship Wali, JSC observed:

D *"the consequence of a breach of the rule of natural justice of fair
hearing is that the proceedings in the case are null and void."*

The portions of the ruling complained of are found at page 120
lines 14-22 and page 129 lines 5-18 of the record. The learned trial Judge
stated thus:

E Page 120 lines 14-22:

*"At this stage it is important to narrow down the arguments of
counsel and frame out issues arising from them for determination in this
ruling. I think with respect, they are:*

F *1. What is the scope of section 308 of the 1999 Constitution and to
what extent is the scope of its applicability limited by the provisions of
subsection (2) thereof?*

G *2. Having regard to the nature and content of the two charges
before the court relating to the 1st accused, are they vitiated by the effect
of the provisions of section 308 (1) and (2) of the 1999 Constitution.*

*3. What is the proper order to make in the circumstances of the
case?"*

Page 129 lines 5-18:

H "It is my view however, having regard to the facts and circum-
stances of this case, the charges before me, it is plain that the 1st ac-
cused does not appear in all the counts of the charge to be a nominal
party. He is a principal offender; in the charge No. FHC/KD/143C/04, the

1st accused, in counts 1 and 2 is charged along with others with conspiracy and money laundering contrary to section 16 and 5(1)(f) respectively of the Money Laundering Decree No. 3 of 1995. In charge No. 144C the 1st accused is charged alone in counts 1 and 4 of the charge. The first accused in all the counts is charged as a principal accused and not as a nominal accused and accordingly, the *charges having regard to section 308 of the 1999 Constitution cannot stand*. I accordingly strike out counts 1 and 4 in charge No.144C. *However in counts 1 and 2 in charge No. 143C the 1st accused is jointly charged with others and there being no challenge to the validity of the charge against the other accused persons, I will apply the blue pencil rule to strike out the portions in the charge that relate to first accused*. Accordingly, I order that the name of 1st accused therein and all allegations relating to him shall be struck out. The summon issued against him is hereby set aside." (Italics supplied)

From the arguments of counsel pages 85-97 of the record in respect of the preliminary objection, the entire gamut of the submissions before the court were in relation to the first issue formulated by the trial Judge viz:

"What is the scope of section 308 of the 1999 Constitution and to what extent is the scope of its applicability limited by the provisions of Subsection (2) thereof?"

The second issue formulated by the court has to do with competence of the charges before the court as they relate to the 1st accused (2nd respondent herein) having regard to the nature and the content thereof. It is my considered view that this is not an issue that could be determined in isolation having regard to the fact that the 1st accused was charged jointly with others. A consideration of this issue would necessarily affect the other accused persons because they formed part of the "nature" and 'content' of the charges.

The focus of the submissions before the court was whether or not criminal charges could be brought against the 1st accused having regard to his position as the Governor of Plateau State and whether a criminal summons could be issued against him. The second issue did not

arise from the submissions of counsel. It was raised *suo motu* by the court .The appellant and the other accused persons therefore ought to have been given an opportunity to address the court on it See: *Abbras v. Solomon* (2001) 15 NWLR (Pt. 735) 144 at 170 D-E.

B With regard to the third issue formulated by the court it is necessary to consider the prayer sought by the 2nd respondent in his preliminary objection to charge No. FHC/KD/143C/2004 found at pages 41-43 of the record.

C The prayer was for:

1. "An order quashing the information against the 1st accused herein as the honorable court lacks jurisdiction to entertain the charge as it relates to the 1st accused and that the name of the 1st accused person be struck out of the charge."

D The prayer set out above is clear and unambiguous. The Ist accused challenged the jurisdiction of the court to entertain the charge as it related to him specifically. In their submissions before the court, learned counsel canvassed argument in respect of the objections as it related to E the 1st accused. The nature of alternative orders that could be made in the event that the objection was upheld was not addressed. Yet the judge in the course of his ruling held.

F "However in count 1 and 2 in charge No.143/C, the 1st accused is jointly charged with others *and there being no challenge to the validity of the charge against the other accused persons*, I will apply the blue pencil rule to strike out the portions in the charge that relate to the first accused." (Italics supplied).

G I am of the view that this was an issue in respect of which the parties should have been given the opportunity of being heard. This is particularly so as the preliminary objection related to the 1st accused alone whereas the decision of the trial Judge to apply the blue pencil rule by striking out the name of the 1st accused from counts 1 and 2 of the H charge was a decision that affected all the remaining persons included in the charges. Section 36 (4) of the Constitution provides:

"Where any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public

within a reasonable time by a court or tribunal.”

In the case of: *UNTHMB v. Nnoli (supra)* at 402 E-F the observation of Nnaemeka-Agu, JSC in *Kotoye v. CBN* (2000) 6 WRN 71; (1989) 1 NWLR (Pt. 98) 419 at 448 was quoted with approval thus:

“For the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given an opportunity of hearing.”

It is also contended the trial Judge decided to continue with the trial on the charges as they stood after the 1st accused’s had been struck out without hearing the parties on the issue. It was argued on behalf of the 1st respondent that the appellant and the other accused persons made no attempt to address the court on the issue after the ruling had been delivered but rather participated fully in the trial thereafter. I am of the view that this issue should be Considered in relation to the proceedings leading up to and immediately after the ruling. The appellant at pages 4-5 paragraphs 4.4 and 4.5 of his brief highlighted some of them.

On 13/12/04 when it was pointed out to the court that although the suit was fixed for trial, argument on the preliminary objection of the 2nd respondent in the applicability of section 308 of the Constitution and respect of applications for bail were also to be taken that day, the learned trial Judge decided to commence the trial with the evidence of PW I before hearing the preliminary objection challenging the jurisdiction of the court to try the 2nd respondent and the bail applications. This runs contrary to established principles of law that the issue of jurisdiction is so fundamental that it must be determined as soon as it is raised. See: *A-G. Federation v. Sode & Ors.* (1990)1 NWLR (Pt. 128) 500. *State v. Onagoruwa* (1992) SCNJ 1(1992) 2 NWLR (PT.221) 33.

A careful study of the ruling particularly at page 129 lines 10-18 produced earlier in this judgment shows that the exercise carried out by the trial judge in applying the blue pencil rule to counts 1 and 2 of the charge in keeping with his earlier avowed intention to ensure that there was no delay in the hearing after the ruling was delivered. Indeed immediately after the ruling was delivered the trial continued with the

evidence of PW2, PW3 AND PW4.

To that extent I agree with learned counsel to the appellant that in doing so the trial Judge had reached a decision without affording him a hearing on whether the trial should proceed against him on the charges as they stood without amendment. This clearly amounted to a denial of the appellant's right to fair hearing.

In the course of arriving at his decision the trial Judge had raised and formulated issues for determination *suo motu*, without hearing the appellant in respect thereof and had made consequential orders arising from his findings that affected him. This is the crux of the complaint in this appeal.

It was held in: *Otapo v. Sunmonu* (1987) 5 SCNJ 56; (1987) NWLR (Pt. 58) 587 at Obaseki, JSC:

"A hearing can only be fair when all the parties to the dispute are given a hearing or not opportunity of hearing. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as a fair hearing.

.....The principles of natural justice are part of the pillars that support the concept of the Rule of Law. They are an indispensable part of the process of adjudication in any civilised society."

In light of the foregoing I hold that the appellant was not given an opportunity of being heard on issues 2 and 3 formulated and determined by the learned trial Judge in his ruling of 16th December, 2004. I also hold that the appellant was not given an opportunity to address the court on whether or not the trial could proceed on the charges, as they stood after the name of the 1st accused had been struck out. I therefore hold that this amounted to a breach of the appellant's right to fair hearing.

It is for these and the fuller reasons contained in the lead judgment of my learned brother, Mahmud Mohammed, JCA that I also find merit in this appeal. I also allow the appeal and abide by the consequential orders made in the lead judgment.