

SUPREME COURT OF NIGERIA
5TH MARCH, 2010. SC. 294/2009
CORAM:- G. A. OGUNTADE, M. MOHAMMED, F. F. TABAI,
C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, JJSC

1 ALHAJI IDRIS
2. AUDU NDATSU ISHAKU
3. NMADU GBOMIKAGI
4. SULE NDACHE SHIRU
5. NMADU KUNA
6. NMADU NNAKO APPELLANTS
7. AHMADU ALHAJI BABA DAUDU
8. NDAKUTA NNAGANA
9. IBRAHIM DZURU
10. MADU USMAN NDAGBA
AND
COMMISSIONER OF POLICE RESPONDENT

COURTS - Findings - Application for certiorari - Finding of abandonment - Propriety - The fact that appellants took no steps to have the application heard is glaringly clear - So the finding merely stated the obvious (H1)

ORDERS OF COURT - Appeals - Sentencing - Order sending appellants back to prison - Propriety - As the appeal was a complaint - Against their conviction and sentence - An order striking out the appeal necessitates an order sending them back to prison (H2)

FACTS

Appellants were arraigned and tried for certain offences under the Penal Code before the Magistrates Court in Doko, Niger state. They were eventually found guilty and sentenced to 7 months imprisonment without option of fine. Aggrieved, appellants had filed a notice of appeal against their conviction at the High Court of Minna in its appellate jurisdiction. In addition to their notice of appeal, appellants had also applied to the High Court sitting at New Bussa, in its

supervisory jurisdiction, for an order of certiorari to quash their conviction and sentence. The application was preceded by an application for leave to apply for the order which application for leave was granted in terms suspending the conviction and sentence of appellants. The substantive application was fixed for hearing for 12th October, 2005.

The application was however not heard as stated for reasons that are not obvious from the record until 26th April 2006. In the mean time, appellants had applied to withdraw their earlier filed appeal. The application to withdraw was heard on 26th April 2006 and granted. But consequent to granting the application, the court ordered that the appellants be sent back to prison. The court held that appellants had abandoned their application for certiorari and as such there was no basis for the continuance of the order suspending their conviction and sentence. Aggrieved, appellants appealed against the consequential order sending them back to prison to the Court of Appeal. But the appeal was dismissed. They have come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court below was right in upholding the finding that the application for certiorari before the High Court was abandoned when indeed there was no evidence in the Record of Proceedings to that effect.

2. Whether the order that the Appellants return to prison could be said to be consequential to the order of discontinuance of their appeal when indeed the suspension of their committal warrant was not conditional upon that appeal."

HELD (Unanimously dismissing the appeal per **MOHAMMED JSC**) ***Application for certiorari - Finding of abandonment***

1. All the Appellants are saying in this issue is that in the absence of evidence on record to that effect, the Court below was in error in upholding the Finding of the High Court of Justice of Niger State, Minna that the Appellants had abandoned their application for certiorari.

The fact that the Appellants took no steps to have that motion heard and determined one way or the other is glaringly clear. For

the Ruling of the Minna High Court of 26th April, 2006 which is the subject of this appeal in which Aorta J. participated in the hearing to conclude that the Appellants had abandoned their motion fixed for hearing since 12th October, 2005, is merely stating the obvious. (pp. 1216 H / 1218 B)

Order sending appellants back to prison - Propriety

2. The Notice of Appeal by the Appellants filed on 28th July, 2005 at the High Court of Justice Minna was a complaint against the Appellants' conviction and sentence. If for any reason the Appellants decided they were no longer interested in exercising their rights of appeal, they have the right to approach the Court to terminate their appeal but they must realize that such a step automatically leaves their conviction and sentence intact which not only the High Court before which the Notice of Appeal was filed, but the learned Appellants' Counsel himself also as an officer of the Court have a duty of ensuring that the Appellants served their sentence in accordance with the law.

In other words the order striking out the Appellants' appeal must necessarily lead to the order sending the Appellants back to the prison to serve their sentences. (p. 1220 B/F)

REPRESENTATION

Ola Olanipekun with Femi Agunloye for the Appellants
S. T. Ogunorisa for the Respondent

CASES REFERRED TO

Okeke v. Okoli (2000) 2 N.W.L.R. (Pt. 644) 215
Adejogbe v. Ologunju (2004) N.W.L.R. (Pt. 868) 70
Larmie v. D. P. M S. (2005) 18 N.W.L.R. (Pt. 958) 478
Chief Land Officer v. Alor. (1991) 4 N.W.L.R. (Pt. 187) 617
Akeem v. University of Ibadan (2004) All F.W.L.R. (Pt. 235) 173
7up Bottling Company v. Abiola & Sons Ltd. (1989) 4 N.W.L.R. (Pt. 114) 229
Akinbobola v. Plisson Fisco (Nig.) Ltd. (1991) 1 N.W.L.R. (Pt. 167) 270 at 288

STATUTE REFERRED TO

Penal Code, ss. 136 and 265

LEAD JUDGMENT BY MOHAMMED JSC

This criminal appeal is against the judgment of the Court of Appeal Abuja Division delivered on 3rd June, 2008 affirming the decision of the High Court of Justice of Niger State sitting at Minna in its appellate jurisdiction in which it granted the Appellants' application to withdraw or discontinue their appeal against their conviction and sentence by the Magistrate Court Doko for offences punishable under Section 136 (b) and 265 of the Penal Code for which they were sentenced to 7 months imprisonment without any option of fine. In striking out the Appellants notice of appeal, the High Court also ordered the Appellants to go back to the prison and serve the remaining part of their sentence.

However, in addition to their notice of appeal filed on 28th July, 2005 at the High Court of Minna in its appellate jurisdiction the withdrawal or discontinuance of which is the subject of the present appeal, the Appellants had also applied before the same High Court of Justice of Niger State sitting in exercise of its original jurisdiction sitting at New Bussa for an order of certiorari to quash their conviction and sentence in the decision of the trial Magistrate Doko which convicted and sentenced the Appellants to 7 months imprisonment without any option of fine for the offences punishable under Sections 136 (b) and 265 of the Penal Code. The application was heard by Auta J. who in granting the Appellants leave to apply for the order of certiorari also suspended the conviction and sentence passed on the Appellants by the Magistrate Court and ordered their release from prison pending the hearing of their substantive application fixed for October, 2005. It is not quite clear from the record as to why this application for certiorari was not heard as fixed for 12th October, 2005 before the Appellants filed their notice of discontinuance of their appeal dated 10th August, 2005 which also was not heard and determined until 26th April, 2006 when the Appellants were ordered back to the prison to serve their sentence imposed by the Magistrate Court.

The Appellants who were aggrieved by this step taken by the High Court, after striking out their notice of appeal, appealed against the decision to the Court of Appeal Abuja Division which after hear-

ing the appeal in a unanimous decision delivered on 3rd June, 2008 dismissed the Appellants' appeal and affirmed the order of the Minna High Court sending the Appellants back to the prison to serve their sentence. It is worth noting at this stage for the purpose, of putting the records straight that the Appellants were also released on bail by the Court of Appeal pending the hearing and determination of their appeal by the Court. B

The Appellants who were not satisfied with the decision of the Court of Appeal dismissing their appeal, are now on a further and final appeal to this Court. In the Appellants brief of argument, the following two issues were raised for the determination. C

"1. Whether the Court below was right in upholding the finding that the application for certiorari before the High Court was abandoned when indeed there was no evidence in the Record of Proceedings to that effect. D

2. Whether the order that the Appellants return to prison could be said to be consequential to the order of discontinuance of their appeal when indeed the suspension of their committal warrant was not conditional upon that appeal."

In the Respondent's brief of argument, in addition to raising a preliminary objection to the Appellants' ground 1 of the grounds of appeal and Appellants' issue 1 arising from it as being incompetent, the two issues identified in the Appellants brief, although differently worded were adopted in the Respondent's brief of argument. E

Starting with the Respondent's Preliminary Objection, I say straight away that it has no substance at all. This is because the Court below clearly commented on the Appellants' application for certiorari which was said to have been abandoned by the Appellants after the suspension of their conviction and sentence by the High Court, in granting their application for leave. The Respondent therefore is not at all on a firm ground in regarding the Appellants' ground one and consequently their issue one as not arising from the judgment of the Court below. The Preliminary Objection to the ground of appeal and the issue arising out of it, is accordingly hereby over-ruled. F G H

In support of the first issue for determination, Appellants' learned Counsel referred to the case of Larmie v. D. P. M. S. (2005) 18 N.W.L.R. (Pt. 958) 478 and quoted part of the ruling of the High Court striking out of Appellants Notice of Appeal and observed that

there is nothing in the ruling to support the statement of that Court that the Appellants had abandoned their motion for certiorari. In the absence of such evidence contended the learned Counsel, there is nothing to support the finding of the trial Court and that for the same reason, the Court below was in error in upholding that finding of the trial Court; that in the absence of the required evidence, the finding of the trial Court upheld by the Court below that the Appellants had abandoned their application for certiorari, is purely speculative which the Court below was bound to set aside if the decision of this Court in Adejugbe v. Ologunju (2004) N.W.L.R. (Pt. 868) 70 is applied to the present case.

In reacting to the arguments of the Appellants on this issue on the abandonment of the Appellants' motion for certiorari, learned Counsel to the Respondent started by defining the word 'certiorari' and the effect of a Court order of certiorari and argued that the record of this appeal shows the fraudulent intent of the Appellants in their conduct in the application for certiorari before the New Busa High Court and at sometime filing their appeal before the Minna High Court. Learned Counsel emphasised that the order suspending the Appellants' committal warrant was made pending the determination of their substantive application which the Appellants failed to take steps to move at the trial High Court. Learned Counsel pointed out that the effect of the Appellants' neglect to pursue their motion resulted in the lapse of the interim order in favour of the Appellants which the High Court of Niger State sitting in its appellate jurisdiction at Minna in treating the Appellants' application to discontinue their appeal regarded as a fraudulent disregard for Court orders and procedure justifying the restoration of the Appellants committal warrant which order was upheld by the Court of Appeal; that taking into consideration that the order suspending the Appellants' committal warrant was obtained ex-parte, the order by process of law, is only expected to last for a short time until the hearing of the motion on notice but certainly not until the hearing of the substantive case having regard to the decisions in 7up Bottling Company v. Abiola & Sons Ltd. (1989) 4 N.W.L.R. (Pt. 114) 229; Chief Land Officer v. Alor. (1991) 4 N.W.L.R. (Pt. 187) 617; Eguamwense v. Amaghisenwan (1986) 5 N.W.L.R. (Pt. 41) 282 and Okeke v. Okoli (2000) 2 N.W.L.R. (Pt. 644) 215.

All the Appellants are saying in this issue is that in the

absence of evidence on record to that effect, the Court below was in error in upholding the Finding of the High Court of Justice of Niger State, Minna that the Appellants had abandoned their application for certiorari. In resolving this issue, it should not be forgotten that this is a criminal appeal against the conviction of the Appellants for the offences under Section 136 (b) and 265 of the Penal Code. The application by the Appellants for leave to apply for an order of certiorari to quash their conviction and sentence, was heard by Auta J. of the High Court of Justices of Niger State sitting at New Bussa on 12th August, 2005. In granting the application for leave ex-parte, the ruling of the Court as shown in the drawn up order at page 59 of the record of this appeal shows as follows -

"Court Order - Certiorari

Upon hearing motion Ex-parte filed by SHEHUM. J. Esq. Counsel to the Applicants seeking for the following orders -

1. AN ORDER (sic) this Honourable Court granting leave to the Applicants to apply for a Writ of CERTIORARI against the proceedings of the Senior Magistrate's Court Doko in suit No. DK/MC/DC/98/2005.

2. AN ORDER suspending the committal Warrant against the Applicants releasing them to bail pending the determination of THIS application."

After hearing the Appellants' Counsel on this application, the learned trial Judge granted the Appellants' reliefs in the following terms -

"1. Leave of this Court is hereby granted to the applicants to apply for a Writ of Certiorari against the proceeding of the Senior Magistrate Court Doko in suit No. DK/MC/DC/98/2005.

2. And the committal warrant is hereby suspended. If they are already in prison they should be released forthwith PENDING the determination of motion on notice. Case is adjourned to 12th December, 2005 for hearing motion on notice."

From the same record of this appeal, it is quite clear that up to the time the Appellants' Notice of discontinuance of their appeal filed on 28th July, 2005 was taken by the High Court of Justice of Niger State sitting in its appellate jurisdiction in Minna on 26th April, 2006 with the State Chief Judge Ndajiwo C. J. presiding and assisted by

the same Aorta J. who had adjourned the Appellants motion on Notice for certiorari for hearing on 12th October, 2005, that motion remained unheard. It is therefore very clear from the record of this appeal, that the Appellants' motion for the order of certiorari had not been heard up to the date the Ruling of the Minna High Court sitting on appeal was delivered striking out the Appellants Notice of Appeal following the Appellants discontinuance of the appeal. **The fact that the Appellants took no steps to have that motion heard and determined one way or the other is glaringly clear. For the Ruling of the Minna High Court of 26th April, 2006 which is the subject of this appeal in which Aorta J. participated in the hearing to conclude that the Appellants had abandoned their motion fixed for hearing since 12th October, 2005, is merely stating the obvious.** This matter being a criminal appeal with the conviction and sentence of the Appellants to a term of 7 months imprisonment staring the Appellants in the face, it is indeed surprising that throughout the proceedings at the Minna High Court of Appeal, the Abuja Division of the Court of Appeal and lastly in this last Court of Appeal, it has not been disclosed by the Appellants or their learned Counsel why their application for certiorari was not moved on 12th October, 2005 or any date thereafter, up to 11th February, 2010, when their appeal was heard in this Court. The fact that the Appellants had to be released on bail by the Court of Appeal pending the hearing and determination of their appeal in that Court was enough to have warned the Appellants' Counsel of the conviction and sentence still hanging on the necks of the Appellants. The fact that the Appellants had to be released on bail pending the hearing of their appeal is also a confirmation that the Appellants are not prepared to say anything on their application for certiorari which was to have been heard since 12th October, 2005. In the circumstances of this case therefore, the Court below took the right course in upholding the finding of the High Court in its Ruling of 26th April, 2006 that the Appellants had indeed abandoned their motion on notice for order of certiorari fixed for hearing on 12th October, 2005 and which remained unheard up to today. The Appellants cannot hide under an ex-parte order suspending their committal warrant since 12th August, 2005 and refuse to take the steps required by law to absolve them of their conviction and sentence which must remain in force.

The second issue is whether the order on the Appellants to return to prison could be said to a consequential order to the order of discontinuance of the Appellants' appeal when the suspension of the committal order was not conditional upon that appeal. Learned Counsel for the Appellant after quoting part of the judgment of the Court below upholding the order of the High Court directing the Appellants to go back to the prison to serve the various sentences imposed on them, argued that the order cannot qualify as a consequential order under the law in an application for the discontinuance of the Appellants' appeal. Counsel however agreed that the order could qualify as consequential order on the determination of the Appellants' application for the order of certiorari if the decision in *Akinbobola v. Plisson Fisco (Nig.) Ltd. (1991) 1 N.W.L.R. (Pt. 167) 270 at 288* is taken into consideration. Learned Counsel urged the Court to allow this appeal since, according to him, the findings of the two Courts below that the Appellants had abandoned their application for certiorari as being purely speculative that cannot be allowed to stand.

For the Respondent however, the learned Counsel relied on the case of *Akeem v. University of Ibadan (2004) All F.W.L.R. (Pt. 235) 173* for what constitutes a consequential Order and argued that the Court of Appeal was right in affirming the order made by the High Court for the Appellants to go back to the prison and serve their respective sentences. According to Counsel, such an order plainly flows from the order striking out the Appellants' Notice of Appeal, having regard to the fact that the interim order suspending their committal warrant by the High Court, had since lapsed leaving their committal warrant quite intact. Recalling the decision of this Court in *Pantosho v. Mohammed (2003) F.W.L.R. 1717*, learned Respondent's Counsel urged this Court to dismiss this appeal.

It is unfortunate that the learned Counsel to the Appellants all along at the Court of Appeal and in this Court seemed to have been belabouring on technicalities on the appropriate order to make by an appellate Court on an application for discontinuance of an appeal by an Appellant. The learned Counsel to the Appellant clearly thought he was dealing with a simple civil appeal rather than a criminal appeal in which conviction and sentence of the Appellants were in issue. In fact this wrong approach appeared to have influenced the

Court below in making an order on costs in a criminal appeal in its judgment now on appeal. Learned Counsel therefore appeared to have forgotten that he was dealing with a criminal appeal the foundation of which is the conviction and sentence of the Appellants for criminal offences under Section 136 (b) and 265 of the Penal Code by the trial Magistrate Court Doko of Niger State. ***The Notice of Appeal by the Appellants filed on 28th July, 2005 at the High Court of Justice Minna was a complaint against the Appellants' conviction and sentence. If for any reason the Appellants decided they Were no longer interested in exercising their rights of appeal, they have the right to approach the Court to terminate their appeal but they must realize that such a step automatically leaves their conviction and sentence intact which not only the High Court before which the Notice of Appeal was filed, but the learned Appellants' Counsel himself also as an officer of the Court have a duty of ensuring that the Appellants served their sentence in accordance with the law.*** To do anything contrary to this is to aid the Appellants in their dubious plan to escape justice.

In the circumstances of this case which is a criminal appeal against conviction and sentence for criminal offences under the Penal Code, the termination of the appeal in the manner chosen by the Appellants without allowing the High Court which is the only Court that has jurisdiction to hear appeals from conviction and sentence of accused persons from the Magistrate Court, left the Appellants completely exposed to face the law and the reality of having to serve their respective sentences. ***In other words the order striking out the Appellants' appeal must necessarily lead to the order sending the Appellants back to the prison to serve their sentences.*** Such order to me is not even a consequential order flowing from the order striking out the notice of appeal, but a mandatory and necessary order to make in ensuring that convicted and sentenced accused persons, are not allowed to evade justice.

Finally, it must also be observed in this matter that this Court will not interfere with the findings by the two Courts below that the Appellants had abandoned their motion on notice for an order of certiorari to quash their conviction and sentence fixed for hearing since 12th October, 2005, unless these findings are perverse or are a

product of wrong inference from accepted facts or that the Courts below had applied wrong principles to such facts. On the undisputed facts of the present case, I see no reason whatsoever to disturb the judgment of the High Court as affirmed by the Court below.

This appeal is without any merit whatsoever. It is dismissed by me. The concurrent decisions of the two Courts below are hereby affirmed.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Mohammed J.S.C. I agree with his reasoning and conclusion. I would also dismiss this appeal. Appeal is accordingly dismissed.

TABAI JSC

I was privileged to read, in advance, the lead judgment of my learned brother Mahmud Mohammed JSC and I agree that the appeal lacks substance and should be dismissed.

The facts are clearly set out in the lead judgment and I need not repeat them. For the purpose of rendering my reasoning comprehensible however it is necessary to state that the appellants were tried at the Magistrate Court Doko in Niger State, convicted and each sentenced to 7 months imprisonment without option of fine. On the 28th July 2005 they filed a notice of appeal against their conviction and sentence to the High Court. In that same Court they also applied for leave to apply for an order of certiorari to quash the Magistrate Court proceedings leading to their conviction and sentence. In granting the application for leave the trial court suspended the sentence and ordered the release of the appellants. The appellants then filed the notice of discontinuance dated 10th of August 2005. The High Court granted the application and so determined the appeal. In granting the order terminating the appeal the learned judge ordered the appellants back to prison to serve the balance of their prison term. It is this order that has given rise to this appeal.

In my view, the appeal filed by the appellants was against their

conviction and sentence part of which they had served. They were at liberty to withdraw and discontinue the appeal. And unless and until the appeal was allowed or the proceedings leading to their conviction and sentence quashed, the conviction and sentences remained valid and enforceable. It is my view therefore that following the termination of the appeal, the High Court rightly ordered the enforcement of the conviction and sentence, the pending application for an order Certiorari notwithstanding.

For the foregoing reasons and the detailed reasons contained in the lead judgment of my learned brother I also dismiss the appeal for lack of merit.

CHUKWUMA-ENEH JSC

I have had the advantage of reading in draft the judgment prepared by my learned brother Mohammed JSC, with which I agree entirely that the judgment of the Court below should not be disturbed as the appeal lacks merit and should be dismissed.

I too dismiss the appeal and endorse the orders contained in the lead judgment.

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