

SUPREME COURT OF NIGERIA
21ST MAY, 2010, SC. 289/2008
CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN,
F. F. TABAI, J. A. FABIYI, O. O. ADEKEYE, JJSC

1. HON. POLYCARP EFFIOM
 2. MR. CLETUS MICHAEL
 3. MR. FESTUS ITA OKON APPELLANTS
 4. MR. PAUL AKICHAGHE
- AND
1. CROSS RIVER STATE
INDEPENDENT ELECTORAL RESPONDENTS
COMMISSION (CROSIEC)
 2. MR. MATTHEW OLORY
-

APPEALS - Grounds - Whether of law or fact - Where a ground does not question a lower court's assessment of facts - But rather its wrong application of legal principles - It is not of facts but law (H1)

EVIDENCE - Conflicting documents - From the same source - Effect - As is the case with Exhibits MEU-4 and EA-2 - They both cancel out each other - Leaving the party alleging the fact in issue - With the initial burden of proof (H2)

ELECTIONS - Candidature - Disqualification - On grounds of indictment - Propriety - Indictment is not enough for disqualification - It must be shown that the person was convicted - By a court or other tribunal (H3)

COURTS - Judgments - Based on *suo motu* issues - Effect - It does not necessarily lead to a reversal of the decision - Unless it is shown that miscarriage of justice was occasioned thereby (H4)

COURTS - Issues - *Suo motu* resolution - Rule against - Limits - The rule that a court ought not to raise and resolve an issue - Without hearing the parties - Applies mainly to issues of fact (H5)

FACTS

The plaintiffs/appellants sued defendants/respondents before the High Court of Cross-River State holden at Akamkpa. The action was commenced by means of originating summons claiming sundry reliefs by which appellants challenged the qualification of 2nd respondent to contest for the office of the Chairman of Akamkpa local Government council or such other public office. The mainstay of appellants' case was that 2nd respondent was dismissed from the public service of the Federation i.e. from the Nigeria Police Force following the verdict of an orderly-room trial which found 2nd respondent guilty of stealing; as such he was disqualified under the Constitution, the Electoral laws and the party Guidelines from contesting for or holding a public office.

In proof of their case, appellants exhibited, inter alia, two letters from the Nigeria Police Force - Exhibits MEU-4 and MEU-5 - the contents of which are to the effect that 2nd respondent was indeed dismissed from the police for stealing. In reaction to these pieces of evidence, 2nd respondent exhibited another letter, also from the Nigeria Police Force - Exhibit EA2 - the contents of which are to the effect that though 2nd respondent was initially dismissed from the force, he was subsequently discharged from the force instead. After hearing, the learned trial judge dismissed the suit for lack of proof. Aggrieved, appellants appealed to Court of Appeal but the appeal was dismissed. Still dissatisfied, appellants have come on a final appeal to the Supreme Court. It is their contention, inter alia, that Court of Appeal was wrong to have raised and resolved the issue of locus standi, suo motu in the determination of the appeal and that the action had occasioned a miscarriage of justice.

ISSUES FOR DETERMINATION

1. WHETHER the learned justices of the Court of Appeal were right when they suo motu raised and considered the propriety of the suit and locus standi of the Appellants to challenge the nomination of the 2nd Respondent to contest the election which were not live issues before them and for doing so without giving the parties, particularly the Appellants, the opportunity to address them on the points?

2. WHETHER the learned Justices of the Court of Appeal had properly addressed the issues placed before them and applied the appropriate and applicable law to those issues?

HELD (Unanimously dismissing the appeal per **TABAI JSC**)

APPEALS - Grounds - Whether of law or fact

1. The question now is whether ground one of the Notice of Appeal is one of facts or mixed law and facts to warrant the leave either of this Court or the Court of Appeal first sought and obtained? I am inclined to answer this question in the negative.

The ground merely complains of errors of law and does not involve or question the lower court's assessment of facts. It merely alleges, in addition, the lower court's wrong application of the principles in *SOFEKUN vs AKINYEMI* (1981) 1 NCLR 135; *GARBA vs UNIVERSITY OF MAIDUGURI* (1986) 1 NWLR (Part 18) 550; and *ACTION CONGRESS vs INEC* (2007) 12 NWLR (Part 1048) 222 and the failure to interpret and give effect to the PDP Guidelines, paragraph 4 (G) of CROSIEC Guidelines for Local Government Elections and section 12 (1) (f) of the Cross River State Local Government Law 2004. (p. 1781 A/F)

EVIDENCE - Conflicting documents - From the same source

2. *Based on the aforesaid shortcomings in the Exhibits filed and relied by (sic relied upon by) the Plaintiffs and the 2nd defendant I hold that it will be extremely dangerous to uphold or sustain the Plaintiffs' claim that the 2nd defendant was dismissed from the Police Force in the face of glaring and unresolved conflicts contained in Exhibits MEU-4 and EA 2.*

Neither the Plaintiffs nor the 2nd Defendant has satisfied me as to the effect of the Defendant's discharge or dismissal from the Police Force. I therefore, with all sense of responsibility decline from disqualifying the 2nd Defendant as prayed by the Plaintiffs from contesting election into the office of Chairman of Akamkpa Local Government of Cross River State Nigeria as prayed in the Plaintiffs' originating summons."

Based on the above reasoning the trial court struck out the originating summons. The court below tended to fault the above reasoning of the trial court. I do not, with respect, see anything wrong with the above opinion and reasoning of the trial court. On this question of whether the 2nd Respondent was dismissed or merely discharged following the Orderly Room trial, the parties joined issues. The three documents, Exhibits MEU-4, MEU-5 and EA 2 all from the Nigeria Police are in conflict. The Plaintiffs/Appellants who allege the dismissal

have a duty to eliminate the authenticity of the factual situation in Exhibit EA 2. In the absence of such elimination the onus still remains with the Appellants to prove that following the Orderly Room trial, the 2nd Respondent was dismissed. (p. 1784 D)

B Disqualification - On grounds of indictment - Propriety

3. For the purpose of establishing a person's disability from holding an elective public office such as President, Governor, Chairman of Council therefore etc., it is not enough to allege that the person had been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a tribunal. Such an assertion remains a mere allegation and no more. To amount to a disability, it must be established that the person claimed to have been so indicted was tried and found guilty for the alleged embezzlement or fraud by a court or other tribunal established by law as stipulated in sections 6 and 36 of the 1999 constitution. (p. 1786 F)

Judgments - Based on suo motu issues - Effect

4. While the court has a duty to give the parties the opportunity to be heard on any issue it raises *suo motu*, a failure to do so does not necessarily lead to a reversal of its decision. To warrant an appellate court's reversal of the decision, the Appellant must go further to show that the failure to hear him on the point occasioned some miscarriage of justice. (p. 1787 G)

Issues - Suo motu resolution - Rule against - Limits

5. As I indicated above this principle that the court ought not to raise an issue *suo motu* and decide upon it without hearing from the parties applies mainly to issues of fact. In some special circumstances the court can raise an issue of law or jurisdiction *suo motu* and without hearing the parties decide upon it. TUKOR vs GOVERNMENT of GONGOLA STATE (1989) 4 N.W.L.R (Part 117) 517 is instructive on this point. In that case although the issue of venue was not raised and argued by the parties in their briefs, it being an issue of jurisdiction was taken by the court. (p. 1788 A)

NOTABLE POINT OF INTEREST**ONNOGHEN JSC***1. Court of Appeal's comment on locus standi was obiter*

It is obvious that what the lower court stated, supra, on locus standi was clearly obiter and ought not to have been a subject of a ground of appeal to be later elevated to a status of an issue for determination. The obiter served to remind us of the true position of the law on the issue of locus standi but it never constituted the reason for the decision in the case. The reason for the decision by the lower court has to do with the issue as to whether the 2nd respondent was disqualified to contest the election in question due to the fact that he was allegedly dismissed from service through orderly Room Trial and Conviction resulting therefrom. (p. 1790 G)

REPRESENTATION

MBA E. Ukwani Esq. with him are, Hon. Joseph N. Ekumankama Esq., Cynthia Onyewuchi, Chuwuemeka Aluchukwa for the Appellants.

Iko Ekpo Ikona Esq. for the 1st Respondent
Imo Inyang Esq., For the 2nd Respondent

CASES REFERRED TO

AJAO vs ASHIRU (1973) 11 S.C. 23 at 39-40
Sofekun v. Akinyemi (1981) 1 NCLR 135 at 146
Obi-Odu v. Duke (2006) All FWLR pt. 337 pg. 537
Buhari v. INEC (2008) All FWLR (Pt. 437) 42 at 49
Amaechi v. INEC (2008) 5 NWLR pt. 1080 pg. 223
Egoium vs Obasangeo (1999) 7 NWLR (Pt. 611) 355
Ugwu v. Ararume (2007) 12 NWLR pt 1048 pg. 1367
EGBBZIEM vs NIGERIAN RAILWAY (1972) 4 SC 10 at 17
ALESINLOYE (2000) N.W.L.R (Part 660) 177 at 211 - 212
IMAH vs OKOGBE (1993) 9 N.W.L.R (Part 316) 159 at 178
ACTION CONGRESS vs INEC (2007) 12 NWLR (Part 1048) 222
DREXEL ENERGY LTD vs TIB (2008) NSCQR 1219 at 1260-1261
DALHATU vs TURAKI (2003) FWLR (Part 174) 247 at 261-262 and 271-272
TUKOR vs GOVERNMENT of GONGOLA STATE (1989) 4 N.W.L.R

STATUTES & RULES REFERRED TO

Electoral Act, 2006, s. 32

Cross-River State Independent Electoral Commission Guidelines for

B Local Government Council Election, 2007, paragraph 4

Cross-River State Local Government Law, 2004, s. 12

Constitution of the Federal Republic of Nigeria, 1999, ss. 36 & 137

LEAD JUDGMENT BY TABAI JSC

C This appeal is against the decision of the Calabar Judicial Division of the Court of Appeal delivered on the 8th of July, 2008 dismissing the earlier appeal against the decision of M. O. Eneji J. of the Akamkpa Judicial Division of the High Court of Cross-River State on
D the 2nd of November, 2007.

The action itself was commenced at the trial High Court on the 23rd of October, 2007 by way of an originating summons. The Plaintiffs who were the Appellants at the court below and also the Appellants herein sued for themselves and on behalf of all other members
E of the Peoples Democratic Party (PDP) Akamkpa chapter, excepting the 2nd Defendant and his supporters. They were also described in the summons as aspirants to the position or office of the chairman of Akamkpa Local Government Council under the platform of the PDP
F for the 2007 Local Government Election and/or the party's stalwarts in the Local Government Area.

In the summons the following four questions were set down for Determination:-

G 1. *WHETHER the 2nd defendant, who was dismissed from the service of the Nigeria Police Force, is qualified to contest election to the office of Chairman of Akamkpa Local Government Council.*

H 2. *WHETHER, in view of the provision of paragraph 4 (g) of the Guideline for Local Government Council elections, 2007 issued by the 1st Defendant, the 2nd Defendant can be cleared by the 1st defendant to contest the forthcoming Local Government election in Cross River State.*

3. *WHETHER it is proper for the 2nd defendant to be presented to the 1st defendant for clearance to contest the forthcoming Local Government Elections in November, 2007 considering the pro-*

visions of paragraph 2 (d) of the Peoples Democratic Party Special Ward and Local Government Congress Guidelines for 25 Ward Delegates, Councillorship Candidates or

4. *WHETHER the presentation of the 2nd defendant to the 1st defendant by the Peoples Democratic Party (PDP) to contest the 2007, Local Government Elections in Akamkpa Local Government Area is not a contravention of the provision of paragraph 3 (d) of the PDP's Guidelines for the Screening of candidates for the said election; paragraph 4 (g) of the CROSIEC Guidelines for Local Government elections and section 12 (I) (f) of the Cross River State Local Government Law, 2004.*

And therein the Plaintiffs/Appellants sought against the Defendants/Respondents jointly and severally the following reliefs:-

1. *A DECLARATION that the 2nd defendant, having been dismissed from the Public Service of the Federation, is disqualified from contesting election into the office of chairman of Akamkpa Local Government council and to hold the position of Chairman of the Local Government Council and/or such other Public Office.*

2. *A DECLARATION that the first defendant cannot lawfully present the 2nd defendant to contest the forthcoming Local Government Elections in Cross River State in view of the provisions of paragraph 2 (d) of PDP's Special Ward and Local Government Congress Guidelines for election of 25 Ward Delegates, Councillorship and Local Government Chairmanship candidate; paragraph 4 (g) of the CROSIEC Guidelines for Elections, 2007 and section 12 (I) (f) of the Cross-River State Local Government Law, 2004.*

3. *AN ORDER OF MANDATORY INJUNCTION directing the 1st defendant to disqualify the 2nd defendant from contesting the forthcoming Local Government elections in Cross-River State and restraining the 1st defendant perpetually from putting forward the 2nd defendant as a candidate to contest the forthcoming Local Government Elections in Cross-River State or any other such elections or to hold any such public office.*

Each of the 1st and 2nd Defendants/Respondents filed a counter affidavit on the 1st November, 2007. To the counter Affidavit of the 2nd Defendant/Respondent were attached Exhibits EA 1, EA 2, EA 3, and EA 4 - EA 7. Earlier, on the 19th October, 2007 there were two counter-affidavits of disassociation deposed to by Lawrence Ogar and

the other by Alhaji Ibrahim Iransina.

On behalf of the parties learned counsel submitted written as well as oral addresses. In its judgment on the 2nd of November, 2007, the trial court per Eneji J. struck out the suit for lack of clear proof.

The Plaintiffs were not satisfied with the said judgment and proceeded on appeal to the Court of Appeal by their Notice of Appeal dated the 2nd of November, 2007 but filed on the 8th November, 2007. Therein briefs were, on behalf of the parties, filed and exchanged and the appeal subsequently heard. In its unanimous judgment on the 8th of July, 2008 the appeal was dismissed.

The plaintiffs were still not satisfied and have come to this court on further appeal. The Notice of Appeal was dated the 21st of July, 2008 and filed on the 24th of July 2008. Here again the parties have through their counsel filed and exchanged their briefs of argument. The joint Appellants' Brief was settled by MBA E. Ukwani and it was filed on the 29th of October, 2008. He also settled the Appellants' Reply Brief which was filed on the 26th of March, 2009.

The brief of the 1st Respondent was prepared by Ikoi Ekpo Ikona and it was filed on the 2nd of April, 2009. That of the 2nd Respondent was prepared by lmo Inyang and it was filed on the 22nd of January 2009.

In the Appellants Brief learned counsel formulated two issues for determination as follows:

1. *WHETHER the learned Justices of the Court of Appeal were right when they suo motu raised and considered the propriety of the suit and locus standi of the Appellants to challenge the nomination of the 2nd Respondent to contest the election which were not live issues before them and for doing so without giving the parties, particularly the Appellants, the opportunity to address them on the points?*

2. *WHETHER the learned Justices of the Court of Appeal had properly addressed the issues placed before them and applied the appropriate and applicable law to those issues*

The 1st Respondent adopted the issues formulated by the Appellants. The 2nd Respondent however formulated his own two issues which he couched in the following terms:

"1. WHETHER the learned Justices of the Court of Appeal were right in holding that the 2nd Respondent was not disqualified from contesting the election for the office of chairman of Akamkpa

Local Government Council.

2. *WHETHER the learned Justices of the Court of Appeal had power to suo motu raise and consider the issue of the competency of the suit and the locus standi of the Appellants and if not whether the same occasioned substantive miscarriage of justice justifying the reversal of their judgment.*" B

The 2nd Respondent also raised a preliminary objection to the competence of the appeal which was argued in his brief.

On the first issue it was the contention of the Appellants that there was no issue before the lower court which either challenged the competence of the suit or the locus standi of the Appellants to institute the suit, it was pointed out that the issue of the locus standi of the Appellants was only raised at the trial court and which was resolved therein in favour of the Appellants and against which there was no appeal to the court below. It was submitted that neither the parties nor the court was at liberty to go outside the issues presented to the court; reliance was placed on *EGBEZIEM vs NIGERIAN RAIL WAY* (1994) 3 NWLR (Pt. 333) 492; *Adeniji v. Adeniji* (1972) 4 SC 10 at 17 and *EASCUTTO vs ADECENTRO NIG. LTD* (1997) 11 N.W.L.R (Part 529) 467 at 481. It was also the Appellants' complaint that after the issue had been raised suo motu they were not given the opportunity to address on it, contending that had they been or given such opportunity they would have shown that they had the locus standi and that the suit was competent. It was Appellants' submission that a court of law is not entitled to raise an issue and resolve it one way or the other without hearing the parties. They relied further on *OSHODI vs OYIFUNMI* (2000) 13 N.W.L.R (Part 684) 298; *UGO vs OBIKWE* (1989) 1 N.W.L.R and *ALLI vs ALESINLOYE* (2000) N.W.L.R (Part 660) 177 at 211 - 212. E F G

Still on this issue learned counsel for the Appellants further referred to section 32 (4) and (5) of the electoral Act 2006 and argued that by virtue of the provisions thereof they had the right to give the information to the effect that the 2nd Respondent was dismissed from the Police Force and therefore not qualified to be a candidate for the 2007 Local Government Council Elections. H

With respect to the 2nd issue for determination, the Appellants contended that the 2nd Respondent having been dismissed from the Nigerian Police since 5th of June, 1986 was disqualified in view of the

provisions of (i) Paragraph 2 (d) of the Special Ward and Local Government Congress Guidelines Exhibit MEU-2 (ii) Paragraph 4 (g) of the CROSIEC Guidelines for Local Government Council Election 2007 and (iii) section 12 (I) (f) of the Cross River State Local Government Law 2004. The Appellants pointed out that their main
B ground for challenging the qualification of the 2nd Respondent was not because he was convicted by a court of law but because he was dismissed from the public service of Nigeria, that is, the Nigeria Police force; According to the Appellants it was not the duty of the court
C below to consider the merit of the dismissal. Rather it was its duty to apply and give effect to the governing laws. It was strongly contended that to allow the decision of the court below to stand will pose serious danger if not a destruction of discipline in our public and civil institutions through judicial interference. Appellants relied on *ESIAGA vs*
D *UNIVERSITY OF CALABAR* (2004) ALL F.W.L.R (Part 2006) 403. In conclusion the Appellant urged finally that the appeal be allowed.

On behalf of the 1st Respondent the following arguments were submitted. With respect to the issues of the competence of the suit and the locus standi of the Appellants, it was the submission of the 1st
E Respondent that the issues were those of jurisdiction and which the court can therefore suo motu raise. Reliance was placed on *DREXEL ENERGY LTD vs TIB* (2008) NSCQR 1219 at 1260-1261; *IORSHAGHER vs OLORUNTOBI* (2004) ALL FWLR (Part 228) 801
F *NDIC vs CBN* (2002) FWLR (Part 99) 1021. It was contended that the propriety of the suit and the standing of the Appellants to institute the suit have been topical issues right from the trial court. The Appellants referred to the 3rd and 4th questions and the 2nd relief of the originating summons and argued that they touched on the compe-
G tence of the suit and the locus standi of the Appellants to file same.

With respect to the 1st issue for determination, the 1st respondent drew the court's attention to Exhibits MEU 4 and MEU 5-5B attached to the affidavit in support of the originating summons and Exhibit EA 2 attached to the counter-affidavit of the 2nd Respondent
H and submitted that the entire case was duly examined by the two courts below before it was struck out on the ground of contradictions. It was the further submission on behalf of the 1st Respondent that the disqualification of any candidate seeking election must be based on conviction and not on an indictment or dismissal by an

administrative body. In support of this submission reliance was placed on *A.C vs INEC* (2007) 30 NSCQR 12ss 1280; *ROTIMI AMAECHI vs INEC* (2008) ALL F.W.L.R (Part 407) 1. It was further submitted that non-compliance with a Political Party's Guidelines or section 12 (I) (f) of Cross River State Local Government Law 2004 or CROSIEC Guidelines 2007 are all subject to section 36 (5) of the 1999 Constitution which presumes the innocence of the 2nd Respondent and his qualification to contest an election unless and until the proof of his conviction by a competent court of law. B

The 1st Respondent's argument on the 2nd issue was just a repetition of the argument on the 1st issue. C

On behalf of the 2nd Respondent a notice of preliminary objection was filed and argued. The substance of the argument is that the appeal raises issues of facts or mixed law and facts for which leave of the court ought to have been sought and obtained. In the absence of such leave sought and obtained ground one of the Notice of Appeal is incompetent and that the said ground and issue No. 2 derived there from be struck out for incompetence. D

As regards the 1st issue for determination the 2nd Respondent referred to the provisions of section 12(I) (f) of the Cross River State Local Government Law 2004 and submitted that for an indictment for the embezzlement or fraud of a person to constitute his disqualification to the office of chairman or vice-chairman of a Local Government Council there must be proof of his trial and conviction in a court of law in support of this submission. He relied on *SOFEKAN vs AKINYEMI* (1981) INCLR 135 at 146; *ACTION CONGRESS vs INEC* (2007) 12 N.W.L.R. (Part 1048) 222; *AMAECHI vs INEC* (2008) ALL FWLR (part 407) I. It was argued that the orderly room trial upon which the dismissal is predicated was not a judicial body and therefore that its decision cannot be the basis of the 2nd Respondent's disqualification. In support of this, the 2nd Respondent relied on *BUHARI vs INEC* (2008) ALL FWLR (Part 437) 42 of 49 pointing out that section 137 (1) of the 1999 constitution is in pari materia with section 12 (I) (f) of the Cross River State Local Government Law 2004. E F G H

With respect to the question of whether the 2nd Respondent was dismissed it was contended that although the 2nd Respondent was initially dismissed after his orderly room trial, upon his protests

and representations by his solicitors the punishment was subsequently reduced to discharge. It was submitted therefore that paragraph 2 (d) of the PDP's Special Ward and Local Government Congress Guidelines for Election of 25 Ward Delegates, Councillorship and Local Government Chairmanship Candidate, Exhibit MEU-2, paragraph B 4 (g) of the Guidelines for Local Government Council Election 2007 and Section 12 (1) (f) of the Cross River State Local Government law 2004 do not apply.

The 2nd Respondent further referred to the invitation by the C Appellants to this court to consider the issue of whether or not the 2nd Respondent was dismissed from the Nigeria Police Force and submitted that the invitation was without any legal foundation. The reason, it was argued, is that the question of whether or not the 2nd Respondent was dismissed is a question of fact and that this court would only D be competent to consider it if the leave of this court or the court below was sought and granted to raise and argue it and which leave was however not granted. It was also argued that section 12 of the Cross River State Local Government Law makes comprehensive provisions for qualification and disqualification and which do not include E *"dismissal from service"*

It was the further submission of the 2nd respondent that neither the 1st Respondent, (CROSIEC) nor has any legal authority to make provisions for qualifying or disqualifying a candidate from contesting chairmanship or councillorship elections of a Local Government Council, contending that only the Local Government Law provides for such qualifications and disqualification. 2nd Respondent argued therefore that qualifications and disqualifications contained in manuals and guidelines are ultra vires the powers vested in such bodies. Reliance F was placed on INEC vs MUSA (2003) FWLR (Part 145) 729. The powers of disqualification are only as provided for in section 10 (c) of the Cross River State independent Electoral Commission Law 2004 and section 12 (1) (f) of the Local Government Law 2004. The 2nd Respondent further relied on BUHARI vs OBASANJO (2005) 2 NWLR H (Part 910) 241 AGBEJE vs AJIBOLA (2002) FWLR (Part 92) 1677; AMAECHI vs INEC (supra). It was further submitted that the discretion and the decision as to which candidate a political party would sponsor for an election is entirely that domestic affair of the political party and that neither the Electoral Commission nor the courts can

make that political decision for the party. In support of the submission reliance was placed on ADEGOROYE vs ALLIANCE FOR DEMOCRACY (2003) FWLR (Part 176) 604; DALHATU vs TURAKI (2003) FWLR (Part 174) 247 at 261-262 and 271-272. It was urged finally that this issue be resolved in favour of the Respondents.

With respect to the 2nd issue of whether the court was right to raise the issue of locus standi of the Appellants it was submitted that locus standi being a jurisdictional issue can be raised at any time and even on appeal and reliance was placed on ANSA vs R.T.P.C.N (2008) ALL FWLR (Part 405) 1681; ADERANYE vs COMPTROLLER OF PRISONS (2000) FWLR (Part 8) 1258; GALADIMA vs TAMBAL (2000) FWLR (Part 14) 2369; Even the parties cannot by agreement confer jurisdiction on a court and so it can be raised at anytime counsel argued. He cited EKERE vs NWAIGWE (2008) FWLR (Part 127) 1101 at 1106 and MATARI vs DANGALADIMA (1993) 2 SCNJ 121; STATE vs ONAGORUWA (1992) 2 NWLR (Part 221) 33.

2nd Respondent further submitted that the court was at liberty to take up a point suo motu if it sees it fit to do so. It was argued that it was not enough to complain that the court raised the issue suo motu and that the Appellant had a duty to go further to prove that by raising the issue suo motu the court occasioned a miscarriage of justice. In support of this argument 2nd Respondent cited SAUDE vs ABDULLAH VOL.3 ACLS 144 and MADZIE vs MBAGWU LTD (2006) ALL FWLR (Part 296) 771.

It was urged finally that the appeal be dismissed for lack of merit.

In the Appellants Reply Brief, the Appellant re-acted to the notice of Preliminary objection by reproducing the said ground and contended that the ground 1 and the issue derived there from both complain of the lower court's none application of the applicable law to the issue placed before it and that it had nothing to do with facts or mixed law and facts and relied on OGBECHIE vs ONOCHE (1980) 2 NWLR (Part 123) 484; ACB LTD vs OBMAMI BRICK and STONES (NIG) LTD (1993) 5 NWLR (Part 224) 399; UBA vs G.M.B.N (1989) 3 N.W.L.R (Part 110) 374; NWADIKE vs IBEKWE (1987) 4 N.W.L.R (Part 67) 718 FOLBOD INVESTMENT LTD vs ALPHA MERCHANT BANK LTD (1996) 10 N.W.L.R (part 478) 344 at 354-355; BWAJ vs UBA PLC (2002) P.W.L.R (Part 119) 1538 at 1554 and ALAMIEYESEIGHA vs C.J.N (2005) 1 N.W.L.R (part 906) 60 at 76.

It was Appellants' further contention that even if the ground one of the ground of appeal is incompetent the remaining three grounds are competent grounds to sustain the appeal. On this submission he relied on *MOHAMMED vs OLAWUNMI* (1990) 2 N.W.L.R (part 133) 458.

B On the propriety of the Court of Appeal's setting aside of the 2nd Respondent's dismissal from the Nigeria Police when there was no counter-claim or cross action before them, the Appellant insisted that the court below was wrong since there was no counter-claim nor a
C cross-action that sought such a setting aside order. It was their further submission that a counter-affidavit would not suffice to justify such an order.

On the claim of the 2nd Respondent that his dismissal from the Nigeria Police was subsequently reduced to a discharge, the Appel-
D lants referred to Exhibit EA 1 dated 26/5/1987 at pages 61-63 of the record and Exhibit EA 2 dated 20th of April, 1993 and contended that Exhibit EA 2 could not in all probability, have been referring to Exhibit EA 1 made six years earlier and therefore that the claim was false. The Appellants also claimed that the 2nd Respondent served at
E Oron in the Akwa Ibom Command of the Nigeria Police until his dismissal and that at no time was he transferred to the Cross River Command. According to the Appellants, it was curious therefore for Exhibit EA 1 to be addressed to the Commissioner of Police Cross
F River State Police Head Quarters Diamond Hill Calabar. The Appellants urged again that the appeal be allowed.

I have given a careful consideration to the issues raised and the submission of the counsel for the parties. Let me first dispose of the preliminary objection. It was the contention of learned counsel
G for the 2nd Respondent that ground 1 of the Notice of appeal is one either of facts or mixed law and facts and for which competence therefore there should be leave either of this court or the court below. There is no doubt that that is the effect of section 233 (3) of the Constitution which provides to the effect that subject to the provi-
H sions of subsection (2) of this section, an appeal lies from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court. Subsection (2) of the section itemizes the type of questions to be raised in the ground of appeal to qualify the appeal to lie as of right to the Supreme Court.

The question now is whether ground one of the Notice of Appeal is one of facts or mixed law and facts to warrant the leave either of this Court or the Court of Appeal first sought and obtained? I am inclined to answer this question in the negative. The said ground ONE states:

“The learned Justices of the court of Appeal erred in law when they relied on the cases of SOFEKUM vs AKINYEMI (1981) 1 NCLR 135; GARBA vs UNIVERSITY OF MAIDUGURI (1986) 1 NWLR (part 18) 550 and ACTION CONGRESS vs INEC (2007) 12 NWLR (part 1048) 222 in coming to the conclusion that:

“The 2nd Respondent cannot be disqualified from contesting the election for the chairman of Akamkpa Local Government council based solely on the dismissal from service through Orderly Room trial and conviction procedure”

thereby failing to give due consideration and effect to the provisions of:

(1) Paragraph 2 (d) of the Peoples Democratic Party Special Wards and Local Government Congress Guidelines of 25 Wards Delegates councillorship candidates.

(2) Paragraph 4 (g) of CROSIEC Guidelines for Local Government Elections and

(3) Section 12 (1) (f) of the Cross River State Local Government Law 2004.

which conclusion has occasioned a miscarriage of justice”

I have taken a hard look at the above ground of appeal and I cannot find anything which makes it come within the meaning of a ground of appeal on facts. ***The ground merely complains of errors of law and does not involve or question the lower court’s assessment of facts. It merely alleges, in addition, the lower court’s wrong application of the principles in SOFKUN vs AKINYEMI (1981) 1 NCLR 135; GARBA vs UNIVERSITY OF MAIDUGURI (1986) 1 NWLR (Part 18) 550; and ACTION CONGRESS vs INEC (2007) 12 NWLR (Part 1048) 222 and the failure to interpret and give effect to the PDP Guidelines, paragraph 4 (G) of CROSIEC Guidelines for Local Government Elections and section 12 (1) (f) of the Cross River State Local Government Law 2004.*** In the circumstances therefore it was in my considered view not necessary for the leave either of this

Court or the Court of Appeal to render it a competent ground. I hold therefore that the objection was misconceived and same in accordingly struck out.

Let me now take the 2nd Respondent's first issue which in my view, effectively accommodates the Appellant's 2nd issue. The combined effect of the Appellant's 2nd issue and 2nd Respondent's first issue is:

"whether from the totality of the affidavit evidence on record there was any conclusive proof that the 2nd Respondent was disqualified from contesting the election for Chairman of Akamkpa Local Government Council?"

The resolution of this issue necessarily admits of two questions. The first is whether there is conclusive proof that following the 2nd Respondent's Orderly Room trial, he was dismissed from the Nigeria Police force? The second is whether, assuming that the 2nd Respondent was dismissed from the Nigeria Police Force following an Orderly Room Trial, such a dismissal, without more, is enough to disqualify him from contesting election for chairman of Akamkpa Local Government Council?

On the first question of whether there is conclusive proof that following an Orderly Room Trial, the 2nd Respondent was dismissed from the Nigeria Police Force the Plaintiffs/Appellants relied on Exhibits MEU-4 and MEU-5 attached to the affidavit in support of the originating summons. Exhibit MEU-4 is a letter from the office of the Assistant Inspector General of Police, Nigeria Police Zone 6 Headquarters Calabar dated 26th of September, 2007 and addressed to the People's Democratic Party, Akamkpa chapter Cross River State. The body of letter reads:-

"RE-AN APPEAL TO KNOW IF POLICE CONSTABLE MATTHEW OLORY WAS RETIRED OR DISMISSED FROM THE NIGERIA POLICE FORCE

I refer to your letter Ref No. AKM/PDP/VOL.2/005 dated 19th September, 2007 and hereby confirm that EX F/NO. 112831 PC Matthew Olory who was attached to Police Division Oron, Akwa Ibom State was dismissed from service of the Nigeria Police force in a case of stealing money, the sum of N2,900.00 (two thousand nine hundred naira) only on 5/6/86 please"

Exhibit MEU-5 is a letter from the Divisional Police Headquarters,

The Nigeria Police Oron and addresses to the Assistant Inspector General of Police, the Nigeria Police Zone 6 Headquarters Calabar and dated the 25th of September, 2007. It reads:

“RE-APPEAL TO KNOW IF MATTHEW OLORY WAS RE-TIRED OR DISMISSED. NO. 112831 PC MATTHEW OLORY

I refer to Commissioner of Police Akwa Ibom State Command Letter No. AH 7370/AIS/VOL.TI/10 dated 24/09/2007 and forward herewith photocopies of Orderly Room proceedings, appeal letter against wrongful dismissal and police investigation report on a case of stealing money against PC Matthew Olory. Furthermore, from the records available at this office Matthew Olory was dismissed from the force on 05/06/86 while the actual Orderly Room proceedings of his dismissal was not traced as a result of the fact that the police file may have been eaten up by termite

Above for your information and necessary action please.”

On his part the 2nd Respondent relied on his Exhibit EA 2 dated the 26th of April, 1993 from the office of the Commissioner of Police the Nigeria Police Headquarters Calabar Cross River State. The said letter states:

“RE NO. 112831 MATTHEW SAMUEL OLORY

With reference to your letter dated 2/4/93. I wish to inform you that your client Mr. Matthew Samuel Olory was enlisted into the Nigeria Police on 1/2/81 as a recruit constable who was allocated with force. No. 112831 Matthew Olory

1. He served for about six years before He was dismissed, the force on the ground of having pending criminal case at Oron Division where he was then serving until he was dismissed the force on 31/12/86 and was published in Cross River State Order No. 24/86 in compliance with directives from Inspector General of Police Office.

2. However, we have found out that your client was consequently discharged please”

On this question of whether the 2nd Respondent was dismissed from the Nigeria Police Force Exhibits MEU-4 and MEU-5 on the one hand and Exhibit EA 2 on the other are in conflict. While Exhibits MEU-4 and MEU-5 are on the effect that the 2nd Respondent was dismissed Exhibit EA 2 is to the effect that although he was dismissed, the dismissal was eventually reduced to a discharge. All the three documents are from the Nigeria Police Force. One may be tempted

to ask which of these documents supersedes the others? The learned trial judge also asked himself this question when at page 154 of the record he asked “(a) which of these documents (Exhibits EA 2 and MEU-4) takes precedence over the other? At the same Pages 154-155 the learned trial judge reasoned as follows:-

B “Since the Police made all Exhibits MEU-4, MEU-5 and EA 2 it
could have certainly helped this court to reach a true and just conclu-
sion in this case, if the Nigeria Police was joined as a party in this
action. The Nigeria Police Force is not a party to this suit. They are
C not represented by any officer or counsel in this case. No police of-
ficer has come to this court to attest to the issuance and existence of
the original copies of Exhibits MEU-4, MEU-5 filed by the Plaintiffs.
The 2nd defendant on the other hand has shown this court an original
copy of Exhibit EA 2. Again that alone is not enough, he ought to
D have taken steps to certify it. **Based on the aforesaid shortcomings in the Exhibits filed and relied by** (sic relied upon by) **the Plaintiffs and the 2nd defendant I hold that it will be extremely dangerous to uphold or sustain the Plaintiffs’ claim that the 2nd defendant was dismissed from the Police Force in the face**
E **of glaring and unresolved conflicts contained in Exhibits MEU-4 and EA 2.**

Neither the Plaintiffs nor the 2nd Defendant has satisfied me as to the effect of the Defendant’s discharge or dismissal from the Police Force. I therefore, with all sense of responsibility
F **decline from disqualifying the 2nd Defendant as prayed by the Plaintiffs from contesting election into the office of Chairman of Akamkpa Local Government of Cross River State Nigeria as prayed in the Plaintiffs’ originating summons.”**

G **Based on the above reasoning the trial court struck out the originating summons. The court below tended to fault the above reasoning of the trial court. I do not, with respect, see anything wrong with the above opinion and reasoning of the trial court. On this question of whether the 2nd Respondent**
H **was dismissed or merely discharged following the Orderly Room trial, the parties joined issues. The three documents, Exhibits MEU-4, MEU-5 and EA 2 all from the Nigeria Police are in conflict. The Plaintiffs/Appellants who allege the dismissal have a duty to eliminate the authenticity of the factual situation in**

Exhibit EA 2. In the absence of such elimination the onus still remains with the Appellants to prove that following the Orderly Room trial, the 2nd Respondent was dismissed.

Let me now examine the more fundamental question in this appeal. Assuming without conceding that following an Orderly Room trial for stealing the sum of N2,900.00 (two thousand, nine hundred naira) only the 2nd Respondent was dismissed from the Nigeria Police Force, would that fact, without more, constitute his legal disability from contesting election for chairman of Akamkpa Local Government Council. The Appellants founded their claim mainly on section 12 (1) (f) of the Cross River State Local Government Law 2004 which provides:-

“12 (1) A person shall not be qualified to hold the office of the Chairman or Vice Chairman if:-

(f) He has been indicted for embezzlement or fraud by a Judicial commission of inquiry or an Administrative Panel of Inquiry whose findings have been confirmed by Government.”

They also relied in paragraph 4(g) of the Guidelines for Local Government Election 2007 issued by the Cross River State Independent Electoral Commission (CROSIEC) which provides:-

“(4) A person shall not be qualified as a candidate to contest the Local Government Council Election if

(g) He has been dismissed from the public service of the federation or State or Local Government or Area Council or from any employment from the private sector.”

The Appellant have all along insisted on the 2nd Respondent's disqualification by virtue of the foregoing provisions. Relying on the cases of SOFEKUN vs AKINYEMI (1981) 1 NWLR (Part 18) 550 and ACTION CONGRESS vs INEC (2007) 12 NWLR (Part 1048) 222: the Court of Appeal per Akaahs JCA at Page 200 of the record reacted to the above provisions in the in the following terms:

“The courts have consistently maintained that trial and conviction by a court is the only constitutionally permitted way to prove the guilt and therefore the only ground for the imposition of criminal punishment or penalty for the criminal offences of embezzlement or fraud. An indictment is no more than an accusation.”

And at Page 261 of the record the court concluded:

“The 2nd Respondent cannot be disqualified from contesting

the Election for chairman of Akamkpa Local Government Council based solely on his dismissal from service through Orderly Room Trial and conviction procedure. Since the alleged offence involved theft of money he should have been subjected to the criminal process where his right to fair hearing is guaranteed. Although probity should be enthroned in our public life we owe it a duty to abide strictly by the rule of law."

I agree entirely with the above reasoning. The ground upon which the Appellants founded their allegation of the 2nd Respondent's disqualification is that he was, while serving at the Oron Police Division of Nigeria Police, dismissed from the Force on the 5th day of June, 1986 in connection with a case of stealing the sum of N2,900.00 (Two Thousand Nine. Hundred Naira) only.

Section 12 (1) (f) of the Cross River State Local Government Law which I have reproduced above is, in substance, to the same effect as section 137 (1) (i) of the 1999 Constitution of the federal Republic of Nigeria. It provides:

"137 (1) A person shall not be qualified for election to the office of president if:-

(i) he has been indicated for embezzlement or fraud by a Judicial commission of inquiry or an administrative Panel of Inquiry or a tribunal set up under the Tribunal of Inquiry Act, a Tribunal of Inquiry Law or any other law by the Federal or state Government which indictment has been accepted by the Federal or State Government respectively."

For the purpose of establishing a person's disability from holding an elective public office such as President, Governor, Chairman of Council therefore etc., it is not enough to allege that the person had been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a tribunal. Such an assertion remains a mere allegation and no more. To amount to a disability, it must be established that the person claimed to have been so indicted was tried and found guilty for the alleged embezzlement or fraud by a court or other tribunal established by law as stipulated in sections 6 and 36 of the 1999 constitution.

This principle was again articulated by this court in ACTION CONGRESS vs INEC (supra) where at Page 260, Katsina-Alu JSC (as

he then was) emphasized:-

"The trial conviction by a court is the only constitutionally permitted way to prove guilty and therefore the only ground for the imposition of criminal punishment or penalty for the criminal offences of embezzlement or fraud. Clearly the imposition of the penalty of disqualification for embezzlement or fraud solely on the basis of an indictment for these offences by an Administrative panel of inquiry implies a presumption of guilt contrary to section 36 (5) of the constitution of the Federal Republic of Nigeria 1999. I say again that convictions for offences and imposition of penalties and punishment are matters appertaining exclusively to Judicial Power..." Clearly therefore an Orderly Room trial procedure and punishment inflicted thereby cannot form the basis of a person's disqualification. For the foregoing reasons I resolve the first and main issue in favour of the Respondents.

On the issue of whether it was proper for the court below to raise the issue of locus standi of the Appellants suo motu and determine same without hearing from the parties, it has long been settled that no court is entitled to do so. The elementary principle is that it is wrong for a court to raise any issue of fact suo motu and decide upon it, without giving the parties an opportunity to be heard on it. This is so because the court is bound by and therefore confined to the issues raised by the parties. Where however the court raises an issue suo motu which it considers material for the proper determination of the case. It must give parties, particularly the party likely to be adversely affected by the issue, to be heard. See *AJWON vs AKANI* (1993) 9 NWLR (Part 316) 182 at 190; *AJAO vs ASHIRU* (1973) 11 S.C. 23 at 39-40 *ATANDA vs LAKANMI* (1974) 3 S.C. 109; *KUTI vs JIBOWU* (1972) 1 ALL NLR (Part II) 180; *R.T.E.A.N vs N.U.R.T.W* (1992) 2 N.W.L.R (Part 224) 381; *FINNIH vs IMADE* (1992) 1 N.W.L.R (Part 219) 511 at 537.

While the court has a duty to give the parties the opportunity to be heard on any issue it raises suo motu a failure to do so does not necessarily lead to a reversal of its decision. To warrant an appellate court's reversal of the decision, the Appellant must go further to show that the failure to hear him on the point occasioned some miscarriage of justice. See *IMAH vs OKOGBE* (1993) 9 N.W.L.R (Part 316) 159 at 178; *OLUDODE*

vs SALAMI (1985) 2 N.W.L.R (Part 7) 282.

As I indicated above this principle that the court ought not to raise an issue suo motu and decide upon it without hearing from the parties applies mainly to issues of fact. In some special circumstances the court can raise an issue of law or jurisdiction suo motu and without hearing the parties decide upon it. TUKOR vs GOVERNMENT of GONGOLA STATE (1989) 4 N.W.L.R (Part 117) 517 is instructive on this point. In that case although the issue of venue was not raised and argued by the parties in their briefs, it being an issue of jurisdiction was taken by the court.

In the instant case therefore the court below would be liberty to raise the issue of locus standi of the Appellants if such an issue was relevant to the proper determination of case. It is to be noted however that the issue of the locus standi of the Plaintiffs/Appellants was raised at the trial court and effectively determined therein in favour of the Appellants. The Respondent did not appeal against it and so it was not an issue before the court below. It was irrelevant and so the court's deliberation on it was an exercise in futility. It is not surprising therefore that the Appellants have not shown in any way that they suffered any miscarriage of justice by the lower court's deliberation on the issue of their locus standi. Accordingly this issue is also resolved against the Appellants.

On the whole, this appeal lacks merit and same is accordingly dismissed with costs which I asses at N50,000.00 (Fifty Thousand Naira) only in Favour of the 2nd Respondent.

MUSDAPHER JSC

I have read before now the judgment of my Lord Tabai, JSC just delivered with which I entirely agree. I too, find no merit in the appeal accordingly dismiss same and I abide by the consequential orders contained in the said lead judgment including the order as to costs.

ONNOGHEN JSC

On the 23rd day of October 2007, the appellants, then plain-

tiffs instituted suit NO. HK/25/2007 at the High Court of Cross River State, Holden at Akamkpa, in which they challenged the qualification of the 2nd respondent to contest the Local Government Election scheduled for the 3rd day of November, 2007 and sought an order directing the 1st respondent to disqualify the 2nd respondent from the said election. The action was struck out by the trial court on 2nd November, 2007 resulting in an appeal to the Court of Appeal, Holden at Calabar, in appeal No. CA/C/224/2007 which was dismissed in a judgment delivered by that court on the 8th day of July 2008. B

It is against that judgment that appellants have further appealed to this court, the issues for the determination of which appeal are as stated in the appellants' brief of argument filed by MBA E. Ukwani Esq., as follows:- C

"1. Whether the learned Justices of the Court of Appeal were right when they suo motu raised and considered the propriety of the suit and the locus standi of the appellants to challenge the nomination of the 2nd respondent to contest the election which were not live issues before then and for doing so without giving the parties, particularly the appellants, the opportunity to address them on those points?" E

2. Whether the learned Justices of the Court of Appeal properly addressed the issues placed before them and applied the appropriate and applicable law to those issues".

It should be remembered that an appeal is a rehearing of the case appealed against by the appellate court which, in effect, amounts to a complete review of the proceedings and decision appealed against. F
At pages 148 - 149 of the record, trial court made the following finding/holding:

"I have examined the affidavit of the plaintiffs and I find that they have the locus standi to bring the action.

The plaintiffs are all indigenes of Akamkpa Local Government Area. So also is the 2nd defendant. The plaintiffs are members of the PDP (People Democratic Party) Akamkpa Chapter. So also is the 2nd defendant. H

Consequently upon the aforesaid facts; the plaintiffs have the right and propriety to question the suitability of the 2nd dependent or indeed any other candidate from within their own party, who aspires to manage and control their lives, affairs and resources, in the ex-

alted office of Executive Chairman of their Local Government Area, if they are in doubt of the persons integrity credibility or ability to deliver democratic dividends to their people.

For the above reason, I do hereby hold that the plaintiffs have the locus standi, and their summons is competent before this court”.

B From the above finding/holding it is obvious that the issue of locus standi of the appellants was hotly in contention between the parties at the trial court which was duly resolved by that court in the above passage. However there was no appeal against that finding/
C holding by way of a cross appeal before the lower court neither was there any issue raised thereon before that court.

The above notwithstanding, in the judgment of the lower court at pages 256 - 257, the lower court made the following comments on the passage earlier reproduced from the judgment of the trial
D court on locus standi of the appellants:-

*“I have strong reservation about the learned trial Judges above quoted proposition on the plaintiffs’ locus standi. If allowed to stand, it will open a very wide vista for interlopers to come in and disrupt the conduct of elections. One can only imagine the confusion it will
E bring in say the Presidential or even Gubernatorial Elections where every citizen or tax payer in this country would have the right to institute an action against the nomination or sponsorship of a Presidential candidate for the election. This view featured in Egoium vs Obasangeo (1999) 7 NWLR (Pt. 611) 355 where Archike J.S.C (of
F blessed memory) was quick to point out at page 410 that:-*

*“It will be palpably erroneous for me to subscribe to the view that the appellant has a locus standi to question an election result by petition by merely stating as the appellant did in paragraph 1 in his
G petition that he is a person who had a right to contest at the election. That will leave his locus nebulous and unsatisfactory.”*

It is obvious that what the lower court stated, supra, on locus standi was clearly obiter and ought not to have been a subject of a ground of appeal to be later elevated to a status of an issue for determination. The obiter served to remind us of the true position of the law on the issue of locus standi but it never constituted the reason for the decision in the case. The reason for the decision by the lower court has to do on the issue as to whether the 2nd respondent was disqualified to contest the election in question due to the fact that he

was allegedly dismissed from service through orderly Room Trial and Conviction resulting therefrom. At pages 260 - 262 of the record, the lower court held, inter alia, as follows:-

"The courts have consistently maintained that trial and conviction by a court is the dully ground for the imposition of criminal punishment or penalty for the criminal offences of embezzlement or fraud. An indictment is no more than can accusation....."

In Action Congress vs INEC (2007) 12 NWLR (Pt. 1048) 222; Katsina-Alu, JSC re-iterated the stand of the Supreme Court that anybody indicted for embezzlement or fraud must be tried by a court of competent jurisdiction before the penalty can be allowed to stand....."

The 2nd respondent cannot be disqualified from contesting the election for Chairman of Akamkpa Local Government Council based solely on his dismissal from service through Orderly Room trial and Conviction procedure. Since the alleged offence involved theft of money he should have been subjected to the criminal process where his right to fair hearing is guaranteed. Although probity should be enthroned in our public life, we owe it a duty to abide strictly by the rule (sic) law.

I hold that it will serve no useful purpose to send the case back to the High Court for a determination of the issue whether the 2nd respondent stand dismissed from service or the dismissed was changed to a discharge.

The appeal has no merit and I accordingly dismiss it...."

The above position of the lower court is very clear and unambiguous and cannot be faulted. It is very clear that though it would have been necessary to remit the matter for rehearing to enable the trial court determine the issue of dismissal of the 2nd respondent from service, the court considered the move counter productive in view of the fact that the alleged circumstances of the dismissal of the 2nd respondent did not result from a trial by a court of competent jurisdiction as decide by the Supreme Court, the said dismissal can, therefore, not qualify as a disqualification of the 2nd respondent to contest the election in issue and consequently the appeal was found to be lacking in merit and accordingly dismissed.

It is with regards to the above reasons together with the more detailed reasons contained in the lead judgment of my learned brother

TABAI, JSC, just delivered, that I too find no merit in the appeal and accordingly dismiss same and abide by the consequential orders contained in the said lead judgment including the order as to costs.

Appeal dismissed.

B FABIYI JSC

This is an appeal against the Judgment of the Court of Appeal, Calabar Division (the court below) delivered on 8 July, 2008 in which the appellants' appeal was dismissed.

C Put briefly, the appellants desired to stop the second respondent from contesting the position of chairman of Akamkpa Local Government Council on the platform of the Peoples Democratic Party (PDP). They filed their action at the High Court banking on an alleged result of a police orderly room trial. The High Court struck out D their claims. An appeal by them to the court below was dismissed. This is a further appeal to this court.

Briefs of Arguments were filed on behalf of the parties. On the 23rd of February, 2010, when this appeal was heard, each learned counsel adopted the brief of argument filed on behalf of his client.

E The real live issue in this appeal is issue No 1 couched in the 2nd respondent's brief of argument. It reads as follows:-

"Whether the learned Justices of the Court of Appeal were right in holding that the second respondent was not disqualified from F contesting election for the office of chairman of Akamkpa Local Government Council."

Section 12 (i) (f) of the Cross River State Local Government Law, 2004 which is the applicable law provides as follows:-

"A person shall not be qualified to hold the office of Chairman G or Vice Chairman if:

(i) He has been indicted for embezzlement or fraud by a Judicial Commission of inquiry whose findings have been confirmed by the government."

H As it has been depicted earlier on in this judgment, the appellants' case at the trial court was based solely on an alleged dismissal from service of the 2nd respondent through orderly room trial and conviction procedure.

This court has consistently maintained that trial and conviction by a court is the only constitutionally permitted way to prove guilt

and therefore the only ground for the imposition of criminal punishment or penalty for the criminal offence of embezzlement or fraud. An indictment is no more than accusation. Starting with the case of Sofekun v. Akinyemi (1981) 1 NCLR 135 at 146; Fatai-Williams, CJN pronounced as follows:

“That once a person is accused of a criminal offence he must be tried in a “court of law” where the complaint of his accusers can be ventilated in public and where he can be sure of getting a fair hearing.

“No other tribunal, investigating panel or committee will do. The jurisdiction and authority of the courts of the country cannot be disturbed by either the Executive or Legislative branch of the Federal or State government under any guise or pretext whatsoever.”

The above stance has been consistently maintained by this court to-date and I strongly feel that it shall so continue to be. See: Action Congress v. INEC (2007) 12 NWLR (Pt. 1048) 222 at page 260; Ameachi v. INEC (2008) All FWLR (Pt. 4071) 1; Buhari v. INEC (2008) All FWLR (Pt. 437) 42 at 49.

From the above it is clear to me that the result of a police orderly room trial cannot form the basis for disqualifying the 2nd respondent from Contesting the office of Chairman of the stated Local Government. The court below was on a firm ground when it found as such and dismissed the appellant’s appeal. I perfectly agree with same and I hereby confirm it.

For the above reasons and those contained in the judgment of my learned brother, Tabai, JSC. I too, hereby come to the conclusion that the appeal is completely devoid of merit and should be dismissed. I order accordingly. I endorse all the consequential orders contained in the judgment of my learned brother; that relating to costs inclusive.

ADEKEYE JSC

I had a preview of the judgment just delivered by my learned brother F.F. Tabai, JSC. I agree with my learned brother’s reasoning and conclusion that grounds one and two of the grounds of appeal are grounds of mixed law and fact. Since no leave was obtained to raise and argue them - they are not competent. Both grounds are

thereby struck out. The appellants relied on the police orderly room trial to establish an offence of stealing against the 2nd respondent - which also is wrong and improper as an administrative body of the police lacks the jurisdiction and competence to try the 2nd respondent for a criminal offence. Such procedure cannot be countenanced as a
 B justifying basis for the disqualification of the 2nd respondent from contesting an election.

Sofekun v. Akinyemi (1981) 1 NCLR 135.

Okoncha v. Civil Service Commission Edo State (2004) FWLR
 C pt. 190 pg. 1304.

Garba v. University of Maiduguri (1986) 1 NWLR pt. 18 pg. 550.

Saude v. Abdullahi vol. 3 ALLC pg. 144.

State v. Onagoruwa (1992) 2 NWLR pt. 221 pg. 33.

D The process and procedure for the nomination of a candidate to be sponsored by a political party is a domestic affair of the party based on the sole discretion of the party. The court has not waived (*sic wavered*) from its position that it has no jurisdiction to question the exercise of such power by a political party. With this prevailing
 E scenario, the position canvassed by the appellants cannot be a justified ground for the disqualification of the 2nd respondent from contesting an election within the provisions of section 12 (f) of the Cross River State Local Government Law 2004 - in pan materia with section 137 (1) of the 1999 Constitution of the Federal Republic of
 F Nigeria.

Action Congress v. INEC (2007) 12 NWLR pt. 1048 pg. 222.

Obi-Odu v. Duke (2006) All FWLR pt. 337 pg. 537.

Ugwu v. Ararume (2007) 12 NWLR pt. 1048 pg. 1367.

G Amaechi v. INEC (2008) 5 NWLR pt. 1080 pg. 223,

With fuller reasons given by my learned brother, FF. Tabai, J.S.C., in the leading judgment, I also dismiss the appeal for lacking in merit. I adopt the consequential orders made in the judgment as mine

H