

SUPREME COURT OF NIGERIA
4TH FEBRUARY 2011. SC. 275/2008
CORAM:- M. MOHAMMED, J. A. FABIYI, O. O. ADEKEYE,
S. GALADIMA, B. RHODES-VIVOUR, JJSC

REAR ADMIRAL FRANCIS ECHIE AGBITI APPELLANT
AND
THE NIGERIAN NAVY RESPONDENT

PRACTICE & PROCEDURE - Substantive appeals - Argument on interlocutory decision - Propriety - Where interlocutory ruling is not appealed against - Appellant may argue the point in a substantive appeal (H1)

APPEALS - Jurisdiction - Issues - Right to raise - Appellant may raise issue of Jurisdiction on appeal without leave of court - Notwithstanding that fresh issues - Can only be raised on appeal with leave of court (H2)

APPEALS - Jurisdiction - Issues - Propriety of raising - The issue must be properly raised - As such must be one capable of being disposed of - Without the need to call additional evidence (H3)

COURT MARTIAL - Constitution of - Invoking s. 133 (7) of Armed Forces Act - Propriety - The president did not place it on record that - It was due to failure to secure proper officers - That available officers are being appointed thereunder (H4)

COURT MARTIAL - Jurisdiction - Improper constitution - Effect - Where improperly constituted - It lacks jurisdiction to try appellant - And any process issued or trial conducted by it - Is a nullity ab initio (H5)

FAIR HEARING - Objection - On likelihood of bias - Need to decide - Where there is objection on grounds of bias - A tribunal should give a ruling on the objection - Else it will be acting in breach of objector's right to fair hearing (H6)

FAIR HEARING - Breach - Allegation of bias - Proof - What needs to

be proved is real likelihood of bias - And no more (H7)

FAIR HEARING - On real likelihood of bias - Test of - The test is that there must be circumstances - From which a reasonable man would think it likely - That the decision maker would favour one side unfairly (H8)

FAIR HEARING - Breach - Effect - Being a constitutionally guaranteed right - Any breach of fair hearing in trials - As in this case - Renders same null and void (H9)

FACTS

The appellant, a former officer in the Nigerian Navy, was arraigned and tried by a General Court Martial, with two other naval officers, for sundry offences against various provisions of the Armed Forces Act, Cap A20 LFN, 2004 and criminal code Act, Cap C41, LFN, 2004. The case for the prosecution was that appellant had conspired with the other officers and wrongfully caused the release of a signed signal which led to noncompliance with the order of Chief of Naval Staff that all arrested vessels under the custody of the Nigerian Navy should be handed over to the Nigerian Police. The composition of the General Court Martial, as indicated in the convening order of 14th October, 2004 and a letter dated 22nd October, 2004, amending the order, consisted of nine (9) persons which included Rear Admiral Oni, Major-General Akpa and Air Vice Marshall Odesola, as members.

Before the commencement of trial, appellant raised two separate objections to the composition of the Court Martial. Appellant's first objection was in respect of the president and Rear Admiral Oni, both of whom he accused of bias on the grounds that each of them had said some uncomplimentary things about his service in the Navy in the past. Appellant's second objection was in respect of Major-General Akpa and Air Vice Marshall Odesola, both of whom he said were lower in rank and seniority to him and could not lawfully sit in the tribunal in view of the provisions of law that such a tribunal should consist only of officers higher in rank than officer standing trial. The tribunal not only failed to give any ruling in respect of the objection to Rear Admiral Oni's participation but peremptorily dismissed the

other aspects of appellant's objections without proper consideration. The tribunal went on to hear the matter, eventually convicted appellant on some of the counts and sentenced him to reduction in rank from Rear Admiral to Commodore on one of the counts and to dismissal from the Armed Forces on the rest. Aggrieved, appellant with leave of Court of Appeal, appealed on grounds of breach of his right to fair hearing, but Court of Appeal eventually dismissed his appeal. The dismissal was on the basis that though prior leave was sought and obtained to appeal against the final judgment of the tribunal, there was no leave sought to appeal against the interlocutory ruling on the objections raised by appellant thereat. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

(1) Having regard to the fact that the principal complaint by the appellant at the lower court was that the entire proceedings of the General Court Martial breached his right to fair hearing and that the proceedings are in contravention of the Armed Forces Act, coupled with the fact that appellant sought and was granted leave by the lower court before the commencement of his appeal, whether the lower court was not patently in error in dismissing the appeal on the ground that leave was not sought and obtained before the appeal was commenced.

(2) Whether the lower court did not breach appellant's right to fair hearing by raising the issue of the competence of the grounds of appeal suo motu and deciding same in its judgment without affording the parties the opportunity of addressing it on same before reaching its decision thereby.

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

Substantive appeals - Argument on interlocutory decision

1. I cannot but take judicial notice of Order 3 Rule 24 of the Court of Appeal Rules, 2002, which is applicable rules of procedure in 2005, when the appellant filed his Notice of Appeal before the lower court. The relevant rule stipulates that -

"No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the court from giving such decision upon the appeal as may seem just."

The Rules of procedure does not oppose arguing an interlocu-

tory appeal in a substantive appeal against a final judgment.
(p. 357 A)

APPEALS - Jurisdiction - Issues - Right to raise

- B 2. Where an appellant in his issues for determination raised questions of jurisdiction, they are undisputed questions of law. An appellant can raise such issues afresh in an appellate court. Such questions are not only competent but are also expedient in the interest of justice for an appellate court to entertain the questions.
- C An appellant is allowed to raise the question of jurisdiction on appeal without the leave of court whereas ordinarily a fresh issue can only be raised on appeal with the leave of court sought and obtained hence the issue becomes incompetent and liable to be struck out.
(p. 357 D)

D

Jurisdiction - Issues - Propriety of raising

- E 3. The issue of jurisdiction or competence when raised must be one which must be capable of being disposed of without the need to call additional evidence. The issue of jurisdiction being radically fundamental to adjudication in the Nigerian legal system must be properly raised before the court can rightly entertain that point. Where the question involves a substantial point of law, substantive or procedural and it is apparent that it will not be necessary to open up further evidence which would affect the decision, the court has a duty to
- F allow the question to be raised and points taken so as to prevent an obvious miscarriage of justice. (p. 357 G)

Invoking s. 133 (7) of Armed Forces Act - Propriety

- G 4. The President did not consider this issue of overall seniority between the three officers in his Ruling, but relied on the fact that both of them have never lost seniority and that the two were senior officers of the Nigerian Army and the Nigerian Air Force respectively. He deemed the appointment of the two officers proper going by Section
- H 133 Subsection 7 of the Armed Forces Act Cap. A20 Laws of the Federation, 2004.

It is my observation that in the circumstance of the case, the President did not properly invoke Section 133 (7). The President did not place it on record that he placed the objection of the appellant be-

fore the convening officer. There must be a report to the Tribunal to be read to the hearing of the Tribunal that due to failure of the convening officer to secure a proper replacement for both officers, he had secured this relevant consent for them to continue as members of the Tribunal regardless of the appellant's objection. The President can at that juncture invoke Section 133 (7) of the Act. This procedure was not complied with whereas the provision of Section 133 (7) is straight forward, clear and unambiguous to that effect. (pp. 360 G/361 C)

Court martial - Improper constitution - Effect

5. In the case of the State v. Olatunji (2003) 14 NWLR pt. 839 pg. 138, this court held that -

"Any court martial which is not constituted as required by the provision of the Armed Forces Decree is just like a court or a tribunal which is not properly constituted. And if a court is not properly constituted, any process issued or trial conducted by it is a complete nullity ab initio."

I adopt this foregoing reasoning as being appropriate in the circumstance of this case.

The act of omission committed by the Court Martial amounts to non-compliance with condition precedent with the trial of officers for any criminal allegations preferred against them before the court. The composition of members of the court is a condition precedent imposed by statute. Non-compliance with the provisions of the statute strips the Tribunal of competence where the Tribunal is not competent; it therefore lacks the jurisdiction to try the appellant. All the proceedings in the trial and the verdict automatically become a nullity. (p. 361 H)

Objection - On likelihood of bias - Need to decide

6. The Tribunal did not consider or rule in respect of the objection to the participation of Rear Admiral Oni. The appellant objected to Rear Admiral Oni on page 11 of Vol. 1 of the Record as follows -

"Rear Admiral Oni Thank God, all the Admirals present here were in the meeting convened by the Chief of Naval Staff that the image distorting publication by the Insider magazine of 28th June, number 29 and page 29 which indicated that I wanted the president de-

stroyed or killed and that the wife came to India when I was DA, that because the ambassador invited the wife to the mission that I wrote that the ambassador should be retired.

It was also stated in the magazine that the Navy gave me money to buy things which I didn't buy and that because I was Abachas boy I was not queried.

Also in the magazine, it was stated that every day I call the Chief of Naval Staff and he will kneel before me to pray for him. And if anybody will publish such a thing against me and the Chief of the Naval Staff told everyone of us that Rear Admiral Oni was responsible for the publication how fair can he be in that regard to try me. So I believe candidly that the CNS has appointed you to say - put him in the coffin and nail him so that he can be buried. This is my candid opinion."

I believe strongly that the foregoing objection deserve the ruling of the president of the Tribunal however brief. It is not surprising that the appellant claimed the breach of his right to fair hearing. (p. 363 D)

FAIR HEARING - Breach - Allegation of bias - Proof

7. Generally speaking, the term fair hearing connotes the impression given to an ordinary reasonable person watching the proceedings. If he goes with the impression that a person has not been treated fairly then there is a breach of fair hearing.

The springboard for raising the question of the breach of fair hearing by the appellant is bias by the president and a member of the Tribunal. It must be amplified that the real likelihood of bias is all that the appellant needs to establish and no more. (pp. 364 A/365 A)

FAIR HEARING - On real likelihood of bias - Test of

8. In effect, the test of real likelihood of bias is that there must be circumstances from which a reasonable man would think it likely or probable that the decision maker would or did in fact favour one side unfairly. The appellant also drew attention to the breach of one of the twin pillars of natural justice - which is that one should not be a judge in his own cause [nemo iudex in causa sua].

The President and Rear Admiral Oni deliberated behind closed doors on the objection raised by the appellant to their participation

in the sittings of the Tribunal, which I regard as a strong reason. The Tribunal failed to give reasons for over-ruling the objection - and did not give any consideration or investigate those against Rear Admiral Oni. Silence on this occasion is not golden but it imputes condonation of those facts exposed by the appellant. (p. 365 E)

B

FAIR HEARING - Breach - Effect

9. The right to fair hearing is a fundamental constitutional right guaranteed by Section 36 (1) of the 1999 Constitution; any breach of it particularly in trials renders same null and void.

C

The court martial which is a military court recognized by the Constitution is also always bound by the criminal rules of evidence and manifestations of fair trial. Where such is breached, the overall trial becomes a nullity.

I shall not bother to consider the other issues raised in this appeal as D the legal points raised in issue one have totally nullified the trial before the General Court Martial held between the 27th of October, 2004 to the 5th of January, 2005. This appeal has merit and it is allowed. The verdict of the Tribunal and confirmation by the Naval Board is set aside for being a nullity. (p. 366 B/F)

E

REPRESENTATION

Chief Wole Olanipekun, SAN with him, Olugbenga Adeyemi, Olabode Olanipekun, Olakunle Fapohunda, Aisha Ali (Miss), Adefolahan Adeyemi, Sanni Adamu and P. A. Ogboke for the Appellant.

F

Mr. J. A. Asemota with him, P. E. Okohue for the Respondent.

CASES REFERRED TO

Bankole v. Pelu (1991) 8 NWLR pt. 211 pg. 523

G

Adamu v. Ikharo (1988) 4 NWLR pt. 89 pg. 474

Oni v. Odeyinka (1998) 8 NWLR pt. 562 pg. 425

LPDC v. Fawehinmi (1985) 2 NWLR pt. 7 pg. 300

Oshatoba v. Olujitan (2000) 5 NWLR pt. 655 pg. 159

Merde v. Gonze Ltd. (2000) 9 NWLR pt. 673 pg. 532

H

Din v. A-G Federation (1988) 4 NWLR pt. 87 pg. 147

Odekilekun v. Hassan (1997) 12 NWLR pt. 531 pg. 56

A-G Oyo State v. Fairlakes Hotel (1988) 5 NWLR pt. 92 pg. 1

Dr. Sofekun v. Chief Akinyemi (1980) 5-7 SC 1 at pgs. 18-19

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

Okoro v. Nigerian Army Council (2000) 3 NWLR pt. 647 pg. 77

STATUTES & RULES REFERRED TO

B Armed Forces Act, Cap A20 LFN, 2004, ss. 1, 103, 133, 137 and 129

Criminal Code Act, Cap C41 LFN, 2004, s. 516

Constitution of the Federal Republic of Nigeria, 1999, s. 36 (1)

Court of Appeal Rules, 2002, O. 3 r. 24

C

LEAD JUDGMENT BY ADEKEYE JSC

This is an appeal against the judgment of the Court of Appeal, Lagos Division delivered on the 11th of December, 2007. The background facts of this case are that Rear Admiral Francis Echie Agbiti, a former officer in the Nigerian Navy now appellant before this court was tried by a General Court Martial, hereafter to be referred to as the “Tribunal”, with two other officers of the Nigerian Navy, Rear Admiral S. B. Kolawole NN/0212 and Rear Admiral A. I. Bob-Manuel NN/0276, for the under mentioned offences: -

E COUNT I

Statement of Offence

Conspiracy to commit felony contrary to Section 114, Subsection 1 of the Armed Forces Act (AFA) Cap. A20 Laws of Nigeria, 2004, and punishable under Section 516 of the Criminal Code Act F Cap C 41 Laws of the Federation of Nigeria, 2004.

Particulars of Offence

G That you, Rear Admiral F. E. Agbiti NN/0237 between February and August 2004, conspired with Rear Admirals Bob-Manuel NN/0276 and S. B. Kolawole NN/0212 and other persons unknown to facilitate and/or effect the disappearance of Vessel MT AFRICAN PRIDE from lawful custody of the Nigerian Navy.

COUNT II

Statement of Offence

H Conduct to the prejudice of service discipline contrary to Section 103, Subsection 1 Armed Forces Act Cap. 120, Laws of the Federation of Nigeria, 2004.

Particulars of Offence

That you, Rear Admiral F. E. Agbiti as CTOPS on/or about 17th

February, 2004 at Naval Headquarters Abuja, wrongfully caused the release of a signed signal DTG 17/118 February, 2004, which led to the non-compliance with the Chief of Naval Staff order that all arrested vessels inclusive MT AFRICAN PRIDE under the custody of the Nigerian Navy should be handed over to the Nigerian Police.

COUNT III

Statement of Offence

Conduct to the prejudice of service discipline contrary to Section 103 Subsection 1 Armed Forces Act Cap. A20 Laws of the Federation of Nigeria, 2004.

Particulars of Offence

That you, Rear Admiral F. E. Agbiti NN/0237 as Chief of Training and Operations (CTOPS) at Naval Headquarters Abuja between 29th January and 10th August, 2004, failed to ensure compliance with the order of the CNS conveying the directive of the Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria that all arrested vessels inclusive of MT AFRICAN PRIDE under the custody of the Nigerian Navy should be handed over to the Nigerian Police Force.

COUNT IV

Statement of Offence

Conduct to the prejudice of service discipline contrary to Section 103 Subsection 1 Armed Forces Act A20 Laws of the Federation of Nigeria, 2004.

Particulars of Offence

That you, Rear Admiral F. E. Agbiti NN/0237 as CTOPS sometime in September, 2001, at Naval Headquarters Abuja lied to the Chief of Naval Staff (CNS) that you did not authorize a signal DTG 17/118 February, 2004, which ran contrary to the order of the CNS that all arrested vessels included MT AFRICAN PRIDE in custody of the Nigerian Navy should be released to the Nigerian Police Force.

COUNT V Statement of Offence

Conduct to the prejudice of service discipline contrary to Section 103 Subsection 1 Armed Forces Act Cap. A20 Laws of the Federation of Nigeria, 2004.

Particulars of Offence

“That you, Rear Admiral F. E. Agbiti NN/0237 as CTOPS sometime in September, 2004, at Naval Headquarters Abuja told the CNS

that the vessel MT AFRICAN PRIDE which was in the custody of the Nigerian Navy had been released to the Nigerian Police Force knowing fully well that it was not true.

COUNT VI

Statement of Offence

B Alteration of service document contrary to Section 90 (b) of the Armed Forces Act Laws of the Federation of Nigeria, 2004.

Particulars of Offence

C That you, Rear Admiral F. E. Agbiti NN/0237 as CTOPS at Naval Headquarters Abuja on/or about 21st June, 2004, fraudulently made alteration to previous minutes on incoming mail with reference number 077/011 /Vol. IV/155 dated 21st June, 2004.

D The convening order for Court Martial dated the 14th of October, 2004, was signed by Vice Admiral S. O. Afolayan, Chief of Naval Staff reflected the composition of the Tribunal. This composition was amended by a letter dated the 22nd of October, 2004.

The Court Martial which was inaugurated on the 27th October, 2004, was finally constituted as follows: -

1. Rear Admiral J. M. Ajayi NN/0205 - President
 - E 2. Rear Admiral A. G. Adedede NN/0236 - Member
 3. Rear Admiral C. S. Ahanmo NN/0239 - Member
 4. Major Gen. P.A. Akpa N/2852 - Member
 5. Air Vice Marshall S. A. Odeshola NAF/475 - Member
 - F 6. Rear Admiral A. O. Oni NN/0242 - Spare member
 7. Col. J. Audu N/6698 - Judge Advocate
 8. Commander J.A. Akinnukawe NN/1011 - Clerk of the Court
 9. Commander U.N. Uchegbu NN/1240 - Provost of the Court
- Vide Part One, Vol. 1 of the Records of Appeal.

G An objection raised by the appellant to the composition of the panel and the participation of the President and Rear Admiral Oni in the Tribunal on the 29th of October, 2004, was overruled by the President.

H The appellant was arraigned on the 1st of November, 2004. At the trial, the prosecution called twenty witnesses and defence called ten witnesses. Sixty-six exhibits were tendered in the process of the trial. There was a joint trial for the first count of conspiracy and separate trials for the other charges. At the end of the trial, parties addressed the court. The Tribunal delivered its judgment on the 5th of

January, 2005. The appellant was discharged and acquitted on the charge of conspiracy - count 1, count 4 was struck out while he was found guilty of counts 2, 3, 5 and 6. The Court Martial sentenced the appellant to dismissal from the Armed Forces on each of the three counts, and on a forth count to reduction from the rank of Rear Admiral to the rank of Commodore.

Being aggrieved by the decision of the Court Martial, the appellant sought the leave of the Court-of Appeal pursuant to Section 183 of the Armed Forces Act Cap. A20 Laws of the Federation of Nigeria, 2004, to pursue an appeal at the court. The lower court granted this application on the 18th of January, 2006 (Vide page 1143 of Volume 8 of the Record). The lower court heard the appeal on the 3rd of October, 2007 and delivered its judgment on the 11th of December, 2007, wherein the court unanimously dismissed the appeal and affirmed the decision of the Court Martial and also the confirmation of the appellant's sentences by the Navy Board.

As the decision of the lower court also left the appellant dissatisfied, he made a further appeal to this court. In accordance with the Rules of this court on appeals, parties exchanged briefs. At the hearing of the appeal, parties adopted and relied on their respective briefs. The appellant distilled two issues for determination from his seven grounds of appeal in the appellant's brief filed on 1/6/09. They read as follows:-

(1) Having regard to the fact that the principal complaint by the appellant at the lower court was that the entire proceedings of the General Court Martial breached his right to fair hearing and that the proceedings are in contravention of the Armed Forces Act, coupled with the fact that appellant sought and was granted leave by the lower court before the commencement of his appeal, whether the lower court was not patently in error in dismissing the appeal on the ground that leave was not sought and obtained before the appeal was commenced.

(2) Whether the lower court did not breach appellant's right to fair hearing by raising the issue of the competence of the grounds of appeal suo motu and deciding same in its judgment without affording the parties the opportunity of addressing it on same before reaching its decision thereby.

The respondent in the brief filed on 4/1/10, formulated the

under mentioned issues for determination: -

1 (a) Whether the Court of Appeal was right in striking out the appellant's issue one distilled from grounds 1, 4 and 17 for incompetence and consequently dismissing the said grounds 1, 4 and 17 of the appellant's grounds of appeal.

B (b) Whether the Court of Appeal was right in holding that the appellant's grounds 2, 3, 5, 6, 7 and 9 of the grounds of appeal were not directed at the judgment of the trial court and whether the striking out of the said grounds of appeal together with the issues formulated by the appellant on the same grounds were improper.

C 2. Whether there was any evidence on record before the Court of Appeal to show that the appellant's right to fair hearing was breached by the General Court Martial.

D 3. Whether there was evidence on record before the Court of Appeal to show that the case against the appellant was proved beyond reasonable doubt at the General Court Martial.

Before delving into the argument and submission of parties on these issues, I am duty bound to pass a few remarks based on my observation on both the appellant and the respondent's issues for determination. Issues for determination in any appeal must flow from the grounds of appeal. They must project clearly and succinctly the substance of the complaint contained in the grounds of appeal. It is therefore wrong for an appellant or respondent to load many complaints in one issue for determination or create subsections under one issue. Issues for determination are meant to acquaint the court with the grievances of the parties in the appeal and subsequently assist the court in doing substantial justice in the determination of the issues. Where many grounds of appeal are compressed to form a, single issue, they must relate, be clear and straight forward. More-over a respondent who did not cross-appeal has no valid reason to go outside the confines of the appellant's ground of appeal to formulate the issue not directly related to the ground of appeal. I dare say that it is for reason of the complexity of Issue One, that the learned senior counsel explained in his brief, that for the purpose of logical presentation and clarity of submission, he sought the indulgence of this court to argue this issue under two broad headings as follows -

(a) The effect of the leave sought by the appellant and granted by the lower court on 18th January, 2006.

(b) The nature of the complaints of the appellant in the appeal before the lower court.

I attach utmost importance to leg (b) of the issues which clearly challenged the entire proceedings of the Tribunal on grounds of competence and the jurisdiction of the Tribunal to try the appellant. Two of these complaints raise the questions of the breach of the appellant's right to fair-hearing and the constitution of the Court Martial which tried the appellant. These two questions on the other hand raise the issue of jurisdiction. The issue of jurisdiction is very vital and fundamental in the Nigerian jurisprudence. The grounds of appeal are 1, 2, 3, 4, 5, 6, 7 and 17.

For ease of reference and for the purpose of clarity, I shall state the grounds of appeal relevant to jurisdiction as grounds 1, 2 and 7 and 17 which read

Ground 1:

The entire proceedings of the General Court Martial are a nullity as same violate the express provisions of Section 36 of the Constitution of the Federal Republic of Nigeria, 1999, guaranteeing the appellant's right to fair hearing read together with Section 137 of the Armed Forces Act Cap. A20 Laws of Nigeria, 2004.

Ground 2:

The entire trial and conviction of appellant by the General Court Martial consisting of officers who are lower to the appellant in seniority are a nullity as same violate the clear provisions of Section 133 (3) (b) of the Armed Forces Act Cap. A20 Laws of the Federation of Nigeria, 2004.

Ground 7:

The entire proceedings of the General Court Martial are a nullity as the Court Martial was not properly constituted.

Ground 17:

The General Court Martial erred in law and violated appellant's right to fair hearing by denying him the opportunity to give further evidence in respect of his allegations of bias against the President and other member (s) of the General Court Martial as well as the implication of the Chief of Naval Staff in the charges brought against him.

The entire proceedings of the General Court Martial commenced on 27th October, 2004, and terminated on 5th January, 2005.

The learned senior counsel submitted in his argument that these

complaints of fair hearing and jurisdiction raised fundamental issues of lack of due process, non-fulfillment of conditions precedent to the exercise of jurisdiction and breach of the fundamental provisions of the Armed Forces Act by the Tribunal in the course of its proceedings. There was no legal justification for the lower court to have treated those grounds of appeal relating to them as being incompetent.

On the issue of the breach of the appellant's right to fair hearing, the learned senior counsel picked upon the objection of the appellant to the participation of Rear Admiral Ajayi and Rear Admiral Oni both President and member of the Court Martial respectively. The learned senior counsel thereupon emphasized that the very foundation upon which the pillars by which any process of adjudication is founded upon is that every citizen in the determination of his rights and obligations must be accorded fair hearing and cited Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria. Further, that the doctrine of fair hearing has been employed to express all the requirements of common law for the observation of the Rules of Natural Justice in the determination of their civil rights and obligations of citizens. The appellant accused both the president of the Court Martial and Rear Admiral Oni, a member of the allegation of bias. In the opinion of the learned senior counsel, the Tribunal trivialized on the objections and summarily dismissed them. The Tribunal further infringed on the appellant's right to fair hearing when the president who was accused of bias acted as judge in his cause to pronounce judgment, discharged and acquitted himself of the allegations behind the bias against the doctrine of fair hearing that one should not be a judge in his own cause - *nemo iudex in causa sua*. The learned senior counsel amplified on the issue of bias that the likelihood of bias is all that the appellant needs to establish and no more. He cited cases

Abiola v. Federal Republic of Nigeria (1995) 7 NWLR pt. 405

pg. 1

Oni v. Odeyinka (1998) 8 NWLR pt. 562 pg. 425.

Mohammed v. The Nigerian Army (1988) 7 NWLR pt. 557 pg. 232.

The learned senior counsel concluded that the odds weighed against the appellant. On the composition of the Tribunal, the learned senior counsel cited Section 129 of the Armed Forces Act Cap. A20 Vol. 1 Laws of the Federation, 2004, which stipulates that there shall

be a general court consisting of a president and four members, and a special court martial consisting of a president and not less than two members. Also, Section 133 (3) (b) of the Act makes provision for the constitution of a court martial. In both sections, the Armed Forces Act employed the use of the word Shall - which means the act to be performed is mandatory and peremptory. Any court martial whose constitution is not in tune and conformity with the mandatory provisions of the Act is illegal. The composition of the Tribunal was clearly prejudicial to the interest of the appellant. The appellant also raised objection to the composition of the tribunal in that his colleagues Major-General Akpa and Air Vice Marshall Odesola and himself have seniority differential as he got promoted to Rear Admiral three days over above them going by the Armed Forces Decree 105 as amended in 1993, Section 133 (3). The two officers are lower in rank and seniority to him. The Tribunal relied on Section 133 (7) of the Armed Forces Act to justify the appointment of the two officers, whereas that section of the Act cannot save the irregularity and illegality of its composition simpliciter without meeting the conditions stipulated in Section 133 (7). The appellant cited the case of Okoro v. Nigerian Army Council (2000) 3 NWLR pt. 647 pg. 77. The evidence and objection of the appellant to the effect that he is senior to these two officers remain uncontradicted - this court is urged to declare the Tribunal as having been improperly constituted and the trial conducted by it a nullity ab initio. On the interpretation of what is the doctrine of fair hearing the appellant referred to cases as follows -

Denloye v. Medical Practitioners Disciplinary Committee (1968) 1 All NLR pg. 306.

Dr. Sofekun v. Chief Akinyemi (1980) 5-7 SC 1 at pgs 18-19.

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

LPDC v. Fawehinmi (1985) 2 NWLR pt. 7 pg. 300.

Section 36 (1) of the 1999 Constitution.

The respondent vehemently opposed the objection to the appeal now lodged against the constitution of the panel in that the appellant did not appeal against the Ruling of the Tribunal given on the 27th of October, 2004. That was the reason why the lower court struck out the issue predicated on the appellant's challenge to the composition of the Tribunal and dismissed the related grounds of appeal 1, 4,

17, as not arising from the judgment of the lower court delivered on the 5th of January, 2005. The judgment of the General Court Martial against the appellant at pages 302-307 of Volume 6 of the Records concentrated on the charges against the appellant - it did not re-open the ruling delivered on the 27th of October, 2004, on the composition of the Tribunal. The leave to appeal granted by the lower court to the appellant did not cover the ruling of the Court Martial delivered on the 23rd of October, 2004. The ruling though was appealable to the lower court, the appellant failed to do so. On the objection of the appellant to the participation of the president and Rear Admiral Oni, the respondent enumerated the grounds for the objection.

The appellant objected to the participation of the President Rear Admiral Ajayi on the grounds that he once told the appellant on phone that the appellant was his problem in the Navy and therefore he was not sure he would receive a fair trial. The appellant suspected that Rear Admiral Oni had something to do with a publication in the Insider Weekly Magazine of 8th June, 2004, at page 29 wherein the appellant was libeled vide pages 11-12 volume 1 of the Record of appeal. The President of the Tribunal ruled that the objection lacked merit. The appellant held that his right to fair hearing was equally infringed in that the president of the Tribunal whom the appellant accused of bias was also a judge in his own cause - discharging and acquitting himself contrary to the age long doctrine that one should not be a judge in one's own cause. The respondent replied that the objection to membership of a Court Martial is predicated on Section 137 of the Armed Forces Act Cap. A20 Laws of the Federation of Nigeria 2004, Chapter 17 of BR 11 (Manual of Naval Law) 1981. According to the foregoing sections, the decision in an objection to the constitution of the Tribunal was not made by the president single handedly but also by other members of the panel who considered the reasonableness or otherwise of the objection and voted on it. The president had a duty to announce the decision of the Tribunal and the reading of the ruling by the president did not make the president a judge in his own cause as erroneously claimed by the appellant's learned senior counsel. The respondent, urged this court to hold that the objection to the president and spare member of the General Court Martial was rightly overruled and in accordance with the law.

The respondent referred to the submission of the learned counsel for the appellant, that the right of the appellant to fair hearing was violated because the General Court Martial was not properly constituted. The respondent referred to Section 129 of the Armed Forces Act creating a General Court Martial and the Special Court Martial and the respective members. The composition of the General Court Martial is depicted in Section 133 of the Armed Forces Act. The respondent submitted that in the composition of the Court Martial, the convening order did not depart from the format known to law. While this court is to take judicial notice of the fact that the three arms of the Armed Forces - the Army, Navy and Air Force have their different nomenclatures and terminologies. In the forces - a Major General in the Army is called a Rear Admiral in the Navy and an Air Vice Marshall in the Air Force - the use of the nomenclature "spare member" instead of "waiting member" and "clerk of court" instead of "liaison officer" are simply naval terminologies. The court must hold that the Tribunal was properly constituted. On the objection to participation of officers alleged to be junior in rank to the appellant, this court is urged to nullify the proceedings of the General Court Martial, as the Court Martial was not properly constituted in accordance with Section 133 (3) (b) of the Armed Forces Act. The respondent's contention is that the appellant did not support his claim to seniority to Major-General Patrick Akpa and AVM Odesola with documentary evidence like promotion letters/gazettes, senior rolls of the Army, Navy and Air Force showing his seniority vis-a-vis that of the officers objected to and that his two colleagues had lost their seniority. The release of the two very senior Generals from the Army and the Air Force to take part in the Naval Court Martial was done pursuant to the provision of section 133 (7) of the Armed Forces Act. In accordance with the foregoing section of the Act the two generals took permission of the Chief of Defence Staff to participate in the Naval Court Martial in Lagos for the period of two months. The appellant agreed that they were both his peers in the Nigerian Army and Nigeria Air Force. This court is urged to hold that the General Court Martial rightly overruled the appellant's objection while the case of Okoro and Nigerian Army Council cited by the appellant is irrelevant to this appeal.

I have given a microscopic consideration to the copious sub-

- mission of both parties on the legal questions raised in this appeal. It is no gainsaying that the issues of breach of fair hearing and jurisdiction being fundamental and threshold issues, this court has a duty to make a finding on them. The respondent however directed the attention of this court to the fact that Court of Appeal Lagos granted
- B leave to appeal against the judgment of the General Court Martial sitting in Lagos delivered on 5th January, 2005 and confirmed by the Naval Board on 21/6/05 simpliciter and “ not leave to argue a preliminary matter which the Court Martial overruled on the 27th of
- C October, 2004. The appellant did not take out interlocutory appeal against the ruling of the General Court Martial. The appellant proceeded to take full part in the proceeding which followed thereafter. The notice of appeal stated that his appeal was against the judgment of the General Court Martial delivered on the 5th of January, 2005.
- D Grounds 1, 4, 17 of his grounds of appeal and issue one for determination distilled from those grounds had absolutely nothing to do with the judgment he sought leave of the lower court to appeal against. The 1st issue dwelt wholly on the interlocutory matters raised by the appellant on the very first day at the Court Martial, the 27th of October, 2004. The Court of Appeal struck out the 1st issue distilled from
- E 1st, 4th and 17th grounds of appeal where the arguments canvassed thereupon are directed at the appellant’s objection to the membership of the President and two members of the Court Martial at the hearing of the appeal suo motu. The appellant is of the impression
- F that the lower court was wrong as the court gave the appellant leave to file and argue his appeal against the decision of the Tribunal, the Notice and grounds of appeal attached to the application was validated and deemed as properly filed and served by the order of the
- G lower court which was made on 18th January, 2006. Any procedural deficiency in the competence of any of the grounds of appeal contained therein had been absolutely and comprehensively cured by the court by which the appeal was deemed as properly filed and served.
- H On gleaning through the Records of this court particularly volume 1 at pages 3-16 where the appellant objected to the participation of the President of the Tribunal and Rear Admiral Oni member of the Tribunal. The appellant also objected to the composition of the Tribunal, particularly to two serving members - Odesola and Akpa,

the ruling of the President of the Tribunal could have given birth to an interlocutory appeal instantly as the nature of the objection revolves around the competence of Tribunal, which is a fundamental and radical issue of jurisdiction. **I cannot but take judicial notice of Order 3 Rule 24 of the Court of Appeal Rules, 2002, which is applicable rules of procedure in 2005, when the appellant filed his Notice of Appeal before the lower court. The relevant rule stipulates that -**

“No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the court from giving such decision upon the appeal as may seem just.”

The Rules of procedure does not oppose arguing an interlocutory appeal in a substantive appeal against a final judgment. Where an appellant in his issues for determination raised questions of jurisdiction, they are undisputed questions of law. An appellant can raise such issues afresh in an appellate court. Such questions are not only competent but are also expedient in the interest of justice for an appellate court to entertain the questions.

Adeyemi v. Opeyomi (1976) 9-10 SC 31.

Fadiora v. Gbadebo (1978) 3 SC 219.

An appellant is allowed to raise the question of jurisdiction on appeal without the leave of court whereas ordinarily a fresh issue can only be raised on appeal with the leave of court sought and obtained hence the issue becomes incompetent and liable to be struck out. I shall repeat with emphasis that an appellant does not require leave to raise the issue of jurisdiction, as it can be raised at any stage of the proceedings and in any manner. **The issue of jurisdiction or competence when raised must be one which must be capable of being disposed of without the need to call additional evidence. The issue of jurisdiction being radically fundamental to adjudication in the Nigerian legal system must be properly raised before the court can rightly entertain that point. Where the question involves a substantial point of law, substantive or procedural and it is apparent that it will not be necessary to open up further evidence which would affect the decision, the court has a duty to allow the**

question to be raised and points taken so as to prevent an obvious miscarriage of justice.

- Oshatoba v. Olujitan (2000) 5 NWLR pt. 655 pg. 159.
 A-G Oyo State v. Fairlakes Hotel (1988) 5 NWLR pt. 92 pg. 1.
 Bankole v. Pelu (1991) 8 NWLR pt. 211 pg. 523.
 B Din v. A-G Federation (1988) 4 NWLR pt. 87 pg. 147.
 Adamu v. Ikharo (1988) 4 NWLR pt. 89 pg. 474.
 Odekilekun v. Hassan (1997) 12 NWLR pt. 531 pg. 56.
 Merde v. Gonze Ltd. (2000) 9 NWLR pt. 673 pg. 532.
 C Beecham Group v. Esdee Foods Ltd. (1985) 3 NWLR pt. 11
 pg. 112.
 Niger Progress Ltd. v. North-East Line Corp. (1989) 3 NWLR
 pt. 107 pg. 68.
 Petrojessica Enterprises Ltd. v. Leventis Technical Co. Ltd.
 D (1992) 5 NWLR pt. 244 pg. 675.
 FRN v. Zebra Energy Ltd. (2002) 3 NWLR pt. 754 pg. 471.

- Eze v. A-G Rivers State (2001) 18 NWLR pt. 746 pg. 524.
 Mercantile Bank of Nigeria Plc. v. Nwobodo (2000) 3 NWLR
 E pt. 648 pg. 297.

Numerous decisions of this court referred to jurisdiction of a court as the basis, foundation and life wire of access to court in adjudication under Nigerian civil process. Jurisdiction has been defined as a term of comprehensive import embracing every kind of judicial
 F action. It has different meanings in different contexts. It is therefore a radical and crucial question of competence, for if the court has no jurisdiction to hear the case, the proceedings are and remain a nullity, however well-conducted and brilliantly decided they might otherwise have been, as a defect in competence is not intrinsic but rather
 G extrinsic to the adjudication.

Therefore, a court is competent to entertain a case when -

- (a) It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for
 H one reason or another, and
 (b) The subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction,
 (c) The case comes before the court initiated by due process of

the law and upon fulfillment of any condition precedent to the exercise of jurisdiction

Madukolu v. Nkemdilim (1962) 2 SCNLR 341 at pg. 348.

As courts are set up under the Constitution, Decrees, Acts, Laws and Edicts, they cloak the courts with the powers and jurisdiction of adjudication. B

The Armed Forces Act Cap. A20 Vol. 1 Laws of Federation, determine the composition and scope of jurisdiction of the General and Special Court Martial. Where there is a challenge to the jurisdiction of a court, it must first assume jurisdiction to consider whether it has or lacks jurisdiction. This was the procedure adopted by the General Court Martial constituted to adjudicate upon the charges preferred against the appellant on the 27th of October, 2004 (vide page 3 of the Records. C

Barclays Bank v. CBN (1976) 1 ALL NLR pt. 1 pg. 409. D

Funduk Engineering Ltd. v. McArthur (1995) 5 NWLR pt. 396 pg. 418.

Oruobu v. Anekwe (1997) 5 NWLR pt. 506 pg. 618.

Osadebay v. A-G Bendel State (1991) 1 NWLR pt. 169 pg. 525. E

Nwosu v. Imo State Environmental Agency Sanitation (1990) 2 NWLR pt. 135 pg. 688.

Section 129 of the Act provides that -

There shall be for the purpose of carrying out the provisions of this Act, two types of court martial that is - F

(a) A General Court Martial, consisting of a president and not less than four members, a waiting member, a liaison officer and a judge advocate.

(b) A special court martial consisting of a president and not less than two members, a waiting member, a liaison officer and a judge advocate. G

The foregoing was complied with in the composition of the panel for the General Court Martial vide pg. 3 of vol. 1 of the Records of Appeal. Section 133 subsections (1) and 3 (b) of the Act provides H as follows: -

“Subject to the provisions of sections 128 and 129 of this act, a court martial shall be duly constituted if it consists of the president of the court martial and not less than two other officers and a waiting

member.”

3 (b) “when an officer is to be tried, the president shall be above or of the same or equivalent rank and seniority of the accused and the members thereof shall of same but not below the rank and seniority of the accused.”

B The operative word in both sections of the Armed Forces is shall.

The statutory interpretation given to the word shall by the courts give the connotation of a word of command or exhortation. It denotes obligation and gives no room for discretion. Therefore, the word shall engaged in Sections 129 and 133 of the Armed Forces Act gives the unmistakable impression that what was to be done is mandatory and peremptory.

Ifezue v. Mbadugha (1984) 15 SCNLR 427.

Mokelu v. Fed. Commissioner for Works & Housing (1976)

D SC pg. 35.

Aroyewun v. Adebajji (1976) 11 SC 33.

Amokeodo v. I. G. P. (1999) 6 NWLR pt. 607 pg. 467.

Bankoshi v. Chief of Naval Staff (2004) 15 NWLR pt. 896 pg. 268 at 291.

E Katto v. CBN (1991) 9 NWLR pt. 214 pg. 126 at 147.

Achineku v. Ishagba (1988) pt. 89 pg. 411.

Mawada v. First Bank of Nigeria Plc. (1997) 4 NWLR pt. 500 pg. 497.

F The convening order dated the 14th of October, 2004, as amended reflected how the court martial was constituted was read to the accused. The appellant objected to two of the members of the Tribunal who are junior to him in rank. He revealed during the inaugural sitting that though Major General Akpa and Air Vice Marshal

G Odesola were his colleagues as they started in the academy on the same day in the same course, he at the time of trial enjoys three days seniority over them by virtue of the Armed Forces Decree 105 as amended in 1993 section 133 subsection 3, they are not therefore totally of the same seniority and rank with him. ***The President did***

H ***not consider this issue of overall seniority between the three officers in his Ruling, but relied on the fact that both of them have never lost seniority and that the two were senior officers of the Nigerian Army and the Nigerian Air Force respectively. He deemed the appointment of the two officers proper going***

by Section 133 Subsection 7 of the Armed Forces Act Cap. A20 Laws of the Federation, 2004.

Section 133 (7) of the Armed Forces Act reads –

“If a court martial is to be convened a place where in the opinion of the officer, the necessary number of officers having suitable qualifications is not available to form the court martial and cannot be made available with due regard to the circumstances the convening officer may, with the consent of a proper superior authority appoint any service officer as president of a court martial in lieu of or as any other member of the court in lieu of or in addition to any service officer or officers.”

It is my observation that in the circumstance of the case, the President did not properly invoke Section 133 (7). The President did not place it on record that he placed the objection of the appellant before the convening officer. There must be a report to the Tribunal to be read to the hearing of the Tribunal that due to failure of the convening officer to secure a proper replacement for both officers, he had secured this relevant consent for them to continue as members of the Tribunal regardless of the appellant’s objection. The President can at that juncture invoke Section 133 (7) of the Act. This procedure was not complied with whereas the provision of Section 133 (7) is straight forward, clear and unambiguous to that effect.

The reply of the respondent to this issue of the constitution of the panel is in my opinion shallow and extremely evasive. The issue of the composition of a Tribunal is statutory as it is embodied in the Armed Forces Act, 2004 and this must be strictly complied with. The convening officer had to invoke Section 133 (1) (a) (b) of the Armed Forces Act. The operative words in Section 133 (ii) (a) (b) are rank and seniority.

I cannot but make comparative analysis with the other professions because I believe that it is a universal practice in every professional career that the time of release of results and promotions are vital factors in determining seniority and rank. For instance, in the legal profession, it is the date of call to Bar of prospective legal practitioners which determine their seniority. The position in the forces cannot be an exception. ***In the case of the State v. Olatunji (2003)***

14 NWLR pt. 839 pg. 138, this court held that -

“Any court martial which is not constituted as required by the provision of the Armed Forces Decree is just like a court or a tribunal which is not properly constituted. And if a court is not properly constituted, any process issued or trial conducted by it is a complete nullity ab initio.”

Madukolu v. Nkemdilim (1962) 2 SC NLR 34.

I adopt this foregoing reasoning as being appropriate in the circumstance of this case.

The act of omission committed by the Court Martial amounts to non-compliance with condition precedent with the trial of officers for any criminal allegations preferred against them before the court. The composition of members of the court is a condition precedent imposed by statute. Non-compliance with the provisions of the statute strips the Tribunal of competence where the Tribunal is not competent; it therefore lacks the jurisdiction to try the appellant. All the proceedings in the trial and the verdict automatically become a nullity.

Madukolu v. Nkemdilim (1962) ALL NLR pt. 2 pg. 581.

Sule v. Nigeria Cotton Board (1985) 2 NWLR pt. 5 pg. 17.

Atolagbe v. Awuni (1997) 9 NWLR pt. 522 pg. 536.

CCB Nig. Plc. v. A-G Anambra State (1992) 8 NWLR pt. 261 pg. 528 at 556.

Okereke v. Yar'Adua (2008) 12 NWLR pt. 1100 pg. 95.

The appellant also objected to participation of the President of the Court Martial - Rear Admiral J. M. Ajayi and Rear Admiral Oni as a member of the Tribunal. He gave reasons in Volume 1 of the Record pages 3-16 that he had crossed path with the president who through a telephone conversation dubbed him the appellant as his problem in the Navy. Rear Admiral Oni was involved in a publication in the Insider Weekly Magazine.

The objection of the appellant to the two officers participation in his trial by the Court Martial was on the ground of bias.

Section 137 (1) of the Armed Forces Act Cap A20 Vol. 1 Laws of Nigeria 2004 stipulates that

“Any accused about to be tried by court martial shall be entitled to object on any reasonable grounds, to any member of the court martial or the waiting member of the court martial whether

appointed originally or in lieu of another officer.”

The president considered the objections which are three in number and dismissed them as follows -

(1) *“That the president said in 2002 that he, the accused was his problem in the Navy. The president never had such a conversation.*

(2) *That the president has said recently that himself, the accused and Rear Admiral Adesokan conspired to retire him. This allegation is incorrect as the president is still a serving officer in the Nigerian Navy.*

(3) *That the president requested him the accused to send a particular officer on a course abroad and that because the request was not met, the president could as such be biased. The notion cannot be true because the criteria for overseas courses are well respected without prejudice by the president in his capacity as a very senior naval officer. Therefore your objection lacks merit and is overruled.”*

The Tribunal did not consider or rule in respect of the objection to the participation of Rear Admiral Oni. The appellant objected to Rear Admiral Oni on page 11 of Vol. 1 of the Record as follows - *“Rear Admiral Oni Thank God, all the Admirals present here were in the meeting convened by the Chief of Naval Staff that the image distorting publication by the Insider magazine of 28th June, number 29 and page 29 which indicated that I wanted the president destroyed or killed and that the wife came to India when I was DA, that because the ambassador invited the wife to the mission that I wrote that the ambassador should be retired.*

It was also stated in the magazine that the Navy gave me money to buy things which I didn’t buy and that because I was Abachas boy I was not queried.

Also in the magazine, it was stated that every day I call the Chief of Naval Staff and he will kneel before me to pray for him. And if anybody will publish such a thing against me and the Chief of the Naval Staff told everyone of us that Rear Admiral Oni was responsible for the publication how fair can he be in that regard to try me. So I believe candidly that the CNS has appointed you to say - put him in the coffin and nail him so that he can be buried. This is my candid opinion.”

I believe strongly that the foregoing objection deserve the ruling of the president of the Tribunal however brief. It is not surprising that the appellant claimed the breach of his right to fair hearing. Generally speaking, the term fair hearing connotes the impression given to an ordinary reasonable person watching the proceedings. If he goes with the impression that a person has not been treated fairly then there is a breach of fair hearing. In the Nigerian legal system, fair hearing is not only a common law right but a constitutional right. By virtue of Section 36 (1) of the 1999 Constitution, the purport is that in the determination of his civil rights and obligations, a person is entitled to a fair hearing within a reasonable time by a court or other tribunal established by law.

Fair hearing requires the observance of the twin pillars of the Rules of Natural justice namely -

(a) Audi alteram partem that is hear the other side.

(b) Nemo iudex in causa sua that is, no one should be a judge in his own cause. This is the rule against bias.

In every circumstance and in the legal parlance, fair hearing requires

(a) Fairness of proceedings among other things requires that a person who is tainted by likelihood of or actual bias should not take part in the decision making process where the adjudicator is under a duty to act fairly.

(b) The person whose conduct is the subject of inquiry should have an opportunity of knowing what evidence has been given against him and to challenge hostile witness.

Bamgboye v. University of Ilorin (1999) 10 NWLR pt. 622 pg. 290.

Udor Akagba v. Parco Ltd. (1993) 4 NWLR pt. 98 pg. 419.

Adigun v. A-G Oyo State (1987) 1 NWLR pt. 53 pg. 678.

Deduwa v. Okorodudu (1976) 9-10 SC pg. 329

Okafor v. A-G Anambra State (1991) 3 NWLR pt. 200 pg. 59.

Ogba v. State (1992) 2 NWLR pt. 222 pg. 164.

Mohammed v. Kano Native Authority (1968) 1 ALL NLR pg. 424.

The springboard for raising the question of the breach of fair hearing by the appellant is bias by the president and a member of the Tribunal. It must be amplified that the real likelihood of bias is all that the appellant needs to establish and no more. The court considered this in the case of Abiola v. Federal Republic of Nigeria 7 NWLR pt. 405 pg. 1 at pages 15-16 where the Supreme Court held that -

"In considering whether there was a real likelihood of bias, the court does not look at the mind of the Chairman of the Tribunal or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that in the circumstances, there was a real likelihood of bias on his part, then he should not sit. Nevertheless, there must be real likelihood of bias.

The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking the judge was biased."

In effect, the test of real likelihood of bias is that there must be circumstances from which a reasonable man would think it likely or probable that the decision maker would or did in fact favour one side unfairly. The appellant also drew attention to the breach of one of the twin pillars of natural justice - which is that one should not be a judge in his own cause [nemo iudex in causa sua].

The President and Rear Admiral Oni deliberated behind closed doors on the objection raised by the appellant to their participation in the sittings of the Tribunal, which I regard as a strong reason. The Tribunal failed to give reasons for over ruling the objection - and did not give any consideration or investigate those against Rear Admiral Oni. Silence on this occasion is not golden but it imputes condonation of those facts exposed by the appellant. The basic criteria and attributes of fair hearing are -

(a) That the tribunal or court must hear both sides not only in the case but also on all material issues in the case before reaching a decision.

(b) That having regard to all the circumstances in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done.

The right to fair hearing is a fundamental constitutional right guaranteed by Section 36 (1) of the 1999 Constitution; any breach of it particularly in trials renders same null and void.

The court martial which is a military court recognized by the Constitution is also always bound by the criminal rules of evidence and manifestations of fair trial. Where such is breached, the overall trial becomes a nullity.

There is under the fundamental Rights procedure embodied in the Constitution of this country, the presumption of innocence in favour of an accused. Hence his defence must be properly considered however bereft with lies, weak, stupid or fanciful or improbable they may appear to be. Vide Section 35 of the 1999 Constitution and cases like

Udofia v. DPP Digest of Supreme Court Cases Vol.10 pg. 343.

Green v. Queen (1955) 15 WACA 73.

Sanusi v. The State Digest of Supreme Court Cases Vol. 10 pg.

348.

Nwuzoke v. The State (1988) 1 NWLR pt. 72 pg. 529.

Asanya v. The State (1991) 3 NWLR pt. 180 pg. 442.

Ani. v. The State (2003) 11 NWLR pt. 830 pg. 142.

I shall not bother to consider the other issues raised in this appeal as the legal points raised in issue one have totally nullified the trial before the General Court Martial held between the 27th of October, 2004 to the 5th of January, 2005. This appeal has merit and it is allowed. The verdict of the Tribunal and confirmation by the Naval Board is set aside for being a nullity.

This court appreciates the fact that the offences preferred against the appellant are of great concern to Nigeria as a nation economically and security wise and nobody ought to be left off on technicalities on them but rules of evidence and statutory criminal procedure must be followed to the letter in the prosecution of crimi-

nal cases. The procedure may appear to be onerous or tedious at a time when all agitations are for speedy trials. The nullification of this trial is however without prejudice to the appellant being re-arraigned before another panel of Court Martial.

MOHAMMED JSC

I have had the privilege of reading in draft the judgment of my learned brother Adekeye, JSC which has just been delivered. I agree entirely with the reasoning and conclusion reached in resolving the main issue on jurisdiction in this appeal which attacked the proceedings of the General Court Marshal which tried and convicted the Appellant being not properly constituted as prescribed by the Armed Forces Act.

It is quite clear from the record that when the Appellant was given the opportunity in accordance with Section 137 of the Armed Forces Act Cap. A20 Laws of the Federation, 2004, to object to the membership of the Panel of the General Court-Martial that was going to try him, the Appellant responded positively by raising objection to the participation of two members of the panel namely - Major-General Akpa and Air-Vice Marshal Odesola on the grounds that the two mentioned members were his juniors in rank and seniority even though by only 3 days. See pages 12 - 16 of Vol. 1 of the record. The General Court Martial considered this objection but overruled the Appellant's objection describing it as a mere technicality raised by the Appellant on the then recent promotion exercise that took place while the case of the Appellant was awaiting trial.

The law on the effect of any General Court Martial not properly constituted, had long been well settled by this court in the case of State v. Olatunji (2003) 14 N.W.L.R. (Pt. 839) 138 at 161 where Kalgo JSC said -

"Any General Court-Martial which is not convened as required by the provisions of the Arms Forces Act, is just like a Court or Tribunal which is not properly constituted."

This decision is in line with the decision of this court in the case of Modukolu & Ors. v. Nkemdelim & Ors. (1962) 2 S. C. N. L. R. 341 at 348 where the Court specified conditions to be satisfied before any Court of Law can exercise jurisdiction. These conditions include -

(a.) That the court is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another.

(b.) That the subject matter of the case is within the court's jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction.

(c.) That the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

C Any defect in competence of court is fatal to its jurisdiction because the proceedings are a nullity however well conducted and decided, the defect being extrinsic to the adjudication. See also *Tukur v. Governor of Gongola State* (1989) 4 N.W.L.R. (Pt. 117) 513 and *Alade v. Alemuloke & Ors.* (1988) 1 N.W.L.R. (Pt. 89) 201 at 204.

D It is quite clear that one of the requirements that must be satisfied before any court can exercise jurisdiction is that the court must be properly constituted as regards members and qualifications of the members such that no member of the court is disqualified from being a member of the court having regard to the provisions of the statute establishing the court. The provisions of the statute establishing the court of the General Court Marshal dealing with the constitution of the court are Sections 129 and 133 of the Armed Forces Act Cap. A20 Laws of the Federation, 2004, where sub-sections (1), (2) and (3) of Section 133 state -

Constitution of Courts Martial

G 133. (1) Subject to the provisions of Sections 128 and 129 of this Act, a Court Martial shall be duly constituted if it consists of the President of the Court-Martial, not less than two other officers and a waiting member.

(2) An officer shall not be appointed to be a member of a Court-Martial unless he is subject to service law under this Act and has been an officer in any of the services of the Armed Forces for a period amounting in the aggregate to not less than five years.

H (3) The President of a Court Martial shall be appointed by order of the convening officer and shall not be under the rank of Major or corresponding rank, unless in the opinion of the convening officer, a major or an officer of corresponding rank having suitable qualifications is not, with due regard to the public service, available,

so however that -

(a) the President of a Court Martial shall not be under the rank of a Captain or a corresponding rank; and

(b) where an officer is to be tried, the President shall be above or of the same or equivalent rank and seniority of the accused and the members thereof shall be of the same but not below the rank and seniority of the accused. B

It is very clear from the provisions of sub-section (3) (b) above that the Constitution of the General Court Martial to try the Appellant shall not contain or include any officer who is junior in rank in terms of seniority in the Armed Forces to the Appellant. Therefore once it is established that one or more of the members of the panel of the General Court Martial to try an officer in the Armed Forces for any offence is or are juniors in rank and seniority to the officer to face trial before the panel of the General Court Martial, the panel becomes improperly constituted and thereby deprived of the jurisdiction to try the officer for any offence under the Armed Forces Act. Therefore as the General Court Martial in the present case was not properly constituted to try the Appellant, its proceedings and judgment convicting the Appellant of the offences he was charged with, are a nullity. C D E

In the result, I agree with my learned brother Adekeye, JSC that this appeal deserves to succeed even on the issue of jurisdiction alone in addition to the issue of denial of fair hearing. Accordingly, I also allow the appeal and abide by the orders made in the leading judgment. F

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother Adekeye, JSC. I agree with the lucid reasons advanced therein to arrive at the final conclusion that the appeal is meritorious and should be allowed while the whole trial by the tribunal is nullified. G

I wish to chip in just a few words of my own in support. The Court of Appeal while writing its judgment, suo motu, struck out grounds of appeal and related issues touching on jurisdiction without calling on parties to address it. An appellate court cannot suo motu raise issues at the judgment stage which the parties did not raise with- H

out the perilous risk of stepping into the arena of conflict. That was what the court below wrongly did. Such cannot be condoned. See: *Hambe v. Hueze* (2001) 2 SC 26 at 39; (2001) 4 NWLR (pt. 703) 372 at 388; *Akintola v. Solana* (1986) 2 NWLR (Pt. 24) 598; *Victino Fixed Odds Ltd. v. Joseph Ojo & Ors.* (2010) SC (Pt. 1).

B The issue touching on the improper constitution of the Court Martial by the appropriate authority has been manifestly established in this matter.

C The first paramount factor for competence of a court is its proper constitution as regards number and qualification of the members of the bench and that no member is disqualified for one reason or another. This is as pronounced by this court in *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341 at 348. The foul step taken in the constitution of the trial court martial rendered the whole trial a nullity.

D For the above reasons and those comprehensively adumbrated in the lead judgment, I too hereby allow the appeal and endorse all the consequential orders therein contained.

GALADIMA JSC

E I have had a preview of the judgment of my learned brother ADEKEYE, JSC just delivered. All the issues submitted for determination in this appeal have been exhaustively considered and resolved. I respectfully adopt the reasoning and conclusion in the judgment as mine. However, I shall add a few words in this appeal. It is all about
F a fundamental issue. That is an act of omission perpetuated by the Court Martial that tried and sentenced the appellant to dismissal from the Armed Forces of Nigeria. The improper composition of the court renders the trial a complete nullity ab initio see *MADUKOLU v. NKEMDILIM* (1962) 2 SC NLR 34; *SULE v. NIGERIA COTTON BOARD* (1985) 2 NWLR (pt. 5) 17 and *ATOLAGBE v. AWUNI* (1997) 9 NWLR (pt. 522) p. 536.
G

H The Appellant objected to the participation of the two members of the Court Martial, namely Rear Admiral J. M. Ajayi (President) and Rear Admiral A. O. ONI. (Member). He gave the reason that he had crossed path with the President who had through a telephone conversation considered him (the appellant) as his “problem” in the Nigerian Navy. Rear Admiral Oni on the other hand was actively involved in a publication in the *INSIDER WEEKLY MAGAZINE*

which contained adverse comments on the Appellant. The Objection of the Appellant was on the ground of bias. The objection deserves serious consideration and the ruling of the President of the Court. It was not done. Hence the Appellant claimed the breach of his right to fair hearing, which is guaranteed by the 1999 Constitution. The likelihood of bias was established by the Appellant. He correctly apprehended that he was not going to be fairly tried. In the circumstances of all that I have said and from more details shown in the lead judgment, I agree too that this appeal is meritorious and should be allowed. The verdict of the Court Martial and its confirmation by the Naval Board are a nullity in the absence of jurisdiction on the part of the Court Marshal to try the Appellant.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment delivered by my learned brother, Adekeye JSC. So completely do I agree with it that I hesitated for some time before finally deciding to add a few paragraphs on the competence of the Court Martial to try and convict the appellant.

Before a court can claim to have jurisdiction to hear and determine a case, it must:

(a) be properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another and,

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

(c) the case comes before the court initiated by due process of the Law and upon fulfillment of any condition precedent to the exercise of jurisdiction. See:

Madukolu v. Nkemdilim 1962 2 SCNLR p. 342

Ajao v. Popoola 1986 5 NWLR Pt. 45 p. 802.

The issue is (a) above, that is to say:

Was the Court Martial that tried the appellant properly constituted. Section 133 (i) and 3 (b) of the Armed Forces Act reads as follows:

“(i) Subject to the provisions of sections 128 and 129 of this act, a Court Martial shall be duly constituted if it consists of the Presi-

dent of the Court Martial and not less than two other officers and a waiting member.

3 (b) when an officer is to be tried, the president shall be above or of the same or equivalent rank and seniority of the accused and the members thereof shall be of the same but not below the rank and seniority of the accused”.

The well laid down position for interpretation of statutes is that where words used in a statute are clear they should be given their ordinary and plain meaning.

See:

Tariola v. Williams 1982 7 SC p. 27

Mobil v. F. B. I. R. 1977 3 SC p. 53

The interpretation of the Act supra is that an accused person (standing trial before a Court Martial) can only be tried by officers who are his seniors, and/or not his juniors.

Indeed in State v. Olatunji 2003 14 NWLR pt. 839 pg. 138

This Court held that:

Any court martial which is not constituted as required by the provision of the Armed Forces Decree is just like a court or a Tribunal which is not properly constituted. And if a court is not properly constituted, any process issued or trial conducted by it is a complete nullity ab initio.

Major General Akpa and Air Vice Marshal Odesola are of the same rank with the appellant, but the appellant is senior to both of them by three days. The law says the President and members of the Court martial shall not be junior to the accused, (appellant). In this case, two members of the court martial are junior to the accused (appellant).

To my mind, once there is a defect in competence the entire proceedings are a nullity. If the law states what is required for the court Martial to be properly constituted as regards its members and there is an infraction, no matter how negligible, so long as it is an Infraction of the Act the trial ought to be nullified. For this and the much fuller reasoning in the leading judgment I would nullify the trial of the appellant by the Court Martial.