

SUPREME COURT OF NIGERIA
9TH DECEMBER, 2011. SC. 182/2007
CORAM:- M. MOHAMMED, C. N. CHUKWUMA-ENEH, M.
S. MUNTAKA-COOMASSIE, J. A. FABIYI,
B. RHODES-VIVOUR, JJSC

SURGEON CAPTAIN C. T. OLOWU APPELLANT
V
THE NIGERIAN NAVY RESPONDENT

MASTER & SERVANT - Military law - Discipline of employee - Since appellant a medical doctor has taken an employment in the military - He is subject to be disciplined under the military law (H1)

FAIR HEARING - Principles - Basis - It is determined from the facts of a case - The facts of this case do not reveal any infraction of appellant's right to fair hearing (H2)

APPEALS - Concurrent findings - Supreme Court does not interfere - Save if the findings have occasioned miscarriage of justice or are perverse (H3)

FACTS

Appellant, a consultant obstetrician and gynecologist was deployed to the Nigerian Navy Medical Centre, Apapa as part of his military assignment as a military medical officer and was there as the commander of the medical centre. One of his patients, Mrs. Joy Bassey was an obstetric patient for antenatal care of her pregnancy. Previously the patient had still birth and caesarean section for failed induction of labour, thus making her a high risk patient. On the 2nd day of April, 1999 the said patient went into labour and she was rushed to the medical centre. She was received by the Nurses on duty while the medical officer (appellant) was absent on the particular date. The nurses conducted preliminary test on the patient and in the course of conducting preliminary test there appeared moconious stains which were signs indicating complication and appellant was immediately notified of the observation on the patient. He arrived at the medical centre at about 20. 00 hrs and asked the nurses ques-

tions without personally examining the patient and thereafter left. Appellant did not come back to the medical centre until the next day at which time the patient's condition had deteriorated despite the fact that he was aware of the medical history of the patient. At 11.00 am on the second day i.e. 3rd April, 1999 when he arrived, he merely wrote a letter of referral for the patient to be taken to the Military Hospital, Yaba-Lagos. It should be noted that the situation of the patient had already become bad as she was already bleeding profusely from her vagina.

She was later operated upon where it was discovered that the baby died about 24 hours ago and was already outside the womb. It was also noticed that her uterus had ruptured. Finally it was observed that the said patient would not be able to bear children again as a result of the extensive damage done to her womb as a result of the prolonged labour. The womb was consequently removed. Consequently, appellant was arraigned before a General Court Martial convened by Flag Officer Commanding, Western Naval Command. He was arraigned on one count charge of failure to perform military duties contrary to Section 62 (b) of the Armed Forces Decree 105 of 1993 (as amended). At the trial, appellant pleaded not guilty. In proving its case, prosecution called eight (8) witnesses, including an expert witness. Appellant in his defence, called six (6) witnesses including two experts. At the close of the hearing, both parties submitted written addresses. The Court Martial delivered its judgment in which it found appellant guilty and reduced his rank from Navy Captain to Commander of four years seniority from the date of confirmation of sentence. Dissatisfied, appellant appealed to the Court of Appeal, Lagos Division. He challenged the jurisdiction of the Court Martial and alleged an infringement on his fundamental right to fair hearing. The court dismissed his appeal and affirmed the judgment of Court Martial. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right when it held that the General Court Martial has jurisdiction to try the appellant on the one count charge which bothers on alleged professional misconduct;

2. Whether the Court of Appeal rightly held that the appellant's constitutional right to fair hearing was not violated by the General Court Martial;

3. *“Whether having regard to the evidence before the court martial, the Court of Appeal was right when it affirmed the conviction of the Appellant based on alleged negligence in the performance of his duty as a Medical Practitioner.*

4. *Whether the Court of Appeal rightly affirmed the decision of the Court-martial in spite of the court martial failure to properly evaluate before it which lead (sic) to a miscarriage of justice”.*

HELD (Unanimously dismissing the appeal per **MUNTAKA-COOMASSIE JSC**)

Military law - Discipline of employee

1. I must say I am in agreement with the sound pronouncements of the lower Court on this issue. I have read the decision in *Medical and Dental Disciplinary Tribunal VS Okonkwo (2001) 4 SCNJ 98* cited by the appellant, that decision did not confer exclusive jurisdiction on the Tribunal set up under the provision of medical and Dental practitioners Decree of 1998 to try medical practitioners on offences bordering on allegation of professional misconduct. It will not only lead to absurdity to say that an employer cannot discipline its employees but also a negation of the principle of master and servant relationship. When a professional tallies up an employment under the military he has by that act subjected himself to the military law. In the instant case the appellant is a Navy Captain in the Nigerian Navy and a Commander of the Medical Centre, Apapa. I therefore have no hesitation in resolving this issue against the appellant. (p. 2447 D)

FAIR HEARING - Principles - Basis

2. On issue II that complained about the violation of the appellant's constitutional right to fair hearing. The main complaint was that the president and members of the GCM examined the appellant's witnesses in a manner that the examination amounted to cross-examination. Learned counsel therefore contended that the court descended into the arena. The respondent's counsel argued that contrary to the position taken by the appellant, the questions asked by the GCM members were meant for the clear understanding of the medical terminologies used in the evidence that the appellant was provided with everything needed to present his defence and he did not object to any of the members of GCM. I have read the case of *Olale vs*

Chairman Medical and Dental Practitioners Investigating Panel (1997) 5 NWLR (Pt. 506) 560 at 563 particularly at 567 and I agree that where a nature of questioning the appellant was subjected to by the Tribunal, it would appear to an objective mind that members had a preconception and were by what happened appeared to be cross-examining trying to that preconception was the truth, the Court or tribunal in that instance could be said to have violated the appellant's right to fair hearing(sic). However, each case is to be determined and decided on its own peculiar circumstances. In the instant case, the members of GCM were not medical experts and were faced with the evidence of medical experts and practitioners. Thus, how would they understand the nature of evidence being given if they do not ask questions to explain medical terminologies used. For example in the case PW. 4 and PW. 6 were extensively questioned on the meaning and effects of "moconious stain". The GCM could not be said to have asked these questions on the basis of having any pre-conception in mind but only to properly understand the evidence being adduced before them. It is in this respect that I totally agree with my learned brother Alfa Belgore, JSC (as he then was) in *Magit V. Uni-Agric Markurdi* (2006) 133 LRCN 46 at 51 when he held that:-

"Fair hearing is not a cut and dry principle which parties can, in the abstract, always apply to their comfort and conveniences. It is a principle which is based on the facts of the case before the court. Only the facts of the case can influence and determine the application or inapplicability of the principle. The principle of fair hearing is helpless or completely dead outside the facts of the case". The facts of this case do not reveal any infraction of the appellant's right to fair hearing and I so hold. (p. 2447 G)

APPEALS - Concurrent findings

3. The question that is pertinent at this juncture is, has the appellant shown that these concurrent findings of the two lower courts were perverse? My Lords permit me to say that without any clear evidence of errors in law or fact leading to or occasioning miscarriage of justice, this court will not interfere with the concurrent findings of the two lower courts. There must be substantial error apparent on the face of the record of proceedings showing that the findings are perverse. I am fortified by the decisions in *Ike V. Ugbuaja* (1993) 7 SCNJ 402.

I am not satisfied that the findings of the two courts below under attack are perverse nor that any substantial error is shown on the face of the records. I am however satisfied that the findings are adequately supported by the evidence before the trial GCM. I therefore have no reason to disturb these findings of fact made by the GCM and the Court below. I hold therefore that the lower Court was right in affirming the conviction of the appellant based on allegation of negligence in the performance of his duty as a medical practitioner. The appellant did not perform his duty as required of him as medical practitioner and of course led to a devastating effect on the patient who could no longer bear children in her life time. My Lords, I think I am in agreement with the views expressed by the lower Court, and I too would not distort and disturb the findings of the lower court and in effect of the trial GCM too.

(pp. 2449 G/2451 D)

NOTABLE POINTS OF INTEREST ***MUNTAKA-COOMASSIE JSC***

1. *Court martial & Conventional court - Difference in procedure*
Issue No IV, is on the failure of the GCM to evaluate the evidence of witnesses in its judgment and to state which of the evidence of the witnesses it believed particularly the expert witnesses. I must point out here that the military Court martial is unlike the conventional Court. Courts Martial operates a criminal procedure akin to jury trial. Section 141 of the Armed forces Act of 1993 spelt out this function of the Judge Advocate who summoned the case of the parties, after the close of the case, addresses of the parties, and direct the members of GCM on the applicable law and the voting procedure to adopt. While evaluation and ascription of value to the evidence adduced at the trial is done by the Judge in the conventional Court. In the military court martial this is done by the Judge Advocate.

(p. 2450 D)

RHODES-VIVOUR JSC

2. Competence of court

A court is competent when -

1. It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified

for one reason or another;

2. 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, and

3. The case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.

Any defect in the competence of the court renders proceedings a nullity. (p. 2457 A)

C
REPRESENTATION

A. M. Lawal Esq., with Abdulsalam Belgore Esq., for the Appellant
P. Okohue with J. A. Asemota Esq., and Mr. Lawal, for Respondent

D
CASES REFERRED TO

R. v. Lawrence (1932) 11 NLR 6 at 7

Gani V. Nigeria Army (2001) 28 WRN 167

David Uso v. C.O.P. (1972) 11 SC. 37 at 45

Ogundiyon V. State (1991) 4 SCNJ 44 at 50

E Oteju v. Oluguna (1992) 8 NWLR (Pt. 262) 752

ISIAKA VS. THE STATE (1986) NWLR (Pt. 17) 156

Okeke V. State (1995) 4 NWLR (Pt.392) 676 at 712

Ibeanu v. Ogreide (1994) 7 NWLR (Pt. 759) 700 - 701

Shorurno v. The State (1010) 12 SC (Pt.1) 73 at 87- 88

F Usman Dan Fodio University v. Kraus Thompson Organisation Ltd (2001) 15 NWLR (PT. 736) P. 305

Olaye V. Chairman Medical & Dental Practitioners Panel and Ors (1997) 5 NWLR (Pt.506) 560 at p. 564

G
STATUTES REFERRED TO

Armed Forces Decree No. 105 1993 (as amended), ss.62 (b), 140(1)(2), 141(1)(2), 157, 181

Evidence Act, ss.223, 187

H Interpretation Act Cap.192 LFN 1990, s.25

Medical & Dental Practitioners Act No.23 1998, s.15

BOOK REFERRED TO

Osborne's Concise Law Dictionary 7th ed.

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

By a convening order dated 17th September, 2001, the Flag Officer Commanding (FOC) Western Naval Command convened a General Court Martial (GCM) to try the appellant on one count charge as follows:-

“a statement of offence

Failure to perform military duties contrary to Section 62(b) of the Armed Forces Decree 105 of 1993 (as amended).

PARTICULARS

That you surgeon Capt. C. T. Olowu NN/6613 on or about 2nd April 1999 at Naval Medical Centre, Mobil road, Lagos did perform your duty negligently as consultant obstetrician/gynecologist which resulted in the mismanagement of Mrs. Joy Bassey's labour a known (High risk) highly as gynecological patient”.

The facts of this case are straight forward and short. The appellant, a consultant obstetrician and gynecologist was deployed to the Nigerian Navy Medical Centre road Apapa as part of his military assignment as a military medical officer and was there as the commander of the medical centre. One of his patients, one Mrs. Joy Bassey was an obstetric patient for antenatal care of the pregnancy. Previously the patient had still birth and caesarean section for failed induction of labour, thus making her a high risk patient.

On the 2nd day of April, 1999 the said patient went into labour and she was rushed to the medical centre where she was previously registered. She was received by the Nurses on duty while the medical officer was absent on the particular date. The nurses conducted preliminary test on the patient and in the course of conducting preliminary test there appeared moconious stains which were signs indicating complication and the appellant was immediately notified of the observation on the patient. The appellant arrived the medical centre at about 2000hrs and asked the nurses questions without personally examining the patient and thereafter left. The appellant did not come back to the medical centre until the next day at which time the patient's condition had deteriorated despite the fact that the appellant was aware of the medical history of the patient. At 11.00 am on the second day, i.e. 3/4/1999 when the appellant came back he merely wrote a letter of referral for the patient to be taken to the

Military Hospital Yaba, the situation had already become bad as she was already bleeding profusely from her vagina. She was later operated upon where it was discovered that the baby died about 24 hours ago and already outside the womb so also the placenta, her uterus had ruptured and finally that the said patient would not be able to
B bear children again as a result of the extensive damage done to her womb which was then removed- as a result of the prolonged labour.

The Appellant was subsequently arraigned for negligence. At the trial the Appellant pleaded not guilty. In an attempt to prove and
C establish their case, the prosecution called eight (8) witnesses, including an expert witness. While the Appellant called six (6) witnesses including two experts.

At the close of the hearing, both parties submitted written addresses. On the 21st day of February 2002, the G.C.M delivered its
D judgment in which it found the appellant guilty and sentenced him to be reduced from the rank of Navy Captain to Commander of four years seniority from the date of confirmation of sentence. The sentence was confirmed by the Navy Board on the 16th day of November, 2002.

E Dissatisfied with the judgment of G.C.M, the Appellant unsuccessfully appealed to the Court of Appeal Lagos Division hereinafter called the lower court which on the 9th Day of November , 2006 dismissed the appeal of the appellant and affirmed the judgment of the G.C.M.

F In this court both parties filed and exchanged their respective briefs of argument. The Appellant in his brief of argument, which was deemed filed on 4/11/09 formulated four (4) issues for determination as follows:-

1. *Whether the Court of Appeal was right when it held that the
G General Court Martial has jurisdiction to try the appellant on the one count charge which bothers on alleged professional misconduct;*

2. *Whether the Court of Appeal rightly held that the appellant's constitutional right to fair hearing was not violated by the General Court Martial;*

H 3. *"Whether having regard to the evidence before the court martial, the Court of Appeal was right when it affirmed the conviction of the Appellant based on alleged negligence in the performance of his duty as a Medical Practitioner.*

4. *Whether the Court of Appeal rightly affirmed the decision*

of the Court-martial's in spite of the court martial failure to properly evaluate before it which lead (sic) to a miscarriage of justice”.

The Respondent in his brief of argument adopted the issues formulated by the Appellant as its own.

Learned counsel to the Appellant at the hearing adopted his brief of argument and urged us to allow the appeal. On his issue I, it was the submission of the learned counsel that the Appellant being a Medical Practitioner could only be tried for Professional Misconduct, Disciplinary Committee and the Tribunal established by Section 15 of the Medical and Dental Practitioners Act No 23 of 1998. It was the counsel submissions that the charge against the Appellant was based on an alleged Professional Misconduct as a Medical Practitioner. Professional Misconduct does not and cannot constitute any criminal offence known to the Armed Forces Act or any other law. He therefore submitted that the G.C.M has no jurisdiction to try the Appellant on the alleged professional Misconduct. He, for that reason, submitted that failure to perform military duties therefore will be failure to perform duties pertaining to war or concerning war. It is the counsel's submission that no person can be tried for a criminal offence unless such offence and, penalty therefore is prescribed in a written law, reliance is being placed on the case of *Aoko V. Fagbemi* (1961) All NLR 406. He also submitted that the charge was ambiguous in that it was not clear whether the Appellant was charged for failing to perform military wvf infection or loss of foetus. Hence the Appellant ought to have been discharged, he cites the case of *ISIAKA VS. THE STATE* (1986) NWLR (Pt. 17) 156.

On the issue No II learned counsel submits that the Appellant's constitutional right to fair hearing was violated by the president and the Honourable members of the G.C.M. during the trial by showing apparent bias against the appellant and his witnesses contrary to the provisions of B.R. II Manual of Naval Law made pursuant to the provision of Section 181 of the Armed Forces Act. Learned counsel submitted that the G.C.M. members conducted themselves and behaved as partial arbiters, they descended into the arena, and also made un-warranted interruptions in the proceedings comment referred to pages 183, 184 - 190, 750, 775, 776, 782 and 785, where the president and members cross-examined the Defence witness. He then submitted that the cross-examination of the defence witnesses

had the trapping... of cross-examination. Thus, the approach taken by the G.C.M. in assuming the roles of the prosecution is unfair to the appellant and cited the case of *Olaye V. Chairman Medical & Dental Practitioners Panel and Ors* (1997) 5 NWLR (Pt.506) 560 at p.564.

B He therefore submitted that the G.C.M did not act as impartial arbiter, counsel referred, to Section 36 of the Constitution, *Obadana v. President Ibadan WEST District Grade D. Customary Court* (1964) 1 ALL NLR 336 at 344, *David Uso v. C.O.P.* (1972) 11 SC. 37 at 45.

C Learned counsel conceded that by the provisions of Section 223 of the evidence Act permits a Judge to ask questions to clarify the case before him, but the law does not permit him to engage in cross-examination or ask question in the nature of cross-examination, counsel cited the case of *Oteju v. Oluguna* (1992) 8 NWLR (Pt. 262) 752.

D On the issue No. III, learned counsel submitted that the evidence before the Court Martial did not support its decisions that the appellant was guilty of negligence in handling the patience, he referred to the evidence of the Nurse which showed that the patient was normal when the appellant visited her and after the referral, she

E was operated upon at Yaba Military Hospital where she lost her foetus and that it was the delay at the Yaba Military Hospital that led to the death of the baby and loss of foetus not the act of the appellant. He therefore submitted the prosecution did not prove the charge beyond reasonable doubt. Counsel referred to Section 187 of the

F Evidence Act, *R. v. Lawrence* (1932) 11 NLR 6 at 7 and *Gani V. Nigeria Army* (2001) 28 WRN 167.

On issue No IV, learned counsel for the appellant submitted that the GCM did not do any evaluation of the evidence before coming to the decision that the appellant was guilty as charged. What the

G GCM did was to summaries their conclusion; the court did not receive the evidence of the witnesses let alone explaining why it preferred the evidence of the prosecution witnesses to that of the defence witnesses. The court also failed to say whether it rejected or

H accepted the evidence of the expert witnesses, even if they were in conflict, such conflicts or contradictions ought to be resolved in favour of the appellant. Learned counsel cited *Queen V. Anyiam* (1961) 1 All NLR 46, *Okeke V. State* (1995) 4 NWLR (Pt.392) 676 at 712. Learned counsel to the respondent also adopted his brief of argu-

ment at the hearing, and urged this court to dismiss the appeal. On issue No. 1, learned counsel submitted that the GCM has jurisdiction to determine this case. He relied on the case of:- Ibeanu v. Ogreide (1994) 7 NWLR (Pt. 759) 700 - 701. On what determined the competence of court to determine a case. In this case the appellant did not contend that the GCM was not properly constituted in respect of members and qualifications of members. He submitted that the subject-matter, the jurisdiction of GCM, the Military is made up of professionals of all fields apart from the trained fighting forces. Thus the GCM has jurisdiction to try every member of the Armed Forces. The appellant is subject to service law, he was not a private medical practitioner. He was a Naval Officer on the regular list performing military duties as a Doctor in a Naval Hospital. He referred to chapter I Article 0105 of the BR II which is applicable to the Naval Court Martial pursuant to Section 181 of the Armed Forces Act. That the misconduct of the appellant amounts to negligent performance of military duty in the Navy Punishable under 62(b) of the Armed Forces Act, and Section 25 of the interpretation Act Cap. 192 LFN 1990. Counsel referred to the admission of the appellant's witnesses that he could be tried by GCM.

Learned counsel submitted that there was no ambiguity in the charge. The charge was duly expressed and explained by the Judge Advocate (J.A) and the appellant answered he duly understood same. On issue No. 11, learned counsel submits that the GCM did not breach the appellant's right to fair hearing.

He again submits that the lower court was right in holding the appellant's right to fair hearing was not breached he was given all the facilities he needed for his defence and, he did not object to the composition of the panel vide. Section 157 of the Armed Forces Act. He testified on his behalf and called witnesses. It was part of his submission that the extent and length of his questions asked by the president and members of GCM were to clarify the case before it, having in mind that the matter involved medical terminologies and jargons. Learned counsel particularly referred to the evidence of DW. 6, whose evidence relates only to what happened at the Military Hospital, Yaba. This witness is the appellant's star witness, but totally unrelated to what happened at Naval Medical Centre, Mobil Road Apapa, where the negligent act of the Appellant took place.

On issue No. III, learned counsel to the respondent submitted that the only charge against the appellant at the court of first instance was that of negligence. The main ingredients of the offence within the military were stated in the case of *Col. C.T. Hami v. The Nigerian Army* (2001) 28 WRN 167 as follows:-

- B i. The Accused Person must be a person subject to military law;
- ii. He must have a defined schedule of duty;
- iii. He neglects to perform the duties or negligently performs therein.

Learned counsel submits that all these ingredients were established by the prosecution. The appellant did not deny that he had a schedule of duty to perform on the patient. The two lower courts made concurrent findings on this point and the manner the appellant negligently handled the case of *Mrs. Joy Bassey* was also proved, counsel reference to *Osborn's concise law Dictionary* (7th Edition) on the definition of negligence and the case of *Thomas v. Ouanaterinare* (1887) 18 Q. B. D. 685 at 694.

Learned counsel further submitted that the appellant, who was supposed to be responding to an emergency call came to the hospital with a woman by his side and later drove off.

E On issue No. IV, learned counsel submits that the appellant's submissions of this issue were misconceived and predicated on misunderstanding of the law which created GCM. He referred to Sections 140(1) and (2), and 141(1) and (2) of the Armed Forces Act; and the case of *Ajia v. The Nigerian Army* No. CA/L/GM 98 delivered on 6/7/2000 and *Komombo v. The Nigerian Army* No. CA/L/14/2000 delivered on 10/12/2001 and submits that court martial operates a jury system of trial. After the conclusion of evidence and address of counsel on both sides the Judge Advocate summarized the cases of the parties and directs the Court on the applicable law and voting procedure to adopt thereafter the jury return a verdict. Thus it is also the duty of the GCM to evaluate the evidence adduced before it.

These are the submissions of the learned counsel to the parties in this case on the four issues submitted for determination.

H Issue 1 deals with the jurisdiction of the GCM to try the appellant for professional misconduct. The appellant contends that it was the Disciplinary Committee or the Tribunal set up under the medical and Dental practitioners Act that is competent to try him, while the respondent contends that the appellant being a medical practitioner in

the employment of the Nigerian Navy, he is subject to military law, and as such he can be tried by the GCM for the offence committed in the course of performing his duty. On this point, the lower Court per Ogunbiyi JCA held as follows:

“As rightly submitted by the learned respondent’s counsel, with professionals diverse specialties employed in the Army, disassociating them or their exclusion from military justice system would certainly amount to an absurdity. This I hold especially in the absence of any excluding provisions to that effect.”

The lower court concluded as follows:

“... the trial of the appellant contrary to the argument by his counsel was properly conducted by the GCM as offence constituted negligence under Section 62(b) of the Armed Forces Decree 105 of the 1993.

This is regardless of the offence amounting to misconduct under the Medical and Dental Practitioners’ Decree of 1998...”

I must say I am in agreement with the sound pronouncements of the lower Court on this issue. I have read the decision in Medical and Dental Disciplinary Tribunal VS Okonkwo (2001) 4 SCNJ 98 cited by the appellant, that decision did not confer exclusive jurisdiction on the Tribunal set up under the provision of medical and Dental practitioners Decree of 1998 to try medical practitioners on offences bordering on allegation of professional misconduct. It will not only lead to absurdity to say that an employer cannot discipline its employees but also a negation of the principle of master and servant relationship. When a professional tallies up an employment under the military he has by that act subject himself to the military law. In the instant case the appellant is a Navy Captain in the Nigerian Navy and a Commander of the medical centre Apapa. I therefore have no hesitation in resolving this issue against the appellant.

On issue II that complained about the violation of the appellants’ constitutional right to fair hearing. The main complaint was that the president and members of the GCM examined the appellant’s witnesses in a manner that the examination amounted to cross-examination. Learned counsel therefore contended that the court descended into the arena. The

respondent's counsel argued that contrary to the position taken by the appellant, the questions asked by the GCM members were meant for the clear understanding of the medical terminologies used in the evidence that the appellant was provided with everything needed to present his defence and he did not object to any of the members of GCM. I have read the case of *Olale vs Chairman Medical and Dental Practitioners Investigating Panel* (1997) 5 NWLR (Pt. 506) 560 at 563 particularly at 567 and I agree that where a nature of questioning, the appellant was subjected to by the Tribunal, it would appear to an objective mind that members had a preconception and were by what happened appeared to be cross-examining trying to that preconception was the truth, the Court or tribunal in that instance could be said to have violated the appellant's right to fair hearing. However, each case is to be determined and decided on its own peculiar circumstances. In the instant case, the members of GCM were not medical experts and were faced with the evidence of medical experts and practitioners. Thus, how would they understand the nature of evidence being given if they do not ask questions to explain medical terminologies used. For example in the case PW. 4 and PW. 6 were extensively questioned on the meaning and effects of "moconious stain". The GCM could not be said to have asked these questions on the basis of having any preconception in mind but only to properly understand the evidence being adduced before them. It is in this respect that I totally agree with my learned brother Alfa Belgore, JSC (as he then was) in *Magit V. Uni-Agric Markurdi* (2006) 133 LRCN 46 at 51 when he held that:-

"Fair hearing is not a cut and dry principle which parties can, in the abstract, always apply to their comfort and conveniences. It is a principle which is based on the facts of the case before the court. Only the facts of the case can influence and determine the application or inapplicability of the principle. The principle of fair hearing is helpless or completely dead outside the facts of the case". The facts of this case do not reveal any infraction of the appellant's right to fair hearing and I so hold.

Issue No. III questions the propriety of the lower court's confirmation of the trial court's conviction of the appellant on the alleged negligence in the performance of his duty as a medical practitioner particularly when the prosecution has not established that he was negligent in handling the case of the patient. This in effect is a challenge on the concurrent findings of the two lower courts in their findings held as follows:- B

"Apart from and other than the accused on oral evidence that he examined the patient and recorded his findings in the patient's case note, there is no evidence anywhere oral or written that he examined the patient or recorded any findings all the time he came to see the patient. The patient's case note, the Nurses 24 hours report books, the ward" book, the duty Nurses oral and written evidence and even the written evidence of the accused officer himself did not state anything about examination of the patient or clinical findings. If the patient's case not got missing or tempered with the nurses ward books is ready (sic) available to confirm whatever the doctor did. But there is no such confirmation in this case under examination by members of the court, the accused confirmed that nurse record down in their ward books whatever a doctor does says or writes when the accused was asked after reading relevant portions of the ward book whether he had any comment about their right-up he never said their entry was incomplete or wrong or tempered with". C D E

The lower court affirmed this finding of the trial court in its judgment thus:- F

"From the synopsis of the evidence before General Court Martial in the light of the findings and judgment arrived at therefore, same as rightly argued by the Respondents' counsel cannot be wrong. The judgment without any iota of hesitation was aptly supported by overwhelming evidence adduced before it". G

The question that is pertinent at this juncture is, has the appellant shown that these concurrent findings of the two lower courts were perverse? My Lords permit me to say that without any clear evidence of errors in law or fact leading to or occasioning miscarriage of justice, this court will not interfere with the concurrent findings of the two lower courts. There must be substantial error apparent on the face of the record of proceedings showing that the findings are perverse. H

I am fortified by the decisions in Ike V. Ugboaja (1993) 7 SCNJ 402; Ibodo V. Enarofia (1980) 5 - 7 SC, 42; Ogundiyan V. State (1991) 4 SCNJ 44 at 50.

I am not satisfied that the findings of the two courts below under attack are perverse nor that any substantial error is shown on the face of the records. I am however satisfied that the findings are adequately supported by the evidence before the trial GCM. I therefore have no reason to disturb these findings of fact made by the GCM and the Court below. I hold therefore that the lower Court was right in affirming the conviction of the appellant based on allegation of negligence in the performance of his duty as a medical practitioner. The appellant did not perform his duty as required of him as medical practitioner and of course led to a devastating effect on the patient who could no longer bear children in her life time.

Issue No IV, is on the failure of the GCM to evaluate the evidence of witnesses in its judgment and to state which of the evidence of the witnesses it believed particularly the expert witnesses. I must point out here that the military Court martial is unlike the conventional Court. Courts Martial operate a criminal procedure akin to jury trial. Section 141 of the Armed forces Act of 1993 spelt out this function of the Judge Advocate who summoned the case of the parties, after the close of the case, addresses of the parties, and direct the members of GCM on the applicable law and the voting procedure to adopt. While evaluation and ascription of value to the evidence adduced at the trial is done by the Judge in the conventional Court. In the military court martial this is done by the Judge Advocate. In the un-reported case decided by the court of Appeal, Lagos Division, LT. Col. M.F. Komombo v. The Nigerian Army App. No. CA/L/114/2000 delivered on 10/12/2001, my learned brother Chukuma-Eneh JCA as he then was, on this point held as follows:

"I have gone through the submission of both counsel and the record of proceedings. I confirm that the lower court did not give reasons for its findings and judgment. That the trial at the lower court was by jury and the proceedings complied with the relevant procedures. After the conclusion of evidence and addresses of counsel on both sides, the Judge Advocate summarized the case of the parties and directed them on the applicable law and the voting procedure to

adopt. Thereafter the jury returned a verdict of guilty. I agree with the learned counsel for the Respondent that this is in conformity with Decree No. 105 of 1993 section 141 thereof."

Even though this is a judgment of the Court of Appeal I agree with the principle of law enunciated therein. In the instant case, the GCM apart from the evaluation of the evidence done by the Judge Advocate went ahead to evaluate the evidence placed before it before arriving at its decision.

The lower court found as a fact the GCM has done a thorough work when it held thus:

"The general Court martial in my humble opinion took a very apt path of view of the evaluation after an objective due evaluation of the entire evidence before it. They could not have done more. Their judgment is thorough and highly commendable as rightly submitted by the learned respondent's counsel, same, in my humble opinion, cannot be faulted. On the authority of the case of GAI V. PAYE (2003) 12 MJSC 76 with the findings of the GCM being of fact, same cannot be disturbed by the Court."

My Lords, I think I am in agreement with the views expressed by the lower Court, and I too would not distort and disturb the findings of the lower court and in effect of the trial GCM too.

All in all, the four issues for determination are hereby resolved against the appellant and in favour of the Respondent. Consequently, the appeal is lacking in merit and it is hereby dismissed. The lower Courts judgment affirming the judgment of the trial GCM is accordingly affirmed.

MOHAMMED JSC

This appeal is against the judgment of the Lagos Division of the Court of Appeal given on 9th September, 2006 affirming the conviction and sentence of the Appellant by the General Court Martial which tried the Appellant on the following charge -

"A statement of offence Failure to perform military duties contrary to section 62(b) of the Armed Forces Decree of the Armed Forces Decree 105 of 1993 (as Amended).

PARTICULARS

That you surgeon Capt. C. T. Olowo NN/6613 on or about 2nd April, 1999 at Naval Medical Centre, Mobil Road, Apapa Lagos did perform your duty negligently as consultant Obstetrician/Gynaecologist which resulted in the mismanagement of Mrs. Joy Basseys labour - a known high risk gynecological patient."

B Section 62 of the Armed Forces Decree 105 of 1993 under which the Appellant was charged reads -

"62. Failure to perform Military Duties A person subject to the service law under this Act who -

C *(a) without reasonable excuse, fails to attend for a parade or other duty of any description or leaves Parade or duty before he is Permitted to do so; or*

(b) neglects to perform, or negligently performs, a duty of any description, is guilty of an offence under this Section and liable, on conviction by a Court - Martial to imprisonment for a term not exceeding two years or any less punishment provided by this Act."

D From the contents of the charge and the provisions of Section 6) of the Act under which the Appellant was tried by the General Court Martial, it is not in dispute that the Appellant was not charged
E and tried for an offence of alleged professional misconduct in his capacity as a Medical Practitioner as claimed in the Appellants brief of argument. Quite contrary, the Appellant, who was clearly a person subject to Military Service law having been employed in the Nigerian Armed Forces specifically as a Naval officer in the Nigerian Navy being
F Surgeon Captain at the Naval Medical Centre Mobil Road, Apapa, Lagos with defined schedule of duties, neglected to perform those duties as described in the charge. The complaint that the Appellant ought not to have been tried and convicted by the General Court
G Martial having regard to his professional Medical background is without basis.

Accordingly, I am completely with my learned brother Coomassie JSC in his lead judgment in the manner he considered and resolved the 4 issues for determination in this appeal. The appeal is without merit and the same is hereby dismissed. The judgment of the Court below affirming the judgment of the trial General Court Martial is hereby further affirmed.

CHUKWUMA-ENEH JSC

I have read before now the judgment prepared and just delivered by my learned brother Muntaka-Coomassie JSC. I agree with the reasoning and conclusion reached therein. And it is for the same reasons in the lead judgment that also dismiss the appeal as unmeritorious and I abide by all the orders contained in the lead judgment. B

FABIYI JSC

I have read before now the judgment just delivered by my learned brother, Muntaka-Coomassie, JSC. I agree with the reasons advanced therein to arrive at the conclusion that the appeal lacks merit and should be dismissed. C
The charge preferred against the appellant before the General Court Martial reads as follows:- D

“(a) Statement offence:

Failure to perform Military Duties contrary to Section 62(b) of the Armed Forces Decree 105 of 1993 (as amended).

(b) Particulars:

That you Surgeon Capt. C. T. Olowu NN/0613 on or about 02 April, 1999 at Naval Medical Centre Mobil Road Apapa Lagos did perform Your duty negligently as Consultant obstetrician/ Gynaecologist which resulted in the mismanagement of Mrs. Joy Bassey’s Labour - a known high risk gynaecological patient.” E F

The appellant was tried by the General Court Martial (‘GCM’ for short). He was found culpable and convicted. He was sentenced to a reduction in a rank from Navy Captain to Commander and same was confirmed by the approving Authority. He appealed to the Court of Appeal, Lagos Division (“the court below” for short) which dismissed the appeal on 9th September, 2006. This is a further appeal to this court. G

For ease of reference and proper appreciation, it is apt to reproduce the provision of Section 62 of the Armed Forces Decree 105 of 1993 under which the appellant was charged. It reads as follows:- H

“62. Failure to perform Military Duties:

A person subject to the service law under this Act who - without

reasonable excuse fails to attend for a parade or other duty of any description or leaves parade or duty before he is permitted to do so; or

(b) neglects to perform or negligently performs duty of any description, is guilty of an offence under this section and liable, on conviction by a Court Martial to imprisonment for a term not exceeding two years or any less punishable provided by this Act.”

The appellant maintained that he should not have been tried by the General Court Martial (GCM) for an offence bordering on professional misconduct. He felt that he should have been taken before the Medical and Dental Disciplinary Tribunal. But the appellant who was subject to Military Service Law and employed as a Surgeon Captain in charge of the Naval Medical Centre, Mobil Road Apapa, Lagos was charged for negligently performing his duty under Section 62 of the above stated Act. The appellant was a person subject to Military Law. He had a defined schedule of duty. See: Colonel C. T. Gami v. The Nigerian Army (2001) 28 WRN 167. He was charged under the appropriate law. He can hardly be heard to complain that he was tried by the General Court Martial (GCM). The appellant should be reminded of the aphorism - ‘He who pays the Piper, dictates the tune.’ The appellant an ‘officer and a gentle- man’, should appreciate this salient point and not attempt to wriggle himself out of the jurisdiction which is rightly inherent in the General Court Martial (GCM) by operation of law.

The next point that I wish to touch briefly is that touching on want of fair hearing. The appellant felt that he was not treated fairly in the manner the members of the GCM conducted the trial. He felt that they were hard on some of his witnesses. This has to do with extensive questioning by the GCM members on medical terms, especially ‘meconium stain’. Medical terms need explanation even before serene courts of record; not to talk of the GCM. I cannot surmise how the questions put to the appellant’s witnesses breached his right to fair hearing. Members of the GCM were not robots. They were officers imbued with military exuberance. A court would not view fair hearing in the abstract. Based on the facts before the GCM, I cannot see how the principle of fair hearing was eroded. Refer to Magit v. Uni-Agric Markurdi (2006) 133 LRCN 46.

It occurs to me that the GCM and the court below principally

made concurrent findings of fact in most material respect that the appellant was negligent in the way and manner that he handled his duty of care in respect of Mrs. Joy Bassey's labour at Naval Medical centre over which he was in charge at the material time. The findings were not perverse and did not engender any miscarriage of justice to the appellant. As usual, this court will not interfere with same. see: Igwe v. The State (1982) 9 SC 114; Shorurno v. The State (1010) 12 SC (Pt.1) 73 at 87- 88. B

For the above reasons and the fuller ones contained in the lead judgment, I too, feel that the appeal is devoid of merit and should be dismissed. I order accordingly. The court below's affirmation of the judgment of the trial GCM is hereby confirmed. C

RHODES-VIVOURE JSC

I shall make some observations on jurisdiction and the competence of a court, because before the court Martial, Court of Appeal and this court the appellant raised the issue of jurisdiction. It reads: D

"Whether the Court of Appeal was right when it held that the General Court Martial has jurisdiction to try the appellant on the one count charge which bothers on professional misconduct." E

The appellant is a medical doctor. He was a Captain in the Nigerian Navy Medical Centre, Apapa, Lagos. Mrs. Joy Bassey, one of his patients who previously lost her pregnancy, and experienced difficult pregnancy went into Labour on the 2nd of April 1999. She was rushed to the Medical Centre where she was attended to by nurses because the appellant was absent. The appellant was notified of the state of the patient. He came to the Medical Centre, asked the nurse questions but did not examine the patient before he left. The next day when the appellant reported for duty the condition of the patient had deteriorated, He referred the patient to the Military Hospital, Yaba. By the time she arrived she was in a bad state bleeding profusely from her private part. She was subsequently operated on. She lost her baby with extensive damage to her reproductive organs. She is unable to have children again. F G H

Now, the thrust of learned counsel for the appellant's argument is that the Court Marshal's jurisdiction is only criminal, and that being the case it is only the Medical and Dental Practitioners Disciplinary

nary Tribunal established by the Medical and Dental Practitioners Act Cap M. 8 Laws of the Federation of Nigeria that has jurisdiction to try the appellant since this is a case of inquiring into the exercise of a Medical Practitioners Professional discretion.

As with all professionals, two courts or tribunals are usually saddled with jurisdiction to try them. What a professional is accused of and tried for is fundamental in determining which the courts or tribunals has jurisdiction. Jurisdiction is a threshold matter. It must be resolved quickly. It is of vital importance in that where a court has no jurisdiction to entertain a claim, anything done in respect of the claim would amount to a wasted effort. It can thus be raised at any stage of the proceedings, on appeal, or even in the Supreme Court for the first time' See *Bronik Motors Ltd and Anor v WEMA Bank Ltd* (1983) 1 SCNLR p.296, *Usman Dan Fodio University v Kraus Thompson Organisation Ltd* 2001 15 NWLR PT 736 P.305

The appellant was charged under section 62 of the Armed Forces Decree No. 105 of 1993. It reads:

"62. Failure to perform Military Duties

A person subject to the service Law under this Act who...

(a) without reasonable excuse, fails to attend for a parade or other duty of any description or leaves parade or duty before he is permitted to do so; or

(b) neglects to perform or negligently performs/a duty of any description is guilty of an offence under this section and liable, on conviction by a court Martial to imprisonment for term not exceeding two years or any less, punishment provided by this Act.

Now, the charge against the appellant reads:

Statement of Offence

Failure to perform military duties contrary to Section 62 (b) of the Armed Forces Decree 105 of 1993 (as Amended).

PARTICULARS

That you Surgeon Capt. C.T. Olowu NN/6613 on or about 2nd April, 1999 at Naval Medical Centre, Mobil Road, Apapa, Lagos did perform your duty negligently as consultant obstetrician/Gynaecologist which resulted in the mismanagement of Mrs. Joy Bassey's labour - a known high risk gynaecological patient.

From the facts it is clear that the failure by the appellant to examine or attend to Mrs. Joy Bassey, a high risk gynecological pa-

tient falls within Section 62 (b) supra. That is to say he neglected to perform his duties.

A court is competent when -

1. It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another; B

2. 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, and

3. The case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. See *Madukolu v. Nkemdilim* (1952) 2 NSCC p 375 C
Any defect in the competence of the court renders proceedings a nullity.

The offence for which the appellant was held liable by the court Martial and confirmed by the Court of Appeal is an offence under the Armed Forces Act Cap. 20 Laws of the Federation of Nigeria and therefore triable only by the Courts Martial. D

Failure to perform Military duties. Professional incompetence, are two distinct offences. In the former case a courts Martial is the proper venue/while in the later case the Medical and Dental Practitioners Disciplinary Tribunal has exclusive jurisdiction. E

In view of section 62 (b) of the Armed Forces Act Military duties are duties of any description given to a person subject to service Law to perform, and a court Marital has exclusive jurisdiction in such cases. F

There was in the circumstances no defect in the court marital which tried the appellant. That court had exclusive jurisdiction to try the offence which the appellant was charged. G

In the circumstances the Court Martial was the proper venue to try the appellant. I am in agreement with my learned brother Muntaka-Coomassie, JSC that there is no merit in this appeal. I confirm the judgment of the Court of Appeal. H