

SUPREME COURT OF NIGERIA
8TH JUNE, 2012. SC. 290/2009
CORAM:- A. M. MUKHTAR, F. F. TABAI,
M. S. MUNTAKA-COOMASSIE, N. S. NGWUTA,
O. ARIWOOLA, JJSC

THE NIGERIAN ARMY APPELLANT
V
LT. PATRICK DODO RESPONDENT

COURT MARTIAL - Membership - Armed Forces Act s. 129(a) - Interpretation - Words used in the section - Suggest that Judge Advocate is not member of General Court Martial (H1)

COURT MARTIAL - Judge Advocate - Duties of - The role of judge advocate in court martial proceedings - Is an advisory one (H2)

FACTS

Accused/respondent was one of the four Military Officers who were arraigned before a General Court Martial. They were charged with three counts of conspiracy to steal, stealing and making of false documents contrary and punishable under sections 114, 66(a) and 90(a) of the Armed Forces Decree 105 of 1993. The court martial found them guilty of the offence charged and after mitigation of the punishment by the Appropriate Superior Authority, they were sentenced to various terms of imprisonment.

Being dissatisfied, respondent appealed to the Court of Appeal, Lagos Division. The court held that the court martial is incompetent on the ground that a military police officer who acted as Judge Advocate was included as a member of the court martial. Hence, the court vacated the proceedings of the court martial and discharged respondent. Aggrieved, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right in law when it held that the Judge Advocate in the Court-Martial was a member of the court Martial and that his membership denied it the competence to try the Respondent, thereby giving judgment in his favour.

2. Whether the court of Appeal was right in law when it held

that the Military police officer was disqualified from being a Judge Advocate and that it was wrong to have served in the Court Martial that tried the Respondent. ”

HELD (Unanimously allowing the appeal per

MUKHTAR JSC)

COURT MARTIAL - Membership

1. It is instructive to note that the above constitution of the general court martial has met the requirement of the provision of section 129(a) of the Armed Forces Act. By a simple interpretation of the said provision, the tabulation and arrangement of the President, Members and Judge Advocate suggests that the Judge Advocate is not a member of the general court martial per se, as he is not lumped together with the members. By the principles of construction and interpretation of a statute, the words used must be given their ordinary grammatical meaning to give the provision the proper and correct interpretation of the intendment of the Legislature. (p. 2075 H)

COURT MARTIAL - Judge Advocate - Duties of

2. The distinction the learned counsel for the respondent is endeavouring to show between the Obisi’s case and the present case is of no moment, for the emphasis is on the role and duties of a Judge Advocate in a court martial proceeding which the rules have set out. As a matter of fact the duties of the Judge Advocate is advisory, as is confirmed in the powers and duties reproduced supra. The manner with which the Judge Advocate in this case discharged these duties can be seen on various parts of the record of proceedings. For example on page 23 of the record of proceedings. On that page and under a heading of ‘FINDINGS’, was recorded the following:-

“This court listened to the prosecution and the Defence counsels’ arguments on the above counts/charges against Lt. Col Yakubu (N/7460) and 3 others and had appreciated the legal issues arising from both sides of the arguments as summed

up by the Hon. Judge Advocate in this case.”

On page 29 can be seen the following:-

“JUDGE ADVOCATE OBSERVATION TO AS (A)

Please note that for count three that of sect 90 of AFD 195 as Amended the court entered a sentence of 7 years term of Imprisonment for Lt. Mohammed and Dodo. The court must have mistaken that offence with the offence of forgery under sect 112 which has a maximum punishment of twenty one years. This sentence has to revert to 2 years imprisonment in line with the appropriate charge under sec. 90 as charged.”

There is no gainsaying that the above portends the advisory role of the Judge Advocate, and that he was not a member of the court. (p. 2077 B)

NOTABLE POINT OF INTEREST

ARIWOOLA JSC

1. Judge Advocate – Meaning

Who then is a Judge Advocate? Under the Military Law, Judge Advocate is “an officer of a Court-Martial who acts as prosecutor. He is also a legal adviser on a military commander’s staff. See Black’s Law Dictionary, Ninth (9th) Edition page 918. It has been held that the Judge Advocate is just in the nature of a State Counsel being a Legal Officer serving in the Court Martial to prosecute any person arraigned before the court. Indeed, the duty of Judge Advocate does not extend to taking part in the final decision making. He is comparable with a Legal Officer from the office of Public Prosecution in the Ministry of Justice, who prosecutes in the common law courts. He only prosecutes by presenting the facts and the law to assist the Presiding Judge to arrive at a just decision on the complaint or charge presented. (p. 2086 C)

REPRESENTATION

Mr. Muhammed Sani Ibrahim, for the Appellant

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

CASES REFERRED TO

Nigeria Progress Ltd. v. N.E.L. Corp (1989) 20 N.S.S.C. (Pt.. II) 211

- Ibrahim v. Ojoma (2004) 4 NWLR (Pt. 867) 89
Ojokoloba v. Alamu 1987 3 NWLR (Pt. 61) 377
Omoijale V. Umoru (1999) 8 NWLR (Pt. 614) 178
Niger Progress Ltd V. Nel (1989) 20 NSCC (Pt. 11) 211
Lt. Commander S. Obisi V. Chief of Naval Staff (2004) 5 SCNJ 99
B Obisi V. Chief of Naval Staff (2004) 6 SCM 31

STATUTES & RULES REFERRED TO

- Criminal Code Act, s. 516
C Armed Forces Decree 105 1993, ss. 66(a), 90(a), 114, 180
Armed Forces Act, ss. 98, 129, 133, 134(2), 181
Rules of Procedure (Army) 1972, rr. 23, 81

BOOK REFERRED TO

- D Black's Law Dictionary 9th Ed p. 918

LEAD JUDGMENT BY MUKHTAR JSC

- This is an appeal against the decision of the Court of Appeal, Lagos Division, which affirmed the conviction of the appellant by the
E General Court Martial. In the said court, the three counts charge against the appellant and his co-accused were as follows:-
CHARGE ONE

- “Statement of offence: Conspiracy to steal contrary to section
F 516 of the criminal code Act and punishable under section 114 of the Armed Forces Decree 1993.
Particulars of offence:*

- In that he at D.M.P. Ikoyi on or about May, 1998 conspired with others to steal the sum of N8.9 Million, being property of the
G Federal Government of Nigeria.
CHARGE TWO*

- Statement of offence: Stealing, contrary to and punishable under section 66(a) of the Armed Forces Decree, 1993.
Particulars of offence:*

- H *In that he at D.M.P. Ikoyi on or about May, 1998 stole the sum of N8.9 Million being property of the Federal Government of Nigeria.*

CHARGE THREE

Statement of offence: Making of false documents contrary to

and punishable under section 90(a) of the Armed Forces Decree 1993.

Particulars of offence:

In that he at D.M.P. Ikoyi on or about May, 1998 connived with others to illegally include 53 fake ex-trainees in a pay schedule thereby defrauding the Federal Government of Nigeria of N8.9 Mil-^B lion.”

The General Court Martial after evaluating the evidence before it found the appellant and his co-offenders guilty as follows:-

“The court hereby finds Lt. Col. Yakubu, Lt. Dodo, Lt. ^C Mohammed and Sgt. Goho guilty of the offences of conspiracy to steal N8.9m and stealing same property of the Nigerian Armed Forces.

Lt. Dodo and Lt. Mohammed guilty on the count of making false document. Lt. Col. A. O. Yakubu and Sgt. Goho are discharged on this count of making of false statement. All findings are subject to ^D confirmation.”

After the mitigation of punishment, the General Court Martial sentenced the appellant thus: -

“Lt. D. P. Dodo (N/10088)

(1) Count one - 7 years imprisonments ^E

(2) Count Two - 2 Years

(3) Count Three -7 Years

... All the sentences are subject to confirmation by the Appropriate Superior Authority (ASA). ^F

RECOMMENDATIONS

The court recommended that:

a. All monies stolen should be recovered and paid into the coffers of the NA

b. DMP should be recognized to enhance probity and account- ^G ability.

The issue of money cheques at DMP should be addressed.”

Aggrieved by the conviction and sentence of the General Court Martial, the appellant appealed to the Court of Appeal on three grounds of appeal. The court of Appeal allowed the appeal as fol- ^H lows:-

*“The inclusion of a Military police officer as a member of the court martial has denied the court martial the competence to enter-
tain the charge against the appellant and it is on these ground (sic)*

that his appeal succeeds. Having found the court martial incompetent, it is unnecessary to go into other issues raised in the grounds of appeal. The proceedings of the court martial are hereby vacated and the appellant discharged.”

The Nigerian Army was dissatisfied with the decision of the Court of Appeal; hence it appealed to this court on three grounds of appeal. In pursuance to the rules of this court, learned counsel for the parties exchanged briefs of argument, which they adopted at the hearing of the appeal. Issues for determination were raised in the appellant’s brief of argument, as follows:-

- “1. *Whether the Court of Appeal was right in law when it held that the Judge Advocate in the Court-Martial was a member of the court Martial and that his membership denied it the competence to try the Respondent, thereby giving judgment in his favour.*
2. *Whether the court of Appeal was right in law when it held that the Military police officer was disqualified from being a Judge Advocate and that it was wrong to have served in the Court Martial that tried the Respondent.”*

A single issue was formulated by the respondent for determination in his brief of argument. The issue is:-

- “Whether the Court of Appeal was right in holding that the appointment of a Military Police Officer to serve as Judge Advocate contrary to the Queens Regulation for the Army 1975 and the Rules of Procedure (Army) 1972 made applicable by virtue of S. 181 of the Armed Forces Act 2004 vitiated the composition and undermined the competence of the General Court Martial.”*

I will adopt the issues for determination formulated by the appellant for the treatment of this appeal starting with the first issue. In proffering argument to cover the first issue, the learned counsel for the appellant has submitted that the court below misconstrued the provision of section 129 of the Armed Forces Act Decree 1993 as amended and the foot note 1 of Rule 23 of the Rules of procedure (Army) 1972, and did not take cognizance of section 180 of the Armed Forces Decree 1993 (as amended) which is to apply in conjunction with the provisions of the Armed Forces Act. According to learned counsel section 134 (2) of the Armed Forces Act would have guided the court below in deciding whether the Judge Advocate was qualified to serve in the court Martial or not. The learned counsel

posited that section 129 of the Armed Forces Act has stated clearly the distinction between the Judge Advocate and members of the court Martial and that section 129(a) are plain enough on the composition of the General Court Martial. He contended that the attitude of this court is that when the words of a statute is clear and unambiguous, no other interpretation should be given to it, as that may distort the intention of the law maker. See *Omoijabe v. Umoru* 1999 8 NWLR part 614, *Nigeria Progress Ltd. v. N.E.L. Corp* (1989) 20 N.S.S.C. part II page 211, and *Obisi v. Chief of Naval Staff* 2004 8 N.J.S.C. at page 140, which the learned counsel cited. The learned counsel finally submitted that the interpretation given by the lower court, that a Judge Advocate is a member of a Court Martial by operations of law distorted the position of the law as reiterated in the *Obisi*' case supra.

The learned counsel for the respondent in reply has distinguished the *Obisi*'s case supra with the instant case with two factors, which are:-

“(1) The Judge Advocate in Obisi’s case was not a Naval Police Officer from the same office which investigated and prosecuted that case so that the partiality or impartiality of the Judge Advocate was not an issue.

“(2) This Honourable Court defined the term “Judge Advocate in the American parlance” and from the American context where a Judge Advocate can also double as a Prosecutor - a scenario that is completely alien to the common law system and the British Military Justice system from which our Military Justice system is derived”.

It is the contention of the learned counsel that under our military justice system, the judge advocate is an impartial and dispassionate adviser to the Court Martial with a statutory duty to balance the interest of the parties and ensure that the accused does not suffer any disadvantage or unfairness throughout the trial. Learned counsel referred to the Rules of procedure (Army) 1972 made applicable by virtue of section 181 of the Armed Forces Act, Rule 80, 1 - 8 which defines and prescribes the general duties of a Judge Advocate as follows:-

(1) The Judge Advocate shall be responsible for the proper discharge of his functions to the Judge Advocate General.

(2) The Prosecutor and the accused respectively are at all times

after the Judge Advocate is named to act at the trial entitled to his opinion on any question of law or procedure relative to the charge or trial whether he is in or out of Court to the permission of the Court.

B (3) On the assembly of the court the Judge Advocate shall advise the court on any defect in the constitution of the court or in the charge sheet, and during the trial he shall advise the Court upon all questions of law or procedure which may arise. The court shall accept his advise on all such matters unless they have weighty reasons for not doing so, and if the Court does not accept it their reason
C for not doing so shall be recorded in the proceedings.

(4) After the closing addresses the judge Advocate shall sum up the evidence and advise the court upon the law relating to the case before the court close to deliberate on their findings. If in the
D course of deliberating on their findings the court require further advice from the judge advocate, they shall suspend their deliberation and ask and be given such advice in open Court.

(5) If when the court announce a finding of guilty or a special finding under either section 98 of the Act or rule 66 (3) the Judge
E Advocate is of the opinion that such finding or special finding is contrary to the law relating to the case, he shall once more but not more than once more, advise the Court what findings are, in his opinion, open to them. The Court shall then reconsider their finding in closed
F door. The record of the proceedings relating to such reconsideration shall be in the form set out in schedule 4 to these Rules.

(6) The Judge Advocate shall be present wherever the court is sitting whether in open court or closed Court, except when the Court is deliberating on the finding on the charge or on a revision thereof.

G (7) The Judge advocate has equally with the President the duty of ensuring that the accused does not suffer any disadvantage in consequence of his position as such or of his ignorance or of his incapacity to examine or cross-examine witnesses, or to make his own evidence clear and intelligible, or otherwise.

H (8) The Judge Advocate shall be responsible for seeing that a proper record of proceedings is made in accordance with Rule 92 and responsible for the safe custody of the record of the proceedings under Rule 94.

The learned counsel for the respondent has submitted that

what obtained in the Court Martial was tantamount to breach of rules of natural justice. I will at this juncture, reproduce the provision of section 129 of the Armed Forces Act here below. It reads:-

“129. Types of courts - martial

There shall be, for the purposes of carrying out the provisions of this Act, two types of courts- martial, that is - B

(a) a general court - martial, consisting of a President and not less than four members, 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.” C

As can be gleaned from the record of proceedings of the Court Martial, the proceedings that is the subject of controversy in this appeal, is a General Court Martial, as is reflected on page 11 of the record of proceedings. On that page 11 is the following:- D

“RECORD OF PROCEEDINGS OF A GENERAL COURT MARTIAL CONVENED BY-

Col. H.O.U. Adeja (N/5854) FSS MSS psc (4)

Ag Commandant AHQ Camp

Under The Armed Forces Decree 105 of 1993 for the trial of E

Lt Col. A O Yakubu (N/7464)

Lt P. D. Dodo (N/10088)

Lt AU Mohammed (N/10079)

79 NA/3398 Sgt Emmanuel Goho...”

Then on Page 12 is the constitution of the general court martial, which reads the following:- F

“PRESIDENT

Brig. Gen R I Adeba (N/3002)

MEMBERS G

1. Col J A Iyedo (N/3421)

2. Col D. D. Oyeбанjo (N/2915)

3. Col Woki (N/5533)

4. Col E B Ojima (N/2719)

5. Col D F Osho (N/5778) H

JUDGE ADVOCATE

Lt Col A O Abubakar (N/6778)...”

It is instructive to note that the above constitution of the general court martial has met the requirement of the provi-

sion of section 129(a) of the Armed Forces Act. By a simple interpretation of the said provision, the tabulation and arrangement of the President, Members and Judge Advocate suggests that the Judge Advocate is not a member of the general court martial per se, as he is not lumped together with the members. By the principles of construction and interpretation of a statute, the words used must be given their ordinary grammatical meaning to give the provision the proper and correct interpretation of the intendment of the Legislature. See *Beswick v. Beswick* 1968 A.C. 58, where Lord Reid expressed the Following:-

"In construing Act of parliament we are seeking the intention of parliament and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning no matter how they get there. But if they are capable of having more than one meaning we are in my view, well entitled to see how they get there." See also *Major and St. Mellon, Rural District Council V. Newport Corporation* 1952 AC 189, *Ibrahim v. Ojoma* (2004) 4 NWLR part 867 page 89 and *Ojokoloba v. Alamu* 1987 3 NWLR part 61 page 377. A correct interpretation of the provision of section 129(a) of the Armed Forces Act supra was effected by the Supreme Court in the case of *Obisi v. Chief of Naval Staff* 2004 8 M.J.S.C. page 137. I take solace in the words of *Pats-Acholonu J.S.C.* (of blessed memory) when he said:-

"We are dealing with the unique case of Court Martial court which is peculiar in its character. Let me illustrate. In the case under consideration, the Judge Advocate for example is not a member of the court and cannot be described as such. He is in the nature of a state counsel being a legal officer whose duty is to prosecute any one arraigned before the Court Martial court. From the provision of section 129 (supra) his position relative to the strict constitution of the court Martial court is the same as the waiting member."

I am fortified by the above position. In consequence, I am of the view that the lower court erred, when in its lead judgment it posited the following:-

"By operation of law, a judge advocate is a member of a court martial. He is a member of such importance that he is required to be present at all the sittings of the court. He must be a legal practitioner

of at least 3 years post call experience giving rulings and directions on questions of law including practice and procedure. His role in a court martial is of utmost importance as the other members act more in the capacity of a jury. The want of a voting right does not in any way undermine the very pivotal role of the Judge Advocate in a court martial." B

The distinction the learned counsel for the respondent is endeavouring to show between the Obisi's case and the present case is of no moment, for the emphasis is on the role and duties of a Judge Advocate in a court martial proceeding which the rules have set out. As a matter of fact the duties of the Judge Advocate is advisory, as is confirmed in the powers and duties reproduced supra. The manner with which the Judge Advocate in this case discharged these duties can be seen on various parts of the record of proceedings. For example on page 23 of the record of proceedings. On that page and under a heading of 'FINDINGS', was recorded the following:- C D

"This court listened to the prosecution and the Defence counsels' arguments on the above counts/charges against Lt. Col Yakubu (N/7460) and 3 others and had appreciated the legal issues arising from both sides of the arguments as summed up by the Hon. Judge Advocate in this case." E

On page 29 can be seen the following:-

"JUDGE ADVOCATE OBSERVATION TO AS (A) F
Please note that for count three that of sect 90 of AFD 195 as Amended the court entered a sentence of 7 years term of Imprisonment for Lt. Mohammed and Dodo. The court must have mistaken that offence with the offence of forgery under sect 112 which has a maximum punishment of twenty one years. This sentence has to revert to 2 years imprisonment in line with the appropriate charge under sec. 90 as charged." G

There is no gainsaying that the above portends the advisory role of the Judge Advocate, and that he was not a member of the court. H
At any rate, the provision of section 134(2) of the Armed Forces Act should have been given the attention it deserves. The provision is as follows:-

"(2) An officer who, at any time between the date on which the accused was charged with the offence and the date of the trial,

has been the commanding officer of the accused and any other officer who has investigated the charge against the accused, or who under service law has held or has acted as one of the persons holding an inquiry into matters relating to the subject matter of the charge against the accused, shall not sit as a member of a court martial or act as a judge advocate at the court martial”

One of the particulars supporting ground one of appeal in the Court of Appeal, states that the Judge Advocate was a military officer from same office, which investigated the case contrary to the provisions of the Manual of Military Law. See page 109 of the record of proceedings. In fact, if the court below had read carefully the said provision of section 134 (2), the learned justice wouldn't have in his judgment found thus:-

“The Judge Advocate in the instant trial, a member of the court Martial, was a Military Police Officer. He was not competent to be a member of the court martial. His membership has undermined the competence of that court martial to try the appellant...”

The inclusion of a Military police officer as a member of the court martial has denied the court martial the competence to entertain the charge against the appellant and it is on these grounds that this appeal succeeds.”

The court below definitely misconstrued the provisions of sections 129 (a) and 134(2) supra. For the forgoing reasoning I resolve issues (1) and (2) of the appellant in favour of the appellant. The sum total of this appeal is that it succeeds in its entirety. The appeal is hereby allowed. The judgment of the lower court is hereby set aside and the judgment of the General Court Martial is affirmed.

G

MUNTAKA-COOMASSIE JSC

The appeal calls for the determination of whether a Military Police Officer can be made a Judge Advocate in a Court Martial set up to try a Military Officer. The Respondent until his trial was an officer in the Nigerian Army. He was arraigned before a General Court Martial on a three (3) count charge of stealing.

The General Court Martial that tried and convicted the respondent was composed as follows:-

President - Brigadier General R. Y. Adoba (N/3002) DOAA.

(ii) Member -

(a) Col. J. A. Iyodo, (N 3421) AHQ DOAA.

(b) Col. D. D. Oyebanjo (N 5558) AHQ DAOPS.

(c) Col. W. Oki (N 5533) HQ L. G. C.

(iii) Waiting Members -

(a) Col. B. T. Ako (N 5567) DAR/R. B

(b) Col. D. F. Osho (N5778) NABHY.

(iv) Judge Advocate - Lt. Col. A. Q. Abubakar (N 6728) NAMP.

The respondent was convicted and sentenced to five (5) years, seven (7) years, and seven (7) years in respect of each of the three counts respectively, which sentence was reduced by the Army Council to Two (2) years imprisonment each in respect of the three counts. The respondent was dissatisfied with the decision of the Court Martial and successfully appealed to the Court of Appeal Lagos Division hereinafter called the lower court. At the lower court the competence of the Court Martial to try the respondent was challenged as a result of the appointment of the Judge Advocate Lt. Col. A. Q. Abubakar, a serving Military Police Officer to serve in the Court Martial. The lower court, as I stated earlier held that the Court Martial was not properly constituted with the appointment of a Military Police Officer as the Judge Advocate and allowed the appeal and discharged the respondent. The lower court held as follows: at page 126 of the record of proceedings. C

“S. 18, 1 (1) of Decree 105 of 1993 expressly imported the Rules of Procedure (Army) 1972. Even though by Section 18, 1 (1) of the said Decree these rules shall cease to operate once the President makes his own Rules, there is nothing before us to show as at 1999 when the trial question took place the president of the Federal Republic of Nigeria had made his own Rules of procedure (Army) 1972 Rule 23 of the said Rules clearly preclude Military Police officers from membership of a Court Martial. The Judge Advocate, in the instant trial, was a Military Police Officer. He was not competent to be a member of the Court Martial. His membership has undermined the competence of the Court Martial to try the appellant.” F

The appellant was dissatisfied with the judgment of the lower Court and has as a result appealed to this court. Both parties filed and exchanged their respective briefs of argument. The appellant in its brief of argument distilled two (2) issues for determination thus:- G

“(1) Whether the Court of Appeal was right in Law when it held that the Judge Advocate in the Court-Martial was a member of the court martial and that his membership denied it the competence to try the respondent, thereby giving judgment in his favour.

B (2) Whether the Court of Appeal was right in Law when it held that the Military Police Officer was disqualified from being a Judge Advocate and that it was wrong to have served in the Court Martial that tried the respondent.”

While the respondent in his Brief of Argument formulated only one (1) issue for determination, thus:-

C “Whether the Court of Appeal was right in holding that the appointment of a military police officer to serve as a Judge Advocate contrary to the Queens Regulation for the Army 1975 and the Rules of Procedure (Army) 1972 made applicable by virtue of section 181 D of the Armed Forces Act 2004 vitiated the composition and undermined the competence of the General Court Martial.”

At the hearing of the appeal the learned counsel to the appellant adopted his brief of argument and urged us to allow the appeal. It was the contention of the learned counsel on his first issue for determination that the lower court misconstrued the provisions of Section 129 of the Armed Forces Act (Decree 1993) as amended and foot note 1 of the Rule 23 of the Rules of Procedure (Army) 1972 and did not take cognisance of Section 180 of the Armed Forces Decree 1993 (as amended) which is to apply in conjunction with the provisions of the Armed Forces Act. Learned counsel referred to the provisions of Section 129 of the Armed Forces Act 1993 and submitted that a Judge Advocate is distinct from the other members of the Court Martial. It was the contention of the learned counsel that the provisions of Section 129 (a) (supra) are plain enough on the composition of the General Court Martial, where the words of a statute are clear and unambiguous no other interpretation should be given to it as that may distort the intention of the law maker, cited the cases of *Omoijale V. Umoru* (1999) 8 NWLR (pt 614) 178 at 188 and *H Niger Progress Ltd V. Nel* (1989) 20 NSCC (Pt. 11) 211 at 220. Hence by virtue of the provisions of Section 129 (a) there is a distinction between members of the General Court Martial and the Judge advocate. In addition, it was submitted that the role of the Judge Advocate is distinct from that of the members of the Court Martial as

he does not take part in the deliberations on findings and sentence of the Court Martial. Learned counsel also referred to the cases of *Obisi V. Chief of Naval Staff* (2004) 8 MJSC at 140.

On the 2nd issue, learned counsel submitted that the applicable section is Section 134 (2) of the Armed Forces Act which provides for those who are exempted from being a member of the Court Martial or a Judge Advocate that the Judge Advocate in the instant case did not fall into any of those categories mentioned in the Section. It was further contended that this interpretation placed on the provisions of Rule 23 of the Rules of procedure (Army) 1972 by the lower court was wrong. Thus the lower court was in error when it held that the Judge Advocate was a member of the Court Martial. Learned counsel concluded that the provisions of Rule 23 (supra) are clear and plain as to the difference between the members of the General court Martial and the Judge Advocate, and who is qualified to serve as Judge Advocate.

Learned counsel to the respondent also adopted his brief of argument and urged this court to dismiss the appeal. Learned counsel agreed with the appellant on the decision in *OBISI V. CHIEF OF NAVAL STAFF* (supra) but distinguished it from the present case particularly he contended that the Judge Advocate in that case did not come from the same department that investigated the allegation hence the partiality or impartiality of the Judge Advocate was not in issue. Learned counsel referred to the provision of the Rules of Procedure (Army) 1972 which was made applicable by virtue of the provisions of section 181 of the Armed Forces Act, which spelt out the powers and duties of the Judge Advocate and submitted that apart from being a prosecutor, the Judge Advocate is also to be impartial, and that is why the Rules of Procedure (Army) 1972 and the Queens Regulation for the 1975 expressly prohibit Military police Offices from sitting or serving as Judge Advocate in a Court Martial. It was submitted that by operation of law, a Judge Advocate is a member of Court Martial who has important functions in the proceedings. He referred to section 129 of this Decree which states that, a court martial shall be duly constituted if it consist of the President of the Court Martial and not less than two other officers and a waiting member.

In the instant appeal, Section 129 (a) of the Act, i.e. General Court Martial is the one under consideration. The General Court

Martial as set up consisted of the following:

- a) President - Brig-General R. T. Adaba
- b) Members
 - i) Col. J. A. Iyado
 - ii) Col. D. D. Oyebanjo
 - B iii) Col. W. Oki
 - iv) Col. E. B. Ojima
- c) A waiting member
 - 1. Col. B. T. Ako
 - C 2. Col. D. F. Osho
- d) Judge Advocate - Col. Abubakar.

From the above, and in view of the provisions of section 129 of the Decree, I have no hesitation in holding that the waiting members and the Judge Advocate are not members of the Court Martial.

D A waiting member is a person who stands by in case any member of the court Martial is, for any reason, unable to attend the sittings of the court Martial, while a Judge Advocate is in the nature of a State counsel, the prosecutor who is to prosecute anyone arraigns before the court Martial. Rule 81 of the Rules of Procedure (Army) 1972

E Learned counsel pointed out that the investigation in this case was ordered by the Provost Martial, the investigator (Femi Adegbayi) was from the Provost martial's office. The prosecutor (Capt. A. A. Ali) was from same office, while the Judge Advocate (Lt. Col. A.Q. Abubakar) is also from the same office and by reason of this the confidence of the court Martial to try the respondent has been undetermined.

F On the 1st issue formulated by the appellant, as to whether a Judge Advocate is a member of a General Court Martial it will be necessary to examine the statutes that established the General Court Martial. Section 129 of the Armed Forces Act 1993 provides as follows:

"129, There shall be, for the purposes of carrying out the provisions of this Act two types of Court's Martial that is:-

H a) *A General Court Martial consisting of a President and not less than four members, a waiting member, a liaison officer, and Judge Advocate.*

b) *A Special Court-Martial, consisting of President and not less than two members, a waiting member, a liaison officer and Judge*

Advocate”.

Whilst Section 133 of the same Act, defines the quorum as follows:-

“133 (1) subject to the provisions of Sections 128 and 129 of the Decree, a Court Martial shall be duly constituted if it consist of the President of the Court Martial and not less than two other officers and a waiting member.”

That explained the reason why the provision of Section 131 (1) of the Decree does not take into account or reckon with the waiting members or a judge Advocate in the constitution of a Court Martial. This court has stated this position clearly in the case of Lt. Commander S. Obisi V. Chief of Naval Staff (2004) 5 SCNJ 99 at 105 - 106 or (2004) 8 MJSC p. 137 as follows:-

“We are here dealing with the unique case of Court Martial, court which is peculiar in its character. Let me illustrate. In the case under consideration the Judge Advocate for example is not a member of the court and cannot be described as such. He is in the nature of a state counsel being a legal officer whose duty it is to prosecute anyone arraigned before the Court Martial court. From the provisions of Section 129 (supra) his position is relative to the strict constitution of the Court martial Court is the same as that of the waiting member” per Pat-Acholonu JSC of blessed memory.

I am bound by this decision. Therefore the lower court was in error when it held that a Judge Advocate is a member of the Court Martial, and I so hold. The reliance placed on the provisions of Rule 23 of the Rules of Procedure (Army) 1972 made applicable by Section 181 of the Armed Forces Act 1993, is inappropriate, Rule 23 provides:-

“Members of the Provost Staff or Officers of the Royal member of Court Martial or act as a Judge Advocate if:-

a) he has been accused commanding officer from the date the accused was charged up to the time of trial ,
b) he investigated the charge against the accused,
c) under the service law he has held or has acted as one of the persons holding an inquiry into matter relating to the subject matter of the charge against the accused.”

In the instant case, the Judge Advocate was not the accused commanding officer at the relevant time, neither did he investigate

the charge or conducted an enquiry into any matter relating to the subject matter of the charge. We cannot go outside the ambit of the provisions of section 134 (2) (supra) to hold that a Military Police Officer cannot act as a Judge Advocate in a Court Martial when he has not fallen into any of the categories of officers provided in that section. I also resolve this issue in favour of the appellant.

On the whole, I allow this appeal and I, consequently, set aside the Judgment of the lower court. I read in draft the well-written lead judgment of my learned brother Mukhtar, JSC I admire the reasons adumbrated in the lead judgment in allowing the appeal at the lower court and restoring the decision of the General Court Martial. I completely agree with that decision in the lead judgment of Mukhtar JSC.

It is because of my little contribution and the fuller reasons contained in the lead judgment of my lord Mukhtar JSC that I too find merit in this appeal. The judgment of the lower court abides after allowing same.

NGWUTA JSC

I read in draft the lead judgment just delivered by My Lord, Mukhtar, JSC.

The constitution of the General Court Martial reads as follows:

“PRESIDENT

Brig.-Gen. R. I. Adeba

MEMBERS

1. Col. J. A. Iyedo (N/3421)

2. Col. D. D. Oyebanjo (N/2915)

3. Col. Woki (N/5533)

4. Col. E. B. Ojima (N/2719)

5. Col. D. F. Osho (N/5778)

JUDGE ADVOCATE

Lt. Col. A. O. Abubakar (N/6778)” (See page 60 of the record).

This tallies with S.127 (a) of the Armed Forces Act. The President of the Court is named and so are Members named from 1-5. Then below is the Judge Advocate. The arrangement shows clearly that the Judge Advocate is not a Member of the Court. Not having been listed as a Member of the General Court Martial, it is idle speculation to argue that the Judge Advocate took part in the adjudication.

For the above and the comprehensive reasoning in the lead judgment, I agree that the appeal is meritorious and it is allowed. I adopt the consequential orders in the lead judgment.

ARIWOOLA JSC

B

The appeal is against the decision of the Court of Appeal, Lagos Division delivered on 27th April, 2007 which affirmed the conviction of the Respondent herein by the General Court Martial.

The Respondent was one of the four Officers who were arraigned before the General Court Martial charged with three counts of conspiracy to steal, stealing and making of false documents. The accused persons were later found guilty of the offences and after the mitigation of punishment by the Appropriate Superior Authority (ASA), the officers were sentenced to various terms of imprisonment for the three counts charge. Dissatisfied with the decision of the General Court Martial, the Appellant appealed to the court below which allowed the appeal. The Court below found the Court Martial incompetent and vacated its proceedings. The Respondent was then discharged accordingly. Not pleased with the decision of the Court of Appeal, the Appellant herein filed an appeal to this court on three grounds.

Briefs of argument were filed and exchanged. The following issues were formulated by the Appellant in its brief of argument.

1. Whether the Court of Appeal was right in law when it held that the Judge Advocate in the Court Martial was a member of the Court Martial and that his membership denied it the competence to try the Respondent, thereby giving judgment in his favour.

2. Whether the Court of Appeal was right in law when it held that the Military Police Officer was disqualified from being a Judge Advocate and that it was wrong to have served in the Court Martial that tried the Respondent.

The Respondent distilled a sole issue on the competence of a Judge Advocate serving on the Court Martial. The learned counsel to the appellant had contended that the Judge Advocate by the provisions of Section 129 of the Armed Forces Act is not a member of the Court Martial hence his presence at the proceedings of the court should not rob the court of its competence to try an offender ar-

raigned before the Court Martial. In this case, the competency of the Martial Court was challenged based on the composition of its membership. In other words, it was contended that the presence of the Military Police Officer at the court Martial making him a member of the Court robbed the court of its competence to try the appellant. It is trite law that a court is competent, inter alia, when 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. See, *Madukolu & Ors V. Nkemdilim* (1962) 1 ALL NLR 587 at 595. Where the Court Martial is composed of a disqualified member, the court's jurisdiction would be affected adversely. The entire proceedings embarked upon thereafter will amount to nullity. Who then is a Judge Advocate? Under the Military Law, Judge Advocate is "an officer of a Court-Martial who acts as prosecutor. He is also a legal adviser on a military commander's staff. See *Black's Law Dictionary*, Ninth (9th) Edition page 918. It has been held that the Judge Advocate is just in the nature of a State Counsel being a Legal Officer serving in the Court Martial to prosecute any person arraigned before the court. Indeed, the duty of Judge Advocate does not extend to taking part in the final decision making. He is comparable with a Legal Officer from the office of Public Prosecution in the Ministry of Justice, who prosecutes in the common law courts. He only prosecutes by presenting the facts and the law to assist the Presiding Judge to arrive at a just decision on the complaint or charge presented. See *Obisi V. Chief of Naval Staff* (2004) 6 SCM 31.

In the circumstance the law is clear that the Judge Advocate is not a member of the Court Martial he serves. His presence should therefore not rob the court of its competence to try offenders as it were. The court below erred to have held otherwise.

For the above reason and the fuller and more comprehensive reasons contained in the lead judgment of my learned brother, Aloma Mukhtar, JSC which I had the opportunity of reading in draft and with which I entirely agree, I also hold that the appeal succeeds as it is meritorious. Accordingly, it is allowed. The judgment of the Court below is set aside while the Judgment of the General Court Martial is affirmed.