

SUPREME COURT OF NIGERIA
FRIDAY 22ND FEBRUARY, 2013. SC. 107/2010
CORAM:- I. T. MUHAMMAD, J. A. FABIYI, O. ARIWOOLA,
M. D. MUHAMMAD, K. B. AKA'AH, JJSC

THE NIGERIAN ARMY APPELLANT
AND
WARRANT OFFICER
BANNI YAKUBU RESPONDENTS

JURISDICTION - Court of Appeal - Court martial - By 1999 Constitution s. 240 - C.A. is given exclusive appellate jurisdiction - Over decisions of general court martial (H1)

APPEALS - Leave - Condition for application - Proof - Since appellant asserted that the condition precedent for leave was not complied with - He has the burden to prove same (H2)

EVIDENCE - Unchallenged evidence - Effect - Such evidence stands - And court should accept and act on same (H3)

APPEALS - Extension of time - Conditions - By C.A. Rules O. 7 r. 10(2) - Affidavit evidence must disclose good and substantial reasons - And the ground must show good cause why appeal should be heard (H4)

COURTS - Ouster clause - Interpretation - Courts guard their jurisdiction jealously - And any enactment that takes away rights to court - Should be narrowly construed (H5)

ACTIONS - Limitation law - Applicability - Where a party is denied opportunity to bring his action timeously - The law will not apply (H6)

FACTS

Respondent was convicted by the General Court Martial (GCM) sitting in Abuja for conspiracy. Respondent instructed his solicitors to write letter of appeal to appellant for a review of his case. There was

no response to same. Hence, respondent approached the Court of Appeal Abuja Division by way of motion on notice pursuant to Order 7, Rule 10 (1) and (2) of the Court of Appeal Rules 2007, wherein he prayed for extension of time within which to apply for leave to appeal against the decision of the G.C.M, leave to appeal and extension of time within which to appeal.

Appellant raised preliminary objection to the application on two grounds that respondent had not complied with the condition precedent before approaching the court and that respondent's action was statute barred by virtue of the provision of section 2 (a) of the Public Officers Protection Act. After considering the material before it and hearing submissions of learned counsel for the parties, the court dismissed appellant's preliminary objection. The court thereafter granted the requisite leave to respondent to appeal against the decision of the G.C.M that convicted respondent of conspiracy. Dissatisfied, appellant appealed to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal correctly evaluated (sic) the law when it ruled that the appeal was properly before their lordships, consequently dismissed preliminary objection."

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

JURISDICTION - Court of Appeal - Court martial

1. Let me state it in clear terms that by the provision of section 240 of the 1999 Constitution of the Federal Republic of Nigeria, the court below is given exclusive appellate jurisdiction over decisions of the G.C.M. Such jurisdiction is not subject to the whims of any other quasi-judicial body or outfit. The appellant should appreciate this vital point right from the onset. (p. 479 B)

APPEALS - Leave - Condition for application - Proof

2. The appellant's counsel strenuously maintained in the brief of argument that the respondent failed to comply with condition precedent before initiating his application for leave to

appeal. He relied on sections 179 (4) and 184 (5) of the Armed Forces Act, inter alia.

The appellant did not pin-point clearly the condition precedent which was not complied with by the respondent. The appellant which asserted that condition precedent was not complied with has the burden to prove same. It is basic that any party which asserts must prove same. (p. 479 C)

Unchallenged evidence - Effect

3. It is extant in the record of appeal as can be seen at pages 48 - 60 of same that the respondent deposed to un-contradicted averments and attached exhibits 'A' and 'B' to his better and further affidavit wherein he applied to the chief of Army Staff in tune with the law for a review of his conviction by the G.C.M. As nothing was done by the Chief of Army Staff he was compelled to approach the lower court. The salient averments remain un-contradicted. It is basic that unchallenged evidence stands. The court should accept same and act on it. The court below was on a firm ground in the stand taken by it. (p. 479 F)

APPEALS - Extension of time - Conditions

4. Let me now move to the real matter in contention between the parties. The respondent maintained that there are good reasons for his failure to appeal within time and that there are substantial points of law to be canvassed at the hearing before the lower court. It must be stated here that Order 7 Rule 10 (2) of the Court of Appeal Rules 2007 provides for two conditions, which must be satisfied conjunctively. The affidavit evidence must disclose good and substantial reasons for failure to appeal or seek leave to appeal within the prescribed time. The proposed grounds of appeal must show good cause why the appeal should be heard. The grounds must be arguable; not frivolous. (p. 480 C)

Ouster clause - Interpretation

5. As stated by learned counsel for the respondent, it is basic that courts do guard their jurisdiction jealously and zealously. As such, any enactment which takes away the rights of the

citizen accessing the court is to be construed narrowly against any one claiming its benefit. (p. 481 E)

ACTIONS - Limitation law - Applicability

**6. The appellant who is trying to cling tenaciously to the law
B put obstacles on the respondent's way by failing to react to
his complaint in good time. He was subjected to trauma and
he fell sick as contained in his affidavit and further affidavit.
This court has held in *Abacha v. Spiff (2009) 5 SCNJ 119 at
C 140* that where a party is prevented from bringing an action
or denied the opportunity to sue timeously, limitation law will
not apply. The position in the case at hand points to the same
direction.**

**Further, the position here is that the respondent desires
D to enforce his fundamental right of access to the law court to
determine his innocence in the conviction meted out to him by
the G.C.M. The right, is as dictated by section 240 of the 1999
Constitution of the Federal Republic of Nigeria. It is unthink-
able to imagine that the provision of section 2 (a) of the Public
E Officers protection Law can be employed to truncate the
respondent's opportunity to ventilate his grievances to the
decision of the G.C.M.** (p. 481 F)

REPRESENTATION

F N. A. Ojile, for the Appellant
A. Akeredolu (Mrs.) with O. Abu (Mrs.) and O. Ashiru (Miss), for the
Respondent

CASES REFERRED TO

G Salihu v. Minister of Defence (2009) 1 NWLR (pt. 1123) 543
Eguamwemse v. Amaghizemwen (1993) 9 NWLR (pt. 315) 11
Omoijahe v. Umoru (1999) 8 NWLR (pt. 614) 178
Niger Progress Ltd. v. NEL Corpn. (1989) 20 NSCC (pt. 11) 211
H Bakare v. N.R.C. (2007) 17 NWLR (pt. 1064) 620
CBN v. Ahmed (2001) 5 SC (pt. 11) 146
Okubule v. Oyagbola (1990) 4 NWLR (pt. 147) 72
Osaware v. Ezeiruka (1978) 6-7 SC 135
Odukwe v. Ogunbiyi (1998) 8 NWLR (pt. 561) 339

Fasoro v. Beyioku (1988) 2 NWLR (pt. 76) 263

University of Lagos v. Aigoro (1985) 1 NWLR (pt. 1) 143

Holman Bros Nig. Ltd. v. Kigo Nig. Ltd. (1950) 8-11 SC 43

Nalsa & Team Associate NNPC (1991) 8 NWLR (pt. 212) 652

Obikoya v. Wema Bank Ltd (1989) IN SCC 113

Ohaka v. The State (1988) 1 NWLR (pt. 72) 539

B

STATUTES & RULES REFERRED TO

Armed Forces Act Cap A20 LFN, ss. 154(6) 179(4)184 (5)

Public Officers Protection Act, s. 2(a)

Constitution of Federal Republic of Nigeria, s. 240

Court of Appeal Rules 2007, O. 7 r. 10(1)(2)

C

LEAD JUDGMENT BY FABIYI JSC

This is an appeal against the Ruling of the Court of Appeal, Abuja Division (the court below) delivered on the 9th day of February, 2010 in Appeal No.CA/66/M/09. Therein the court below granted extension of time within which to apply for leave to the respondent to appeal against the decision of the trial General Court Martial ('GCM' for short) presided over by Col. O. O. Okoro (N/7710) at DHQ Joint Officers Mess Mogadishu Cantonment Asokoro, Abuja delivered on 20/12/07 after overruling preliminary objection on two grounds strenuously urged on behalf of the appellant.

E

The relevant facts of the matter leading to this appeal are not in serious contention. The respondent was convicted by the G.C.M presided over by Col. O. O. Okoro (N/7710) on 20/12/07 along with one Warrant Officer Peter Weibey for conspiracy. The verdict of the G.C.M was confirmed on 9/8/2008 and same was published on 13/8/2008. The respondent instructed his solicitors to write letter of appeal to the appellant for a review of his case. There was no response to same.

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The respondent then approached the lower court by way of motion on notice pursuant to Order 7, Rule 10 (1) and (2) of the Court of Appeal Rules 2007 wherein he prayed for extension of time within which to apply for leave to appeal against the decision of the G.C.M, leave to appeal and extension of time within which to appeal; often referred to as 'the trinity prayers.'

H

The appellant raised preliminary objection to the application

on two grounds that the respondent had not complied with the condition precedent before approaching the lower court and that the respondent's action was statute barred by virtue of the provision of section 2 (a) of the Public Officers Protection Act. The court below considered the materials placed before it and the submission of counsel on the laws seriously canvassed and dismissed the appellant's preliminary objection. The court below thereafter granted the requisite leave to the respondent to appeal against the decision of the G.C.M which found the respondent guilty of conspiracy. The appellant felt dissatisfied with the said Ruling of the court below and has appealed to this court. The Notice of Appeal filed on 23/2/2010 contains two grounds of appeal.

Briefs of argument were duly filed and exchanged by the parties in tune with the Rules of the court. On the 6th of December, 2012 when the appeal was heard, learned counsel on both sides of the divide adopted and relied on the brief of argument, as respectively filed, on behalf of the parties. The lone issue couched on page 3 of the appellant's brief of argument for determination of the appeal reads as follows:-

"Whether the Court of Appeal correctly evaluated (sic) the law when it ruled that the appeal was properly before their lordships, consequently dismissed preliminary objection."

On behalf of the respondent, the two issues formulated for determination, as contained on page 4 of his brief of argument read as follows:-

"ISSUE 1

Whether the Court of Appeal judicially and judiciously exercised its discretion in favour of the respondent by granting the reliefs sought and dismissing the appellant's preliminary objection (GROUND 1)

ISSUE 11

Whether the matter before the Court of Appeal can be negatively affected by the provisions of section 2 (a) of the Public Officers Protection Act (GROUND 2)"

Arguing the sole issue formulated on behalf of the appellant, learned counsel submitted that the respondent failed to exhaust mandatory condition precedent before initiating his application for leave to appeal against the decision of the G.C.M. He cited the case

of *Salihu v. Minister of Defence* (2009) 1 NWLR (Pt. 1123) 543. Learned counsel maintained that the condition precedent which was not complied with was pointed out and arguments canvassed on same were ignored by the court below. He cited the case of *Eguamwemse v. Amaghizemwen* (1993) 9 NWLR (Pt. 315) 11.

Learned counsel opined that the respondent, being a military man and subject to service law, ought to have complied with the requirement of the Armed Forces Act, Cap A20 LFN as mandated by the provisions in sections 179 (4) and 184 (5) of same.

Learned counsel contended that the operative word in section 179 (4) of the Act is “shall” which mandates that an aggrieved soldier who desires to exercise his right by way of complaint must first exhaust the administrative remedies before embarking on any other action. He felt that the court below gave the law a narrow interpretation without any justification. Learned counsel cited the cases of *Omoijahe v. Umoru* (1999) 8 NWLR (Pt. 614) 178 at 188; *Niger Progress Ltd. v. NEL Corpn.* (1989) 20 NSCC (Pt.11) 211 at 220; *Bakare v. N.R.C.* (2007) 17 NWLR (Pt.1064) 620.

The learned counsel maintained that the court below did not give correct interpretation to the appropriate sections of the Armed Forces Act in arriving at its ruling. He urged that the ruling of the court below be set aside.

On behalf of the respondent, learned counsel pointed it out that it was clearly shown by the un-contradicted averments before the lower court and the exhibits attached to the respondent’s better and further affidavit that he applied passionately to the Chief of Army Staff for a review of his conviction. He maintained that as nothing was done, the respondent was compelled to approach the lower court. He observed that the letter of appeal was written, pursuant to the provision of section 149 of the Armed Forces Act. Learned counsel referred to pages 48-60 of the record.

Learned counsel for the respondent maintained that the appellant never told the lower court or the respondent what the condition precedent is all about. He submitted that he who asserts must prove same. Learned counsel observed that there was no condition precedent on the respondent’s way which was not fulfilled.

Learned counsel submitted further that where the respondent chose to apply for review of the sentence as canvassed by the appel-

lant, he was still at liberty to approach the lower court for intervention and at any point he so desired, his application to the Army Authority becomes automatically extinguished. He referred to section 154 (6) of the Armed Forces Act. He felt that the position of the law is a clear demonstration that the doors of the courts can never be shut against a convict to ventilate his disagreement with the decision of the G.C.M.

Learned counsel for the respondent further submitted that the provisions of sections 183 - 184 (4) of the Armed Forces Act also provide the unfettered discretion to the court below to grant the desired leave to appeal. He observed that the court below judicially and judiciously considered the material placed before it in granting the desired leave as required by Order 7 Rule 10 (2) of the Court of Appeal Rules, 2007. Learned counsel referred to *Salihu v. Minister of Defence* (supra) at 564.

Learned counsel further submitted that the right of appeal to the lower court from the decision of the G.C.M is constitutionally guaranteed and that any other enactment that tends to derogate from same is null and void. He referred to section 240 of the 1999 Constitution that gives appellate jurisdiction to the lower court which is not subject to any other quasi judicial outfit. He asserted that there was an amendment to the Armed Forces Act by virtue of Decree No.15 of 1997 which now gives direct access to the court below from decisions of G.C.M. He again referred to *Salihu v. Minister of Defence* (supra) at page 573.

Learned counsel further submitted that there are good reasons for the respondent's failure to appeal within the time stipulated and that there are substantial points of law to be canvassed at the hearing before the court. He felt that it is desirable for the court below to hear the matter on its merit and that the discretion of the lower court in granting leave to the respondent should not be interfered with by this court.

Learned counsel maintained that apart from the provision of section 240 of the 1999 Constitution of the Federal Republic of Nigeria and Order 7 Rule 10 (2) of the Court of Appeal Rules 2007, section 200 of the Armed Forces Act also provides that an aggrieved person who has been convicted by a G.C.M. can apply directly to the lower court for leave to appeal out of time over the decision of

the G.C.M.

Learned counsel, in respect of this aspect of the matter, finally cited the case of Central Bank of Nigeria v. Saidu H. Ahmed (2001) 5 SC (Pt.11) 146 at 162. He urged that issue 1 be resolved in favour of the respondent.

Let me state it in clear terms that by the provision of section 240 of the 1999 Constitution of the Federal Republic of Nigeria, the court below is given exclusive appellate jurisdiction over decisions of the G.C.M. Such jurisdiction is not subject to the whims of any other quasi-judicial body or outfit. The appellant should appreciate this vital point right from the onset.

The appellant's counsel strenuously maintained in the brief of argument that the respondent failed to comply with condition precedent before initiating his application for leave to appeal. He relied on sections 179 (4) and 184 (5) of the Armed Forces Act, inter alia.

The appellant did not pin-point clearly the condition precedent which was not complied with by the respondent. The appellant which asserted that condition precedent was not complied with has the burden to prove same. It is basic that any party which asserts must prove same. Refer to Okubule v. Oyagbola (1990) 4 NWLR (Pt.147) 72; Osaware v. Ezeiruka (1978) 6 - 7 SC 135 at 145; Odukwue v. Ogunbiyi (1998) 8 NWLR (Pt.561) 339 at 352. The appellant tried to raise dust when it maintained that the respondent failed to exhaust the available remedies provided by the law before recourse to the court.

It is extant in the record of appeal as can be seen at pages 48 - 60 of same that the respondent deposed to un-contradicted averments and attached exhibits 'A' and 'B' to his better and further affidavit wherein he applied to the chief of Army Staff in tune with the law for a review of his conviction by the G.C.M. As nothing was done by the Chief of Army Staff he was compelled to approach the lower court. The salient averments remain un-contradicted. It is basic that unchallenged evidence stands. The court should accept same and act on it. The court below was on a firm ground in the stand taken by it. See: Omoregbe v. Lawani (1980) at 117, Fasoro v. Beyioku & Ors.

480 Nig. Army v. Banni Yakubu (2013) 1-2 KLR Fabiyi JSC
(1988) 2 NWLR (Pt.76) 263 at 271.

Since no action was taken on the complaint of the respondent by the appellant, he was perfectly entitled to approach the lower court for leave to appeal. It does not lie in the sphere of the appellant to turn around and say that the respondent did not exhaust available
B remedies before approaching the court. Inaction on the part of the appellant to take appropriate step to consider the respondent's complaint should not foreclose his right to approach the lower court to ventilate his grievances before the court which is imbued with requisite jurisdiction as dictated by section 240 of the Constitution of the
C Federal Republic of 1999 (the grundnorm).

***Let me now move to the real matter in contention between the parties. The respondent maintained that there are good reasons for his failure to appeal within time and that
D there are substantial points of law to be canvassed at the hearing before the lower court. It must be stated here that Order 7 Rule 10 (2) of the Court of Appeal Rules 2007 provides for two conditions, which must be satisfied conjunctively. The affidavit evidence must disclose good and substantial reasons
E for failure to appeal or seek leave to appeal within the prescribed time. The proposed grounds of appeal must show good cause why the appeal should be heard. The grounds must be arguable; not frivolous.*** See *University of Lagos v. Aigoro* (1985) 1
F NWLR (Pt.1) 143; *Holman Bros Nig. Ltd. v. Kigo Nig. Ltd.* (1950) 8-11, SC. 43.

In the case of *Central Bank of Nigeria v. Salihu H' Ahmed & Ors.* (2001) 5 SC (Pt.11) 146 at 162; cited by respondent's counsel in the brief, this court emphatically maintained that:-

G *"It must be remembered that before an application of this kind could succeed, the applicant must satisfy the court that there are good and satisfactory reasons for not filing his application timeously. It must also be shown that the applicant has good, substantial and arguable grounds of appeal. It is settled that for this court to exercise its discretionary power, an application of this sort must be supported by an affidavit which must give sufficient reasons to explain the delay, the judgment or ruling of the court to appeal and proposed grounds of
H appeal against the said judgment or ruling. "The respondent deposed to the fact that he was not informed of the decision of the Army*

Authority which confirmed his sentence for the offence of conspiracy and his demotion in rank. He was informed later by his co-accused. The grounds of appeal in the proposed grounds of appeal at pages 9 - 11 of the record of appeal appear, prima facie, arguable. There is ground 4 which complains that the Army Authority, contrary to the finding of the G.C.M. went ahead to enter a finding of 'Guilty' on the respondent for making false document, punishable under section 90 (d) of AFA Cap. A20 LFN, 2004. To my mind, this is an arguable point."

The court below, resolved issue 1 decoded by respondent in his favour. I pitch my tent with the court below as it was on a firm stand.

The next point relates to the applicability of the provision of section 2 (a) of the public Officers Protection Act. The appellant maintained that same applied to foreclose the right of the respondent to approach the lower court for leave to appeal. On his part, learned counsel for the respondent maintained that the law cannot be employed to gag him from exercising his constitutional right of appeal to the court below.

As stated by learned counsel for the respondent, it is basic that courts do guard their jurisdiction jealously and zealously. As such, any enactment which takes away the rights of the citizen accessing the court is to be construed narrowly against any one claiming its benefit.

The appellant who is trying to cling tenaciously to the law put obstacles on the respondent's way by failing to react to his complaint in good time. He was subjected to trauma and he fell sick as contained in his affidavit and further affidavit. This court has held in Abacha v. Spiff (2009) 5 SCNJ 119 at 140 that where a party is prevented from bringing an action or denied the opportunity to sue timeously, limitation law will not apply. The position in the case at hand points to the same direction.

Further, the position here is that the respondent desires to enforce his fundamental right of access to the law court to determine his innocence in the conviction meted out to him by the G.C.M. The right, is as dictated by section 240 of the 1999 Constitution of the Federal Republic of Nigeria. It is unthinkable

able to imagine that the provision of section 2 (a) of the Public Officers protection Law can be employed to truncate the respondent's opportunity to ventilate his grievances to the decision of the G.C.M.

B Learned counsel for the respondent referred to the case of Federal Republic of Nigeria v. Chief Udensi Ifegwu (2003) 5 SC 252 at 252 wherein Uwaifo, JSC pronounced as follows:-

C *"At this stage, I think I can briefly dispose of the argument in respect of section 2 of the Public Officers Protection Act (Cap. 379) Laws of the Federation of Nigeria relied on by the learned Senior Advocate that the respondent's action was statute barred. It would be argument carried too far to say that the public Officers Protection Act applied to bar a relief sought in connection with an error committed in purely judicial capacity. It does not.*

D *The remedy sought is to enforce a Constitutional right contravened by a court acting judicially. The time within which to seek that remedy is not subject to the time limit prescribed by the public Officers Protection Act. There is no reason why it should. If it did, it will likely conflict with court rules..."*

E The above remains the stance of this court. I completely agree with same. And by parity of reasoning, there is no way by which the decision of the G.C.M can be covered from being challenged as constitutionally guaranteed by section 240 of the stated Constitution under the feigned canopy of the provision of section 2 (a) of the Public Officers Protection Act.

F In conclusion, I am of the considered opinion that viewed from any angle, this appeal is bound to fail. It lacks merit and, it is hereby dismissed. The Ruling of the court below handed out on 9th February, 2010 is hereby affirmed in its entirety.

I. T. MUHAMMAD JSC

H I was permitted by my learned brother, Fabiyi, JSC to read in advance the draft of the judgment just delivered. I am contented with the reasoning and conclusions reached that the appeal lacks merit and it should be dismissed.

The central issue in this appeal and as raised before the court below is that the appellant herein, raised by way of Preliminary ob-

jection before the court below that the appeal was not competent neither did the applicant comply with nor exhaust conditions precedent before he instituted his application at the court below, in accordance with the law and that the court below lacked jurisdiction to entertain the application as the subject matter of the appeal was statute barred. The court below dismissed the Preliminary Objection and held that the application was properly filed before that court. B

The main contention of the learned counsel for the appellant before this court on his sole issue is that the court below did not correctly interpret the provisions of the Armed Forces Act and Public Officers' Protection Act in arriving at its decision. Learned counsel cited sections 179(4), 184(5) of Armed Forces Act, Cap. A20 LFN. C

Learned counsel for the respondent argued that it was clearly shown by the uncontradicted averments before the court below and the exhibits attached to the respondent's better and further affidavit that he applied passionately, to the Chief of Army Staff for a review of his unjust conviction and that nothing was done before he was compelled to approach the lower court. D

The application before the lower court was for the following reliefs: E

1. *"AN ORDER for extension of time within which to apply for leave to appeal against the decision of the Trial General Court Martial presided over by Colonel O. O. Okoro (N/7710) at DHQ Joint Officers, Abuja delivered on 20/12/07.*

2. *AN ORDER for leave against the decision of the Trial General Court Martial presided over by Col. O. O. Okoro (N/7710) at DHQ Joint Officers Mess, Mogadishu Cantonment, Asokoro, Abuja delivered on 20/12/07* F

3. *AN ORDER for extension of time within which to appeal against the decision of the General Court Martial presided over by Col. O. O. Okoro (N/7710) at DHQ Joint Officers Mess, Mogadishu Cantonment, Asokoro, Abuja delivered on 20/12/07* G

4. *Such further Order(s) as the Court may consider fit and just in circumstances."* H

The appellant is insisting that the respondent should not have approached the court below for any relief as the respondent was not in compliance with the provisions of the Armed Forces Act. After having evaluated the affidavit evidence of the parties, the court be-

low made the following findings:

“From what has been displayed above inclusive of the related provisions of the Armed Forces Act, the Constitution Section 240 and decided authorities, the Armed Forces Act viz Section 149, 154, 179, 184 the operative word in those provisions of the Armed Forces Act is “may” and in the context used is optional, discretionary but not mandatorily provided for, therefore failure to utilize those remedies administrative or not would not foreclose the right of appeal to this court open and provided for by the Constitution Section 240 and Sections 184 and 200 of the Act. In that vein if the appellant has as in this instance failed to file the appeal within the three months provided to do so, his remedy lies in applying for extension of time within which to appeal etc. Section 184 of the Armed Forces Act provides for leave to appeal and extension of time thereof to the Court of Appeal. Section 154(6) provides for the cessation of any administrative remedies earlier sought by an appellant to the Military Authorities once the process of appeal to the Court of Appeal has commenced. Order 7 Rule 10(2) of the Court of Appeal Rules 2007 provides as follows:

(2) Every application for enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal.

That Civil Procedure stated above is what is applicable no condition precedent as envisaged and posited by the Respondent/Objector can stand in the way. Therefore this issue is resolved in favour of the appellant.”

The court below finally granted the application in the following terms:

1. “AN ORDER for extension of time within which to apply for leave to appeal against the decision of the Trial General Court Martial presided over by Colonel O. O. Okoro (N/7710) at DHQ Joint Officers Mess, Mogadishu Cantonment, Asokoro, Abuja delivered on 20/12/07.

2. AN ORDER for leave against the decision of the Trial Gen-

eral Court Martial presided over by Col. O. O. Okoro (N/7710) at DHQ Joint Officers Mess, Mogadishu Cantonment, Asokoro, Abuja delivered on 20/12/07.

3. *AN ORDER for extension of time within which to appeal against the decision of the General Court Martial presided over by Col. O. O. Okoro (N/7710) at DHQ Joint Officers Mess, Mogadishu Cantonment, Asokoro, Abuja delivered on 20/12/07.* B

4. *The appellant is granted 30 days within which to file his Notice and Grounds of Appeal."*

From what I have myself seen from the record of appeal, it is not true that the respondent did not exhaust all he was obliged to exhaust by the Armed Forces Act. Take for instance, Section 149 of the Armed Forces Act Cap. A20 LFN, 2004 (referred to for short as the Act) provided as follows: C

"(1) An accused may, within three months after being sentenced by a court-martial and before the sentence is confirmed, submit to the confirming authority any written matter which may reasonably tend to affect the confirming authority's decision whether to disapprove a finding of guilty or to approve the sentence.

(2) The matters which may be submitted under this subsection (1) of this section include - E

- a) allegations of errors affecting the legality of the trial;*
- b) portions or summaries of the record or copies of documentary evidence offered or introduced at the trial; and*
- c) matters in mitigation which were not available for consideration at the trial."* F

From his affidavit in support of Motion on Notice, the respondent personally averred to the following facts:

"4. That the General Court Martial handed down to me in its verdict on 20/12/07 a sentence of guilt for the offence of Conspiracy and a demotion from the rank of Warrant Officer to Corporal. That I was and I am still absolutely dissatisfied with the decision of the General Court Martial.

5. That as a consequence, my counsel, E.P.I. Odo, Esq, wrote an appeal on 3/08/07, to the Chief of Army Staff for a review of the conviction which said conviction was against the weight of evidence.

6. That the appeal to the Chief of Army Staff is a condition precedent before I can appeal to this honourable court if I am not

satisfied with the review by the Army authorities.

7. *That the sentence was subject to confirmation by Appropriate Superior Authority [ASA] before it can take effect and become binding on me.*

B 9. *That I have not been officially informed about the confirmation or otherwise by the respondent up till this moment.*

10. *That it was my co-accused/convict (Warrant Officer Peter Weibey) who informed me that the confirmation of the General Court Martial has been done and that he has since filed a motion seeking leave from this honourable court vide motion No.CNM/267/C/08: 79NA/31549 W/O PETER WEIBEY v. NIGERIAN ARMY to appeal on his own behalf.*

D 11. *That immediately I got the information from WO Peter Weibey, I rushed to the Army Headquarters where I confirmed that by Part 2 Orders [Sldrs] published on 9/9/08 the Army authorities confirmed the decision of the General Court Martial and approved my demotion to the rank of Sergeant. A certified copy of the publication is hereby attached and marked as Exhibit 'C'.*

E 14. *That I have been so traumatized and very sick since this ordeal started and I have been going in and out of the hospital for medical treatment for hypertension and diabetes hence my inability to bring this application before now."*

In his further and better affidavit, the applicant stated further;

F "4. *That I know as a fact that I exhausted all the internal remedies available to a convicted officer before coming to this Honourable court.*

5. *That I know as a fact that I stated this in paragraphs 4 and 5 of my supporting Affidavit to the motion on notice.*

G 6. *That I know as a fact that I petitioned the findings and sentences of General Court Martial presided over by N/7710 Col. O. O. Okoro in RE: NIGERIAN ARMY v. 79NA/3668 W/O BANNI YAKUBU, TO THE CHIEF OF ARMY OF STAFF a copy of the said petition dated 3rd August, 2007 is hereby attached and marked as exhibit H 'A'.*

7. *That I know as a fact that I equally petitioned the REVIEW of the above case by a letter to the Chief of Army Staff dated 25/9/08. A copy of the said letter is hereby attached and marked as exhibit 'B'.*

9. *That I know as a fact that I have done all that is expected of me by the law before seeking the attention of this Honourable Court and therefore I am ready to go on with this appeal.*"

In addition to the Constitutional provisions which entitle a citizen of this country to appeal against any decision of a court or tribunal which is not favourable to him, the Act has conferred powers on the Court of Appeal to hear appeals from the decisions of a court Martial. (See S. 183 of the Act). Where leave to appeal is required or to file an appeal out of the time prescribed, the Act has made the following provisions:

"(1) Leave to appeal to the Court of Appeal shall not be given except in pursuance of an application in that behalf made by or on behalf of the appellant and lodged, subject to subsection [2] of this section, within forty days of the date of promulgation of the finding of the court-martial in respect of which the appeal is brought with the Registrar of the Court of Appeal, being an application in the prescribed form and specifying the grounds on which leave to appeal is sought and such other particulars, if any, as may be prescribed.

(4) The Court of Appeal may extend the period within which an application for leave to appeal is required by subsection (1) of this section to be lodged, whether that period has expired or not.

(5) In considering whether or not to give leave to appeal, the Court of Appeal shall have regard to any expression of opinion made by a judge advocate, if any, who acted at the court-martial that the case is a fit one for appeal, and, if any such expression is made, may give leave to appeal."

The application filed by the respondent at the court below was quite in order as the respondent satisfied all the requirements of the law. Where an applicant/appellant satisfies the provision of the law a court of law has no reason to refuse to grant his prayers. See: Williams v. Hope Rising Voluntary Funds Society (1982) SC; Muhammadu Durumin-Iya v. C.O.P. (1961) NNLR 70.

The statutory function of a law court is the protection of the right of an individual whether a soldier, a police, a teacher, a trader, a fisher, a farmer etc. The law, they say, is not a respecter of persons, or, I can add, a corporate institution or organisation who/which decides to violate the provisions of the law. The respondent in my view, has every right to contest the punishment meted to him by the Trial

General Court Martial at the court below.

I am therefore in complete agreement with the decision of my learned brother, Fabiyi, in his leading judgment that the appeal lacks merit. I, too, dismiss the appeal and affirm the Ruling of the court below. I abide by consequential orders made in the leading judgment.

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment of my learned brother, Fabiyi, JSC just delivered. I am in total agreement with the reasoning and conclusion and I adopt them as my own. As a result, I also dismiss the appeal and affirm the Ruling of the court below delivered on 9/02/2010.

M. D. MUHAMMAD JSC

Having had a preview of the lead judgment of my learned brother, Fabiyi, JSC; just delivered, I am in complete agreement that the appeal being unmeritorious be dismissed.

The relevant facts of this case have fully been narrated in the lead judgment making it unnecessary to restate them here. The crucial question raised by the appeal pertains to the appellant's right of appeal which the constitution provides vis-a-vis a condition an Act of the National assembly requires the appellant to fulfill before exercising that right.

The court below to the exclusion of any other court has, See section 240 of the 1999 Constitution, the jurisdiction to entertain appeals from the decision of the General Court Marshal which has aggrieved the respondent. S. 179 (4) of the Armed forces Act which learned appellant counsel contends the lower court did not fully advert its attention to before granting the respondent the reliefs he sought provides:-

"S. 179-

(4) subject to subsection (1) of this section, a soldier, rating, or an aircraft man who feels he has been wronged in any manner shall first Exhaust the administrative remedies available to him under this section before embarking on any other action."

It is learned appellant's counsel's submission that respondent's application for leave to appeal to the court below which grant informs this appeal, is that "other action" the appellant undertook without having exhausted "the administrative remedies available to him under S. 179 of the Armed forces Act CAP. A20 Laws of the federation as reproduced above. On respondent's behalf, counsel has argued that the affidavit in support of the application for the leave to appeal the Court below obliged the respondent shows that the respondent had exhausted all the administrative remedies provided for under S. 179 of the Act. He got no response for the steps he took. These facts were neither challenged nor controverted so, learned respondent's counsel further submits, the court below had to and correctly relied on those facts in exercising its discretion in favour of respondent.

I am to emphasize that the court below is fully justified in exercising its discretion in favour of the respondent who had done all the law required of him before his resort to it. The materials put before the court by the respondent puts him in good stead for the relief he sought and obtained from the court. The reasons for the leave he requires, his doing so outside the time the law permits him to acquire the leave and file his notice of appeal have not only been averred to but the appellant herein did not controvert these facts. I agree with learned respondent's counsel that the law is that the court below is bound to accept the unchallenged facts and act on them. See *Yesufu v. Co-operative Bank Ltd. (1989) 3 NWLR (Pt 110) 483 SC*. I have examined the grounds of appeal annexed to respondent's application to the court below and further agree that the grounds are arguable and not frivolous. Having satisfied these twin requirements, the court below is right to have granted the respondent the reliefs he sought pursuant to its powers under order 7 rule 10 (1) and (2) of its 2007 rules. See *Nalsa & Team Associate NNPC (1991) 8 NWLR (Pt.212) 652 SC* and *Obikoya v. Wema Bank Limited & Anor (1989) IN SCC 113*.

This court's position remains that right of appeal being constitutional cannot be easily whittled down by technical, procedural or interpretative means. Being the supreme law of this nation, the constitution overrides all other laws. The Armed forces Act by the contention of Appellant counsel, stands in conflict with the clear provi-

sion of the constitution on which respondent's right of appeal hangs. I have seen no such conflict and were same to exist, the duty of any reasonable court or tribunal would be to interpret or apply the Act in such a way as to bring it in line with the letters and intendment of the constitution. See *Ohaka v. The State* (1988) 1 NWLR (pt.72) 539.

B The lower court's decision reflects all the correct and necessary characteristics decision of a reasonable tribunal should demonstrate. Such an impeccable decision must endure.

C It is for the foregoing and more so the fuller reasons contained in the lead judgment that I too dismiss the appeal. I abide by the consequential order made by my learned brother therein.

AKA'HS JSC

D I read in draft the lucid judgment of my learned brother, Fabiyi JSC. The belief of the appellant is that if it stayed action on the respondent's request for a review of his conviction by the General Court Martial time will lapse and the respondent's right of appeal will abate. The appellant was oblivious of the fact that the right of appeal cannot be extinguished by having recourse to statute of limitation in criminal matters provided the delay in appealing can be explained by a would be appellant.

F The respondent diligently applied to the Chief of Army Staff for a review of his conviction but someone somewhere sat on it under the pretext that the application was not properly channelled. The ultimate authority to decide on the review was the Chief of Army Staff and so the argument that the application was not properly channelled holds no water whatsoever.

G Since the respondent's right to apply for extension of time to appeal is guaranteed under section 240 of the Constitution any argument by the appellant that a condition precedent has not been fulfilled to enable the respondent exercise the right cannot be countenanced. I completely agree that the appeal has no merit and it is dismissed. I also affirm the Ruling by the lower court delivered on 9th February, 2010.