

**SUPREME COURT OF NIGERIA**  
FRIDAY 15<sup>TH</sup> FEBRUARY, 2013. SC. 80/2004  
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-  
COOMASSIE, S. GALADIMA, N. S. NGWUTA,  
S. S. ALAGOA, JJSC**

THE STATE ..... APPELLANT  
V.  
1. MONSURAT LAWAL  
2. KAZEEM ALIM  
3. SAIDI BELLO  
4. AKEEM LAWAL  
AND  
1. SENIOR MAGISTRATE GRADE II  
- MR. B.O. QUADRI OF MAGISTRATE  
COURT 4 IBADAN ..... RESPONDENTS  
2. COMMISSIONER OF POLICE  
OYO STATE

---

COURTS - Supervisory role - Certiorari - The writ is available under the 1999 Constitution and High Court Rules - To empower High Courts to checkmate - The arbitrariness of inferior courts or Tribunals (H1)

CRIMINAL PROCEDURE - Trial - Absence of accused - Trial of 1<sup>st</sup> accused in his absence - Constitutes a breach of the law - As addresses by parties or their counsel - Are integral part of the proceedings (H2)

CRIMINAL PROCEDURE - Judgment - Fair hearing - The proceedings of the inferior court in the absence of some of the accused - Is a nullity as well as the judgment thereof - For denial of fair hearing (H3)

CRIMINAL PROCEDURE - Trial - Absence of accused - Exception - Accused must be tried in his presence - Except where he is kept out of court in the interest of public safety - Due to violent tendencies (H4)

### **FACTS**

Accused/appellants were charged before the Senior Magistrate Court 4 Holden at Ibadan for the offences of conspiracy, malicious damages and causing grievous Bodily Harm. The court had in its judgment which was delivered ten months after the address of counsel, convicted and sentenced appellants as charged in the absence of 1<sup>st</sup> accused (even though appellants were jointly charged for conspiracy).

Consequently, appellants applied to the High Court of Oyo State Ibadan for an order of certiorari to quash their conviction and sentence by the Senior Magistrate. The court dismissed the application. Appellants being further aggrieved, appealed to the Court of Appeal, Ibadan Division. The court just as the High Court held, refused the application and thus dismissed same. Hence, appellants filed further appeal to Supreme Court.

### **ISSUE FOR DETERMINATION**

*“Whether the learned Justices of the Court of Appeal were not right to have unanimously held that the Appellants ought to have challenged the proceedings and judgment of the 1<sup>st</sup> Respondent by way of appeal rather than by prerogative writ of certiorari?”*

**HELD** (Unanimously allowing the appeal per

**MOHAMMED JSC)**

*COURTS - Supervisory role - Certiorari*

**1. The law is well settled that the Prerogative Writ of certiorari is available under our 1999 Constitution in Section 272(2) and the various State High Court laws and the State High Court Civil Procedure Rules to empower the various High Courts to act as watch dogs over judicial activities of inferior Courts or Tribunals. The process is meant to provide a supervisory process to keep in check the excesses and arbitrariness of such Courts.**

**In other words once grounds for bringing application for order of certiorari exists, a person aggrieved by the decision or order of an inferior Court or Tribunal, can apply for an order**

**of certiorari to issue, even though he has a right of appeal also against the order or decision.** (pp. 1190 C/ 1191 B)

*CRIMINAL PROCEDURE - Trial - Absence of accused*

**2. In the case at hand, with regard to the errors of law on the face of the record of the inferior Court or Tribunal, it is quite clear from the proceedings of the trial Senior Magistrate Court of 14th June, 1999 at page 21 of the record of appeal that the 1<sup>st</sup> Respondent Senior Magistrate 1 recorded the 1<sup>st</sup> accused person absent while 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons were present. As all the 4 accused persons were jointly charged particularly in the charge of conspiracy and were being jointly tried, the 1<sup>st</sup> Respondent ought not to have proceeded with the trial in the absence of 1<sup>st</sup> accused person even though the hearing of that day was for address. The law is trite that addresses by parties or their learned Counsel are an integral part of the hearing or trial of the accused person. Proceeding with the trial of the accused persons in the absence of one of them therefore, had constituted a serious breach of the Criminal Procedure Law of Oyo State which requires the presence of an accused person in Court throughout his trial in the absence of any necessary allowable reasons in law to keep him out of Court for public safety. (p. 1192 A)**

*Judgment - Fair hearing*

**3. Certainly, for the 1<sup>st</sup> Respondent to attribute a plea of leniency to the 3<sup>rd</sup> accused person who was absent in Court on the day the judgment was delivered, may call into question the status of the proceedings of the Court of that day as to whether or not such proceedings can qualify as judicial proceedings of a Court of law. In other words by refusing to record the absence of the 3<sup>rd</sup> accused person but recording what the absent 3<sup>rd</sup> accused person did not say in Court that day, had in my view, constituted a serious error of law on the face of the record of that inferior Court to justify the removal of the entire proceedings of that Court to the High Court by certiorari order to be quashed by the High Court as sought by the Appellants in their application in exercise of the supervisory**

**powers of the High Court.**

**In any case the very fact that the 1<sup>st</sup> Appellant and the 3<sup>rd</sup> Appellant were absent in their joint trial in Court on 14th June, 1999 when the inferior Court was addressed and 18th April, 2000 when the inferior Court delivered its judgment, this exercise of allowing the trial to proceed in the absence of some of the accused persons being jointly tried had rendered the entire proceedings of that Court including the judgment a complete nullity for not only denial of fair hearing under Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 but also for failure of that Court to give the affected Appellants even a hearing that may not be called a fair hearing.**

**On the face of the record of this appeal therefore, I am of the view that the Appellants' application by way of writ of certiorari to bring the proceedings of 1<sup>st</sup> Respondent including the judgment before the High Court of Oyo State at Ibadan for the purpose being quashed had been made out to justify granting the application. This is because in such application for the order the writ of certiorari to bring the proceedings of an inferior Court before the High Court to be quashed, the fact that the evidence on record has disclosed a case against the applicant, is totally irrelevant provided on the face of the record of the inferior Court lack of or excess of jurisdiction or, breach of the rule of natural justice and errors of law on the face of the record are apparent, justify granting the order of certiorari to quash the entire proceedings complained of by the application. (pp. 1193 A/1194 A)**

**CRIMINAL PROCEDURE - Trial - Absence of accused - Exception 4. It has to be stressed that it is an essential principle of our criminal law and practice in Nigeria that the trial of an accused person for an offence has to be conducted in the presence of the accused and for such purpose trial means the whole of the proceedings including the judgment and sentence. The only exception is where the violent tendencies of an accused - person may necessitate keeping him out of Court in the interest of public safety for peaceful conduct of the trial.**

## NOTABLE POINTS OF INTEREST

### **NGWUTA JSC**

#### ***1. Writ of certiorari – Conditions for grant***

De Smith, the learned author of “Judicial Review of Administrative Action” 4<sup>th</sup> Edition at pages 396-407 thereof listed four conditions on anyone of which the order of *certiorari* may be granted. The four conditions are:

- (1) Lack of jurisdiction.
- (2) Breach of rules of natural justice.
- (3) Error of law on the face of the records, and
- (4) Decision obtained by fraud or collusion. (p. 1200 B)

#### ***2. Court established directly by the Constitution & under the Constitution – Distinction***

A distinction has to be between a Court established directly by the Constitution and a Court established under the Constitution. The Magistrate Courts belong to the latter category. Magistrates Courts are established pursuant to powers donated to the States by the Constitution. See s.4 (6) of the 1999 Constitution as altered which Constitution as altered which provides:

“S. 4(6) *The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.*” (p. 1200 H) F

### **REPRESENTATION**

Seni Adio Esq. with Olayide Bello Esq. for the appellant  
Olasoji Olowadafe, for the respondent

### **CASES REFERRED TO**

Nwaoboshi v. MILAD Delta State (2003) 11 NWLR (pt. 831) 305  
Adeoye v. The State (1999) 4 SCNJ 136  
Edoho v. The State (2004) 5 NWLR (pt. 865) 17  
Odiba v. Azege (1998) 9 NWLR (pt. 566) 370  
Akwuegbo v. Kagoma (2000) 14 NWLR (pt. 687) 252  
Obodo v. Olomo (1987) 3 NWLR (pt. 59) 111  
Amough v. Zaki (1998) 3 NWLR (pt. 542) 483

Oduwole v. Famakinwa (1990) 4 NWLR 239

Queen v. District Officer (1961) 1 All NLR 51

Akwuegbu v. Kagoma (2000) 14 NWLR (pt. 687) 252

Obodo v. Olomu (1987) 3 NWLR (pt. 59) 111

Asakitikpi v. The State (1993) 5 NWLR (pt. 296) 641

B Arzika v. Governor Northern Nig. (1961) All NLR 379

Okukpe v. Federal Board of Inland Revenue (1974) 4 SC 93

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

**STATUTE REFERRED TO**

C Constitution of Federal Republic of Nigeria 1999, ss. 36, 272(1)(2), 294

**LEAD JUDGMENT BY MOHAMMED JSC**

D This appeal is against the judgment of the Court of Appeal Ibadan delivered on 1<sup>st</sup> July, 2003 in which that Court dismissed the Appellants' appeal against the Ruling of the High Court of Justice of Oyo State Ibadan dismissing the Appellants' application for an order of certiorari to quash their conviction and sentence by the 1<sup>st</sup> Respondent/Respondent Senior Magistrate Court 4 Ibadan for the offences of conspiracy, malicious damages and causing grievous bodily harm.

F From the record of appeal particularly the proceedings at the trial Senior Magistrate Court where the Appellants were tried and convicted, it is clear that the judgment of the trial Court was delivered about 10 months after the addresses of the learned Counsel. It is not disputed from the record that the offences for which the Appellants were convicted were within the jurisdiction of the trial Court.

G The main contention between the parties in this appeal therefore is whether or not the High Court and the Court of Appeal were right in their decisions that the reliefs sought by the Appellants in their application for an order of certiorari to quash the entire proceedings of the trial Magistrate Court resulting in their conviction, were not available to the Appellants in the circumstances of this case.

H In the Appellants brief of argument, the following two issues for the determination of this appeal were formulated from the 4 grounds of appeal filed on behalf of the Appellants.

*“(1) Whether the learned Justices of the Court of Appeal were*

*right in law in holding that criminal trial conducted in the absence of an accused person cannot be quashed (Grounds 1 of Notice of Appeal).*

*(2) Whether the learned Justices of the Court of Appeal were right in upholding the decision of trial Court that appeal rather than an order of certiorari should be called in aid by the Appellants to challenge the decision of the 1<sup>st</sup> Respondent (Grounds 2 - 4 of the Notice of Appeal)”* B

In the Respondents brief of argument however, their learned Counsel distilled only one issue from the 4 grounds of appeal filed by the Appellants. That issue reads C

*“Whether the learned Justices of the Court of Appeal were not right to have unanimously held that the Appellants ought to have challenged the proceedings and judgment of the 1<sup>st</sup> Respondent by way of appeal rather than by prerogative writ of certiorari?”* D

Although two issues for determination have been framed by the Appellants from the 4 grounds of appeal contained in their Notice of Appeal, the common factor in the two issues as shown in the Appellants brief is the possibility or otherwise of challenging of the decision of the 1<sup>st</sup> Respondent by an order of certiorari. This in my view makes the issue as identified in the Respondents’ brief of argument as the only real issue for determination in this appeal. E

For the Appellants, their learned Counsel after quoting from the judgment of the Court below that - *“A complaint on the delivery of judgment in the absence of the 3<sup>rd</sup> accused is better lodged as a ground of appeal to set aside the judgment not to quash the judgment in certiorari,”* submitted that the Court below had completely failed to apply the correct principles of law governing when an order of certiorari will issue to quash judgment of an inferior Court or Tribunal which that Court correctly stated in its judgment. That order may be made, argued the learned Counsel where – F

(i) It is established by evidence that the inferior Court has acted in excess of its jurisdiction or,

(ii) Where there is a breach of natural justice; or H

(iii) Where on the face of the record, there is distinct error of law.

Learned Appellants Counsel supported this argument with the case of *Nwaoboshi v. Military Administrator Delta State* (2003) 11

N.W.L.R. (Pt. 831) 305 and stressed that based on this case alone, the Court below ought to have allowed the Appellants appeal and granted Appellant's reliefs refused by the High Court. Learned Counsel further argued that the law is well settled that an accused person cannot be tried in his absence and that where that happened, it renders the trial a nullity. The case of *Adeoye v. The State* (1999) 4 SCNJ 136, was cited in support of the submission; that in the instant case where at page 44 of the record the Court below confirmed that the 3<sup>rd</sup> Appellant was convicted and sentenced in absentia while at page 41 of the record the 1<sup>st</sup> Appellant was confirmed absent when the trial Senior Magistrate was addressed the Court below ought to have allowed the Appellants' appeal against the decision of the High Court refusing their application for certiorari which ought to have been granted in exercise of the supervisory powers of the High Court to keep in check excesses and arbitrariness of such inferior Courts or Tribunals. Learned Counsel therefore pointed out that the Appellants resorted to find aid in an order certiorari to quash their conviction mainly on the grounds of breach of their rights of natural justice by the 1<sup>st</sup> Respondent and errors committed by that Court on the face of the record showing denial of fair hearing and likelihood of bias under Sections 36 and 294 of the 1999 Constitution. Relying on the cases of *Edoho v. The State* (2004) 5 NWLR (pt. 865) 17 at 47 and *Odiba v. Azege* (1998) 9 NWLR (pt. 566) 370, learned Counsel urged this Court to declare the decision of the Court below affirming the decision of 15 the High Court perverse and liable to be set aside.

With regard to the use of the Prerogative Writ of Certiorari in Oyo State, that the procedure is available under the law as part of potent means of effecting supervisory control of inferior Courts and Tribunals in the same way as the processes through appeals, and that in the - circumstances of the present case where there were clear errors on the face of the record which amounted to breach of the rules of natural justice, the application of the Appellants for the order of certiorari to quash their conviction, ought to have been granted by the High Court and that the Court below was in error in failing to grant the Appellants the reliefs sought in their application concluded the learned Counsel. Based on the cases of *Nwaboshi v. Military Administrator Delta State* (supra) and *Akwuegbo v. Kagoma* (2000) 14 NWLR (pt. 687) 252 at 269, learned Counsel urged this Court to allow this



appeal.

In the Respondents Brief of argument, their learned Counsel noted that the main complaint of the Appellants in their trial by the 1<sup>st</sup> Respondent being the absence of the 1<sup>st</sup> Appellant on 14th June, 1999 when the trial Senior Magistrate as addressed, the absence of the 3<sup>rd</sup> Appellant on 18<sup>th</sup> April, 2000, when the trial Senior Magistrate Court delivered its judgment in which it recorded the presence of the 3<sup>rd</sup> Appellant and the allocutus attributed to him in spite of his absence on that date in that Court and submitted that the Appellants do not seem to appreciate the difference between certiorari and appeal. The learned Counsel agreed entirely with the Court below in its judgment that in exercising its discretion judiciously and judicially, a Court will not allow the exercise of or the use of the prerogative order of certiorari to supplement the regular process of appeal to a higher Court. Pointing to the conditions an applicant must satisfy for his application for an order of certiorari to succeed, such as lack of or excess of jurisdiction, error on the face of the record of the inferior Court and breach of natural justice outlined in the cases of *Obodo v. Olomo* (1987) 3 NWLR (Pt. 59) 111 and *Amough v. Zaki* (1998) 3 N.W.L.R. (Pt. 542) 483, and argued that the fact that all the Appellants were effectively represented by Counsel on the dates of 14th June, 1999 and 18<sup>th</sup> April, 2000 when 1<sup>st</sup> and 3<sup>rd</sup> Appellants were absent and that the failure of their Counsel to ask for adjournment to allow the attendance in Court of the 1<sup>st</sup> and 3<sup>rd</sup> Appellants, shows that the irregularities had been conceded by the Appellants which only affected the 1<sup>st</sup> and 3<sup>rd</sup> Appellants individually and does not justify the quashing of the entire proceedings of the trial of the remaining Appellants by order of certiorari rather than through the exercise of the individual right of appeal.

With regard to the complaint on the failure of 1<sup>st</sup> Respondent to deliver judgment within ninety days as prescribed by Section 294(1) of the 1999 Constitution, learned Counsel argued that the provision applied only to the Courts established under the Constitution and not to those other Courts established by any other means like the 1<sup>st</sup> Respondent Court established by the Laws of Oyo State of Nigeria. Learned Counsel concluded that all the complaints of denial of fair hearing raised by the Appellants on this issue of delivery of judgment 10 months after the addresses or likelihood of bias on the part of the

1<sup>st</sup> Respondent, could have been appropriately questioned on appeal rather than through the Prerogative Writ of certiorari as correctly found by the Court below and therefore urged this Court to dismiss the appeal.

As I have earlier stated in this judgment, the main issue for determination in this appeal is as identified in the Respondents' brief of argument and it is whether the learned Justices of the Court of Appeal were right in holding that the Appellants ought to have changed the proceedings and judgment of the trial Senior Magistrate Court by way of appeal rather than by Prerogative Writ of certiorari.

***The law is well settled that the Prerogative Writ of certiorari is available under our 1999 Constitution in Section 272(2) and the various State High Court laws and the State High Court Civil Procedure Rules to empower the various High Courts to act as watch dogs over judicial activities of inferior Courts or Tribunals. The process is meant to provide a supervisory process to keep in check the excesses and arbitrariness of such Courts.*** Denning L. J. (as he then was) precisely put it in Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw (1952) 1 KB 338 at 346 - 347 thus-

*"The Court of King's Bench has inherent jurisdiction to control all inferior Tribunals, not in an appellate capacity, but in a supervisory capacity... This control extends not only to seeing that inferior Tribunals keep within jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination which on the face of it, offends against the law."*

This English Court decision was adopted, and applied by our Courts particularly by the Court of Appeal in Oduwole v. Famakinwa (1990) 4 N.W.L.R. 239 at 251. This supervisory power is vested in our High Courts by the various State High Court Laws and High Courts Civil Procedure Rules and above all by the provisions of Section 272(1) and (2) of the 1999 Constitution which provides-

***"272(1) Subject to the provisions of Section 251 and other provisions of this Constitution the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture,***

*punishment or other liability in respect of an offence committed by any person.*

*(2) The reference to civil or criminal proceedings in this Section includes reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the Court in exercise of its appellate or supervisory jurisdiction.”* B

***In other words, once grounds for bringing application for order of certiorari exists, a person aggrieved by the decision or order of an inferior Court or Tribunal, can apply for an order of certiorari to issue, even though he has a right of appeal also against the order or decision.*** C

With the statutory provisions also on the ground, there is no doubt whatsoever that the High Court of Justice of Oyo State before which the Appellants filed their application by prerogative writ of certiorari asking that Court to quash the entire proceedings of the 1<sup>st</sup> Respondent Senior Magistrate Court culminating in the undated judgment convicting them of the offences of conspiracy, assault occasioning grievous harm and malicious damage, has jurisdiction to entertain their case. The only question for determination now is whether the High Court was right in dismissing the Appellants application and also whether the Court below was also right in affirming the decision of the High Court. E

One of the cases dealing with the effective use of certiorari proceeding is that of the Queen v. District Officer & Anor. (1961) 1 All N.L.R. 51 where Ademola, CJF (of the blessed memory) put it pointedly thus at page 58- F

*“Now it is clear that it is of the utmost importance that the Court should act to prevent an injustice being done when the remedy sought is within its powers to grant. This to my mind, is one of such matters in which the Court should act The High Court has an inherent powers, unfettered by statute, to control inferior Tribunals in a supervisory capacity. Such control is by means of certiorari to keep the inferior Tribunal within the law, within bounds and within such jurisdiction as the legislature deemed fit to confer upon it.”* G H

See also the case of Akwuegbu v. Kagoma (2000) 14 N.W.L.R. (Pt. 687) 252 at 269, a judgment of the Court of Appeal, Kaduna Division in which I affirmed the order of certiorari issued by the High

Court of justice of Kaduna State quashing the proceedings, judgment, conviction and sentence and other orders made by the Kaduna Rent Tribunal.

***In the case at hand, with regard to the errors of law on the face of the record of the inferior Court or Tribunal, it is quite clear from the proceedings of the trial Senior Magistrate Court of 14th June, 1999 at page 21 of the record of appeal that the 1<sup>st</sup> Respondent Senior Magistrate 1 recorded the 1<sup>st</sup> accused person absent while 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons were present. As all the 4 accused persons were jointly charged particularly in the charge of conspiracy and were being jointly tried, the 1<sup>st</sup> Respondent ought not to have proceeded with the trial in the absence of 1<sup>st</sup> accused person even though the hearing of that day was for address. The law is trite that addresses by parties or their learned Counsel are an integral part of the hearing or trial of the accused person. See Obodo v. Olomu (1987) 3 NWLR (Pt. 59) 111. Proceeding with the trial of the accused persons in the absence of one of them therefore, had constituted a serious breach of the Criminal Procedure Law of Oyo State which requires the presence of an accused person in Court throughout his trial in the absence of any necessary allowable reasons in law to keep him out of Court for public safety.***

As for the excess or lack of jurisdiction on the part of the inferior Court or Tribunal, the proceedings containing the charges for which the accused persons were tried, have confirmed that all the charges for which the accused persons were tried and ultimately convicted, were within the jurisdiction of the 1<sup>st</sup> Respondent Senior Magistrate Court 1. However, although the judgment of the 1<sup>st</sup> Respondent was not dated, it is clear from the record of appeal particularly the affidavits filed for and against the application for order of certiorari heard at the High Court, that the judgment was delivered on 18<sup>th</sup> April, 2000 in the absence of the 3<sup>rd</sup> accused person but whose absence was not recorded on record as ought to have been reflected clearly to necessitate the adjourning of the delivery of that judgment to another day when the 3<sup>rd</sup> accused person shall have been in attendance in Court. In this regard in my view, a more serious error of law committed by the 1<sup>st</sup> Respondent is at page 35 of the record where

1<sup>st</sup> Respondent after finding all accused persons guilty of counts 1,2 and 3 in the absence of 3<sup>rd</sup> accused person, proceeded as follows -  
*“Previous conviction:- Nil Allocutus:- Accused persons pleaded for leniency.”*

**Certainly, for the 1<sup>st</sup> Respondent to attribute a plea of leniency to the 3<sup>rd</sup> accused person who was absent in Court on the day the judgment was delivered, may call into question the status of the proceedings of the Court of that day as to whether or not such proceedings can qualify as judicial proceedings of a Court of law. In other words by refusing to record the absence of the 3<sup>rd</sup> accused person but recording what the absent 3<sup>rd</sup> accused person did not say in Court that day, had in my view, constituted a serious error of law on the face of the record of that inferior Court to justify the removal of the entire proceedings of that Court to the High Court by certiorari order to be quashed by the High Court as sought by the Appellants in their application in exercise of the supervisory powers of the High Court.**

**In any case the very fact that the 1<sup>st</sup> Appellant and the 3<sup>rd</sup> Appellant were absent in their joint trial in Court on 14th June, 1999 when the inferior Court was addressed and 18th April, 2000 when the inferior Court delivered its judgment, this exercise of allowing the trial to proceed in the absence of some of the accused persons being jointly tried had rendered the entire proceedings of that Court including the judgment a complete nullity for not only denial of fair hearing under Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 but also for failure of that Court to give the affected Appellants even a hearing that may not be called a fair hearing. See Godspower Asakitikpi v. The State (1993) 5 N.W.L.R. (Pt. 296) 641 at 657. It has to be stressed that it is an essential principle of our criminal law and practice in Nigeria that the trial of an accused person for an offence has to be conducted in the presence of the accused and for such purpose trial means the whole of the proceedings including the judgment and sentence. The only exception is where the violent tendencies of an accused - person may necessitate keeping him out of Court in the interest of public safety for peace-**

**ful conduct of the trial.**

**On the face of the record of this appeal therefore, I am of the view that the Appellants' application by way of writ of certiorari to bring the proceedings of 1<sup>st</sup> Respondent including the judgment before the High Court of Oyo State at Ibadan for the purpose being quashed had been made out to justify granting the application. This is because in such application for the order the writ of certiorari to bring the proceedings of an inferior Court before the High Court to be quashed, the fact that the evidence on record has disclosed a case against the applicant, is totally irrelevant provided on the face of the record of the inferior Court lack of or excess of jurisdiction or, breach of the rule of natural justice and errors of law on the face of the record, are apparent justify granting the order of certiorari to quash the entire proceedings complained of by the application.**

Accordingly this appeal shall be and is hereby allowed. The Ruling of the High Court of Justice of Oyo State dismissing the Applicants/Appellants application which was affirmed on appeal by the Court of Appeal Ibadan Division in its judgment of 1<sup>st</sup> July, 2003, is hereby set aside and replaced with an order granting the order of certiorari and quashing the proceedings of the trial of the Appellants including the judgment of the 1<sup>st</sup> Respondent the Senior Magistrate 1 in suit No. MI/ 944C/98. The 3<sup>rd</sup> relief of discharge and acquittal of the Appellants cannot be granted after quashing the entire proceedings of the inferior Court. That relief which is no longer available is hereby refused.

G

### **MUNTAKA-COOMASSIE JSC**

I have read before now the illuminating judgment rendered by my respected learned brother, Mohammed, JSC and I entirely agree with it. The reasons and conclusion reached by his lordship are agreeable to me so I adopt same, with respect as mine.

The live contention in this appeal is to the effect that what was the proper way in law, shall be followed in the circumstances of this appeal. What was the proper way of approaching the appellate court in challenging the decision of the trial court. Was it by way of normal

appeal proceedings or by way of prerogative writ of certiorari?

In the appeal at hand the Justices of the Court of Appeal unanimously held that the appellants ought to have challenged the proceedings and the judgment of the Chief Magistrate, (Respondent) by way of appeal rather than by prerogative writ of certiorari whether that decision is correct or not. B

The delivery of judgment by the 1<sup>st</sup> respondent in the absence of the 3<sup>rd</sup> accused agreed is a nullity but then how an aggrieved person shall approach the appellate court; is it by way of an appeal or certiorari? C

Relying on the decision in *Nwaoboshi V. Military Administrator Delta State* (2003) 11 NWLR (pt. 831) 305, the appellants insisted that the Court of Appeal was wrong in upholding the judgment of the High Court. They further submitted that the Court of Appeal Ibadan Division should have allowed the appellants' appeal against the ruling of the 1<sup>st</sup> Respondent instead of dismissing same. The learned Justices of the Court of Appeal should have ordered for the application of certiorari to quash the appellants' conviction and sentence by the 1<sup>st</sup> Respondent. D

My learned brother, Mohammed JSC, held and I think he was correct to so hold, that since it is settled law that an accused person cannot be lawfully tried in his absence, where that happened the whole trial is regarded as a nullity. The record clearly shows that the senior Magistrate i.e. 1<sup>st</sup> Respondent was addressed in the absence of the 1<sup>st</sup> appellant. The High Court was empowered to correct these anomalies of the 1<sup>st</sup> respondent, but alas failed to do just that. The appellants lost an opportunity in the Court of Appeal of correcting the lapses of the High Court. I agree entirely with the lead judgment to the effect that appeal is pregnant with merit. I too hold that the appeal has a lot of merit same is hereby allowed. Appeal is allowed. E F G

---

### ***GALADIMA JSC***

I have had the privilege of reading the draft of the judgment of my learned brother, Mohammed, JSC. I agree with his reasoning leading to his conclusion allowing the appeal. H

This is an appeal against the judgment of the Court of Appeal Ibadan delivered on 1/7/2003, dismissing the Appellants' appeal

against the Ruling of the High Court of Justice of Oyo State Ibadan dismissing the Appellants' application for an order of Certiorari to quash their conviction by the 1<sup>st</sup> Respondent who was a Senior Magistrate for the offences of conspiracy and malicious damages and causing grievous bodily harm.

B From the printed record it is quite clear that the judgment of the trial Magistrate Court that convicted the Appellants was delivered about 10 months after the addresses of the Learned Counsel, although the offences for which the appellants were convicted undoubtedly were within the jurisdiction of the said trial court.

C The main contention of the parties in this appeal is whether or not the two courts below were right when they held that the reliefs sought by the Appellants in their application for an order of Certiorari to quash the entire Proceedings of the trial Magistrate court, were D not available to the Appellants, in the circumstances of this case.

From the issues set out by the parties in their respective briefs of argument, the common factor in these issues, as shown in the Appellants' brief is the possibility or otherwise of challenging the decision of the trial magistrate by an order of certiorari. The Respondent encapsulates their sole issue appropriately thus:

E *"Whether the learned Justices of the Court of Appeal were not right to have unanimously held that the Appellants ought to have challenged the proceedings and judgment of the 1<sup>st</sup> Respondent by way of Appeal rather than by prerogative writ of Certiorari."*

F Learned Counsel for the Appellants, quoting the passage of the judgment of the court below, submitted that the court had completely failed to apply the correct principles of law governing when an order of Certiorari will issue to quash judgment of inferior court or G Tribunal. He supported his argument with the case of Nwaoboshi v. Military Administrator Delta State (2003) 11 NWLR (pt.831) 305. Based on this case, he stressed further, the court below ought to have allowed the Appellants' appeal and granted their reliefs by the High Court. It is argued that an accused person cannot be tried in his H absence and where that happened, it renders the trial a nullity, citing Adeoye v. The State (1999) 3 - 4 SCNJ 136 in support of his argument the supervisory powers, of the superior court as in this case, to check the excesses of the Senior Magistrate Court. Learned Counsel therefore, has urged this court to set aside the decision of the court



below, which affirmed the decision of the High Court, as being perverse.

Responding, Learned Counsel for the Respondent noted that the main complaint of the Appellants in their trial was the absence of the 1<sup>st</sup> Appellant on 14/6/1999 when the trial Senior Magistrate was addressed and the absence of the 3<sup>rd</sup> Appellant on 18/4/2000 when the court delivered its judgment in which it recorded the presence of the 3<sup>rd</sup> Appellant and 5 the allocutus attributed to him (3<sup>rd</sup> Appellant) in spite of his absence on that date in that court. Appreciating the difference between the Latin terms “Certiorari” and the process of appeal Learned Counsel agreed with the court below in its judgment that in exercising its discretion, a court will not allow the use of the prerogative order of Certiorari to supplement the regular process of appeal to a higher court. He argued that the fact that all the Appellants were represented by Counsel on 14/6/ 1999 and 18/4/2000, when the 1<sup>st</sup> and 3<sup>rd</sup> Appellants were absent, the failure of their Counsel to ask for adjournment to allow their attendance shows that the irregularities had been conceded by the Appellants, which only affected the 1<sup>st</sup> and 3<sup>rd</sup> Appellants individually, and does not justify the quashing of the entire proceedings of the trial of the remaining Appellants by order of Certiorari rather than through the exercise of the individual right to appeal.

Pertaining to the complaint on the failure of the 1<sup>st</sup> Respondent to deliver judgment within 3 months as prescribed by section 294(1) of the 1999 Constitution. Learned Counsel argued that the provision applied only to the courts established under the constitution and not those other courts established by any other means like the 1<sup>st</sup> Respondent (Senior Magistrate Court II) established by the law of Oyo State of Nigeria.

Concluding, Learned Counsel for the Respondent, submitted that all the complaints of denial of fair hearing raised by the Appellants on this issue of delivery of judgment 10 months after addresses or likelihood of bias on the part of the 1<sup>st</sup> respondent, could have been appropriately challenged on an appeal rather than through the prerogative writ of Certiorari as correctly held by the Court below. This court is urged to dismiss the appeal.

The main Issue for determination in this appeal as identified by the Respondent is whether the learned Justices of the court below

were right in holding that the Appellant ought to have challenged the proceeding and judgment of the trial Senior Magistrate Court by way of appeal or by prerogative writ of Certiorari. The prerogative writ of Certiorari process is meant to provide a supervisory process or measure to the excesses and arbitrariness of inferior Courts or Tribunals.

- <sup>B</sup> See *Rex v. Northumberland Compensation Appeal Tribunal - Ex Parte Shaw* (1952) 1 KB 338 at 346 -347. This decision of the English Court was considered and applied in *Oduwole v. Famakinwa* [1990] 4 NWLR (pt. 143) 239 at 251. See further the cases of *Queen v. District Officer & Anor* (1961) 1 All NLR 51 *Akwuegbu v. Kagoma* (2000) 14 NWLR (pt.687) 252 at 269.

<sup>C</sup> The Certiorari procedure is available under S. 272 (1) and (2) of the 1999 Constitution and various State High Court Laws and High Court Civil Procedure Rules. These powers of control of inferior courts or Tribunals by the High Court is exercised by means of quashing any decision of an inferior Court which on the face of it is excessive arbitrary or oppressive.

The High Court of Oyo State before which the Appellants filed their application by Prerogative Writ of Certiorari asking that court to quash the entire proceedings of the 1<sup>st</sup> Respondent Senior Magistrate has jurisdiction to entertain their case. This is the proper case that can be brought for quashing the conviction and sentence of the Appellants because of several errors on the face of the record of the trial court. It is clear from the proceedings of that Senior Magistrate Court <sup>F</sup> II of 14/6/1999 at page 21 of the record of appeal that he recorded the 1<sup>st</sup> accused absent while the 2<sup>nd</sup> and 4<sup>th</sup> accused persons were present. The trial of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons in the absence of the 1<sup>st</sup> accused person, even though the business of the court that <sup>G</sup> day was for address, in the charge for conspiracy, was serious procedural irregularity which breached criminal procedure law of Oyo State. The law requires the presence of an accused person in court throughout his trial except for any reason of security and public safety, allowable in law.

<sup>H</sup> It is clear from the record of appeal and the affidavits of the parties in the application for order of Certiorari of the trial that the judgment of Senior Magistrate court was delivered on 18/4/2000 in the absence of the 3<sup>rd</sup> accused person. His absence was not recorded. This should have been clearly reflected and the delivery of judgment

adjourned to another day when the 3<sup>rd</sup> accused should have been in attendance in court. There has been more serious error of law, and indeed chicanery of the 1<sup>st</sup> Respondent at page 35 of the record where after finding all accused persons guilty of counts 1, 2, and 3 in the absence of the 3<sup>rd</sup> accused person proceeded to attribute a plea of leniency to him. By refusing to record the absence of the 3<sup>rd</sup> accused person but recording what he did not say in court on the said day, did constitute a serious error of law on the face of the record of the trial court to justify the removal of the 3<sup>rd</sup> accused person but recording what he did not say in court on the said day, did constitute a serious error of law on the face of the record of the trial court to justify the removal of the entire proceedings of that court to the High Court by Certiorari order to be quashed. B C

In view of the foregoing and more elaborate reasoning in the lead judgment, I too shall allow this appeal. It is meritorious. Consequently, the Ruling of the High Court dismissing the Appellants' application, which was affirmed by the Court of Appeal in its judgment of 1/7/2003 is hereby set aside and replaced with an order of this court granting the order of Certiorari and quashing the proceedings of the trial of the Appellants, including the judgment of the 1<sup>st</sup> Respondent. I abide by other order made in the lead judgment including costs. D E

---

### NGWUTA JSC

Having had the opportunity of considering the exhaustive reasons prepared by my learned brother, Mohammed, JSC, I am in complete agreement with the conclusion he arrived at. I desire to add only a few brief observations in support of the judgment. F G

The main issue in contention in this appeal, as identified in the appellants' brief of argument and adopted in the lead judgment, is the propriety *vel non* of the decision of the Court below that the appellants ought to have challenged the proceedings and judgment of the trial Court by way of appeal rather than by the prerogative writ of *certiorari*. H

Certiorari is a prerogative order or writ of common law origin available to the High Court in the exercise of its supervisory control over an inferior Court, tribunal or a body entrusted with the perfor-

mance of a judicial or quasi-judicial function to ensure that it does not exceed its jurisdiction or commit irregularities thereby making its decision bad on its face. See *Nwaboshi v. Military Administrator Delta State* (2003) 11 NWLR (Pt. 831) 305 (SC); *Arzika v. Governor North-ern Nigeria* (1961) All NLR 379; *Okukpe v. Federal Board of Inland Revenue* (1974) 4 SC 93.

De Smith, the learned author of “Judicial Review of Administrative Action” 4<sup>th</sup> Edition at pages 396-407 thereof listed four conditions on anyone of which the order of *certiorari* may be granted. The four conditions are:

- (1) Lack of jurisdiction.
  - (2) Breach of rules of natural justice.
  - (3) Error of law on the face of the records, and
  - (4) Decision obtained by fraud or collusion.
- As demonstrated in the lead judgment, the trial Senior Magistrate breached the rules of natural justice and violated the right of fair hearing as entrenched in s.36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) by taking proceedings in the absence of some of those being jointly tried by His Worship.

Moreover, the 3<sup>rd</sup> Respondent was not in Court on the day the judgment was delivered. This notwithstanding, His Worship recorded the 3<sup>rd</sup> Respondent was in Court and credited him with a plea for leniency. In an undated judgment, the 3<sup>rd</sup> Respondent was convicted in absentia and sentenced by the Senior Magistrate. With the undated judgment, it is a matter for speculation as to when the time to exercise the right of appeal has run. All the above individually and collectively smacks/smack of fraud and collusion.

Learned Counsel for the Respondents laboured to justify the delivery of the judgment in the case about ten months after the final address on the tenuous ground that s.294 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) applies only to Courts established by the Constitution. The section provides:

*“S. 294 (1): Every Court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final address and furnish all parties to the case determined with duly authenticated copies of the decision within seven days of the delivery thereof.”*

A distinction has to be between a Court established directly by

the Constitution and a Court established under the Constitution. The Magistrate Courts belong to the latter category. Magistrates Courts are established pursuant to powers donated to the States by the Constitution. See s.4 (6) of the 1999 Constitution as altered which Constitution as altered which provides:

*“S. 4(6) The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.”* B

The Magistrates Court Law of Oyo State which created or he Respondent is a law made pursuant to s.4 (6) of the Constitution. The Magistrates Court is established under the Constitution and is therefore subject to s.294 (1) of the Constitution C

In any case, s.294 (1) of the Constitution is intended to ensure that a Court delivers its judgment before the lapse of human memory. Those who preside over the Magistrates Court have no claim to better and longer memory than the Judges of superior Courts, nor can there be a double standard of justice delivery, one in the lower and the other in the High Courts. D

It is for the above and the illuminating reasons adduced in the lead judgment that I also allow the appeal and I adopt the consequential orders in the lead judgment. E

### ALAGOA JSC

This is an appeal against the judgment of the Court of Appeal Ibadan Division upholding the judgment of the Oyo State High Court dismissing the appellant/Applicants case for being lacking in merit. The brief facts and circumstances culminating in this appeal are as follows: F

In the Senior Magistrate Court the present Appellants now on appeal were tried for causing grievous bodily harm to one Quadri. The trial in the Magistrate Court was protracted despite all efforts made to speed up trial and even after the last witness was taken and addresses taken, it took up to ten months for the learned Senior Magistrate to deliver his judgment contrary to the provisions of Section 294 of the 1999 Constitution. The Appellant filed an application for a prerogative order for prohibition and certiorari before the Oyo State High Court. After the judgment which went against the Appellants was delivered same being alleged by the Appellants to have been written G H

in a hurry, the Appellants withdrew the application for prohibition and pursued the application for Certiorari seeking to quash the proceedings and judgment of the Magistrate Court for reasons that:

1. The judgment was undated and written outside the three (3) months period allowed or stipulated by Section 294/94 of the B 1999 Constitution;

2. That as the delivery of the judgment was done by the learned Senior Magistrate in 10 months instead of within 3 months the Appellants were denied fair hearing;

C 3. The judgment having been delivered in the absence of the 3<sup>rd</sup> Defendant/Applicant, it offended against the Criminal Procedure Law which requires that the accused be present throughout his trial.

The Appellants prayed the High Court for an order to quash the order of the trial Senior Magistrate Court. In opposition the State D Counsel for the Respondent filed a Counter affidavit contending that an order of Certiorari was inappropriate to set aside the order of the Magistrate and that an appeal against the order of the Magistrate to the High Court was the proper procedure if the Appellants were dissatisfied with the judgment of the Magistrate Court.

E The trial High Court ruled that any error in the proceedings of the learned Senior Magistrate is better corrected by a complaint on appeal and that an order for certiorari is more amenable for use in a tribunal which exceeds its jurisdiction and that there was no complaint of excess of jurisdiction in the Appellants' complaint: that the F mere fact that the Magistrate Court judgment was delivered outside 3 months did not per se render it a nullity except it can be shown that the judgment resulted in a miscarriage of justice which can only be done on appeal and that certiorari is unsuitable for such evaluation G of evidence.

The High Court also ruled that allegation of bias by the Magistrate is not proved only by averments. There must be evidence of bias or real evidence of likelihood of bias. The High Court dismissed the application of the Appellants/Applicants hence appeal to the Court H of Appeal. The Court of Appeal said the High Court found and recorded that the Magistrate acted within his jurisdiction and that the Appellants' complaint is not one that comes within the competence of an order of certiorari. Certiorari pleadings will not be appropriate where appeal should suffice. Complaint of delay in itself is not tanta-

mount to lack of fair hearing. The complaint of absence of the 3<sup>rd</sup> Defendant/Respondent during judgment is better raised as a ground of appeal to set aside the judgment and not to quash the judgment by certiorari.

It is a fundamental principle of fair hearing that accused persons standing trial for a criminal offence have to be present in court throughout the period of their trial, a violation of which renders the trial a nullity. B

See *Daniel Adeoye v. State* (1999) 6 NWLR (PART 605) 74 where this Court held that a trial whether objected to or not in the absence of an accused person is a sham and renders the purported trial a nullity, the only known exceptions being where the accused misconducts himself at the trial or is of unsound mind and so incapable of making his defence when the judge, magistrate or jury as the case may be shall in the first instance investigate the fact of such unsoundness of mind when such investigation shall be held in the absence of the accused or the penalty to be imposed by the Magistrate on the accused where the offence is punishable only by a penalty not exceeding one hundred naira provided that the accused pleads guilty in writing or through his counsel when the court shall dispense with personal attendance. C D E

The absence of the 1<sup>st</sup> and 3<sup>rd</sup> Appellants in Court at their joint trials when addresses were taken and judgment delivered does not fall into these categories and renders the entire proceedings and the judgment which is the outcome of the sham proceedings a nullity. It is complete denial of the principles of fair hearing as enshrined in Section 36 of Constitution of the Federal Republic of Nigeria 1999. F

See also *Alhaji Muhammadu Maigari Dingyadi v. Independent National Electoral Commission (No. 2)* (2010) 18 NWLR (PART 1224) 154; *Rasaki Salu v. Taiwo Egeibon* (1994) 6 SCNJ 223; *Adigun v. Attorney General of Oyo State* (1987) 1 NWLR (Part 53) 678. G

It is for this and the fuller reasons given in the lead judgment of my brother Mahmud Mohammed JSC, which I was privileged to read in before now and which I completely agree with that I too allow the appeal. I abide by other order or orders contained in the lead judgment. H