

SUPREME COURT OF NIGERIA
FRIDAY 14TH FEBRUARY, 2014. SC. 354/2011
CORAM:- J. A. FABIYI, B. RHODES-VIVOUR,
M. U. PETER-ODILI, M. D. MUHAMMAD,
J. I. OKORO, JJSC

NONYE IWUNZE APPELLANT
V.
THE FEDERAL REPUBLIC OF
NIGERIA RESPONDENT

APPEALS - Jurisdiction - Conferment - Constitution and Rules of the court confer on CA jurisdiction to entertain appeals - Hence CA lacks jurisdiction where there is non compliance with the statutes - Or defect in notice of appeal (H1)

APPEALS - Rules - Applicable one - Rules governing practice and procedure is the one in force at the time of trial - Or when application is taken - Which in this case is CA Rules 2007 (H2)

APPEALS - Notice of appeal - Signing - By CA Rules O. 16 r. 4(1)(5)(6) - Every notice of appeal in criminal appeal must be signed by appellant - Except if appellant is insane or is a company (H3)

APPEALS - Notice of appeal - Signing - Court's discretion - Where court is satisfied that it was impossible for appellant to sign in criminal appeal - Discretion would be exercised in favour of appellant - And appropriate orders made for him to proceed (H4)

FACTS

Accused/appellant was arraigned before the Federal High Court sitting in Kano on a two count charge brought under the provisions of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C34 LFN 2004. In the first count charge, appellant was charged with manufacturing fake Barbicilin Ampicillin Syrup (Powder) and Rampiciline Ramsey Syrup (Powder) and thereby committed an offence contrary to section 1 (a) of the Act. In count two, he was charged with possession of fake

Barbicillin Ampicillin Syrup (Powder) and Rampicillin Ramsey Syrup (Powder) and thereby committed an offence contrary to Section 1 (a) of the Act punishable under section 3 of the Act. Appellant pleaded guilty to both counts.

Appellant was not represented by counsel. Prosecution/respondents opened its case and called three witnesses and tendered several exhibits in support. Appellant neither cross-examined PW nor adduced any evidence in his defence. He also did not object to the tendering of the exhibits and refused to address the court at the end of trial. In its judgment, the court convicted appellant on both counts and sentenced him to five years imprisonment with an option of N500,000 fine on each count. Aggrieved, appellant appealed to the Court of Appeal Kaduna Division. Respondent filed preliminary objection to the hearing of the appeal on the ground that since the Notice of Appeal was signed by counsel for appellant and not by appellant the appeal is incompetent. The court agreed with the learned counsel for respondent and struck out the appeal. Dissatisfied, appellant approached the Supreme Court with an appeal.

ISSUE FOR DETERMINATION

Whether the appeal was improperly struck out for being incompetent.

HELD (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

APPEALS - Jurisdiction - Conferment

1. The Constitution confers on the Court of Appeal jurisdiction to hear and determine appeals. The jurisdiction is statutory and also controlled by rules of court. The Court of Appeal would lack jurisdiction to hear an appeal if an appellant fails to comply with statutory provisions or the relevant rules of the court.

The originating process in all appeals is the Notice of Appeal once it is found to be defective the Court of Appeal ceases to have jurisdiction to entertain an appeal in whatever form. (p. 938 G)

APPEALS - Rules - Applicable one

2. The well laid down position of the Law is that the rule governing practice and procedure is the rule in force at the time of the trial or when the application is taken unless there are any provisions to the contrary.

The Notice of Appeal to the Court of Appeal was filed on 7/4/05, but the appeal was heard on 24/3/2011. The applicable rules of court were the Court of Appeal rules 2007.

(p. 939 B)

APPEALS - Notice of appeal - Signing

3. Order 16 Rule 4(1), (5) and (6) of the Court of Appeal Rules 2007 states who should sign the Notice of Appeal in Criminal Appeals.

The words used in Order 16 Rules 4(1), (5) and (6) supra must be given their ordinary meaning, thereby making it abundantly clear the intention of the President of the Court of Appeal who made the Rules by virtue of the powers conferred on him by section 248 of the Constitution.

By virtue of Order 16 Rule 4(1), (5) and (6) of the Court of Appeal Rules 2007 every Notice of Appeal in a criminal appeal must be signed by the appellant. Exceptions are if the appellant is insane, or is a company. (p. 939 C/G)

APPEALS - Notice of appeal - Signing - Court's discretion

4. Where rules provide that a Notice of Appeal in a Criminal Appeal shall be signed by the appellant, but it is shown to the satisfaction of the court that due to extenuating circumstances compliance was impossible the court would readily exercise its discretion in favour of the appellant, making appropriate orders to enable the appellant proceed with his appeal. Can this be said to be the position of the appellant?

My lords, in this case the appellant was sentenced to 5 years imprisonment or N500, 000.00 fine. He could very well have been a free agent, and if he was not he was undergoing ordinary incarceration completely different from Ikpassa who was in a condemned cell. Learned counsel for the appellant did not say that he was unable to have access to the appellant.

Consequently learned counsel for the appellant has not shown that he had difficulty taking the Notice of Appeal to the appellant to get it signed or why the appellant did not sign it. When no credible excuse or reason for failure of the appellant to sign the Notice of Appeal is given no indulgence can be granted.

The Court of Appeal was right to uphold the Preliminary Objection and strike out the appeal for being incompetent. On these facts a judge would be in grave error to exercise his discretion in favour of the appellant. (p. 940 G)

C NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

1. Competence of Appeals – Determination on merit

Before concluding that the appeal was incompetent, the Court of Appeal considered the appeal on its merits. The three issues formulated by the appellant were considered and pronouncements made on them. This is a good procedure, and judges who sit in the penultimate court are advised to adopt that procedure, the reasoning being that in the event the final court finds that the Court of Appeal was wrong on jurisdiction it would have no difficulty considering the appeal on its merits. Failure to make a pronouncement on the merits, and the final court finds that the Court of Appeal was wrong on jurisdiction, the Supreme Court would have to send the case back to the Court of Appeal for a hearing at great cost to the appellant, and a waste of judicial time. (p. 936 G)

REPRESENTATION

B.C. Igwilo, O. Chinwike, for the Appellant

G T. Ede, for the Respondent

CASES REFERRED TO

Ikpasa v. Bendel State (1981) 9 SC 31

H Uwazuruike v. A-G Federation (2007) 8 NWLR (pt. 1035) 1

Adekanye v. FRN (2005) 15 NWLR (pt. 949) 433

State v. Jammal (1996) NWLR (pt. 473) 384

Olowokere v. African Newspapers (1993) 5 NWLR (pt. 295) 583

Owata v. Anyigor (1993) 1 NSCC (pt. 1) 199

Afolabi v. Adekunle (1983) 14 NSCC 398

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

State v. Gwonto (1983) 1 SCNLR 142

Adeleke v. Awoliyi (1962) SCNLR 401

Buwai v. State (2004) 16 NWLR (pt. 899) 285

Onochie v. Odogwu (2006) 6 NWLR (pt. 975) 65

Amokeodo v. IGP (1999) 5 SCNJ 71

Ajayi v. Omorogbe (1993) 6 NWLR (pt. 301)

Akanbi v. Alao (1989) 5 SCNJ 10

STATUTES & RULES REFERRED TO

Counterfeit & Fake Drugs & Unwholesome Processed Foods (Miscellaneous provisions) Act Cap C.34 LFN 2004, ss. 1(a), 3

Constitution of Federal Republic of Nigeria 1999, ss. 240, 243(1)(b)

Supreme Court Rules, O. 6 r. 5(1)(2)

Court of Appeal Rules 2007, O. 16 r. 4(1)(5)(6)

LEAD JUDGMENT BY RHODES-VIVOUR JSC

The appellant, as accused person was arraigned before a Federal High Court, Kano on a two count charge which read:

COUNT 1

That you Nonye Iwunze (M) a trader resident of Kwanarkifi Quarters Brigade Kano on or about 18th October 2004 at Bachalawa Quarters Kano manufactured fake Barbicillin Ampicillin syrup (powder) and Rampicillin Ramsey syrup (powder) and you thereby committed an offence contrary to section 1 (a) of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous provisions) Act Cap C.34 Laws of the Federation of Nigeria 2004 and punishable under section 3 of the same Act.

COUNT 2

That you Nonye Iwunze (M) a trader resident of Kwanarkifi Quarters Brigade Kano on or about 18th October 2004 at Bachalawa Quarters Kano, within the jurisdiction of this Honourable Court were in possession of fake Barbicillin Ampicillin syrup (powder) and Rampicillin Ramsey syrup (powder) and you thereby committed an offence contrary to section 1 (a) of the Counterfeit and Fake Drugs and Unwholesome Processed Foods Miscellaneous provisions) Act Cap C.34 Laws of the Federation of Nigeria 2004 and punishable

section 3 of the same Act.

The appellant entered guilty pleas to both counts.

He was not represented by counsel. The prosecution opened its case on 24/2/05, called three witnesses and tendered several exhibits. The appellant did not cross-examine the witnesses neither did he give evidence or call witnesses for his defence. He also did not object to the tendering of the exhibits and refused to address the court at the end of trial on the 3rd of March 2005. In a considered judgment delivered on the 11th of March, 2005 the learned trial judge found the appellant guilty on both counts and sentenced him to five years imprisonment with an option of N500,000 fine on each count.

Dissatisfied with the conviction and sentence, the appellant filed an appeal. It was heard by the Court of Appeal, Kaduna Division. In that court the respondent filed a preliminary objection to the hearing of the Appeal. His ground of objection was that since the Notice of Appeal was signed by counsel for the appellant and not by the appellant the appeal is incompetent. After hearing counsel on both sides the Court of Appeal concluded as follows:

“On the whole, since the appeal is incompetent for want of proper procedure in initiating it I will visit striking out on it. Accordingly, the appellants’ appeal filed on the 1st of April, 2005, be and is hereby struck out for being incurably incompetent.”

This appeal is against that judgment. In accordance with Order 6 Rule 5(1) and (2) of the Supreme Court Rules, counsel filed briefs of argument. Learned counsel for the appellant, Mr. B.C. Igwilo filed the appellants brief on the 22nd of November 2011. He urged this court to allow the appeal and set aside the conviction of the appellant.

Learned counsel for the respondent, Mr. T. Ede filed the respondents brief on the 5th of April 2012. He urged us to dismiss the appeal.

Before concluding that the appeal was incompetent, the Court of Appeal considered the appeal on its merits. The three issues formulated by the appellant were considered and pronouncements made on them. This is a good procedure, and judges who sit in the penultimate court are advised to adopt that procedure, the reasoning being that in the event the final court finds that the Court of

Appeal was wrong on jurisdiction it would have no difficulty considering the appeal on its merits. Failure to make a pronouncement on the merits, and the final court finds that the Court of Appeal was wrong on jurisdiction, the Supreme Court would have to send the case back to the Court of Appeal for a hearing at great cost to the appellant, and a waste of judicial time. B

Learned counsel for the appellant formulated three issues from his live grounds of appeal. They are:

1. Whether the recall of the prosecution witnesses did not occasion miscarriage of justice and whether the Court of Appeal was right in upholding the conviction and sentence of the appellant by the trial court, solely on appellant's plea of guilty notwithstanding that there was break in the chain of causation from the time the alleged fake drugs were recovered to the time same was presented to the laboratory for analysis. C

2. Whether the non service of proof of evidence on the appellant and failure of the trial court to explain the charge to the appellant was not unfair and resulted in a miscarriage of justice. D

3. Whether the Court of Appeal was right in upholding the preliminary objection of the respondent counsel solely on technicality instead of doing and ensuring substantial justice. E

On his part, learned counsel for the respondent formulated two issues. They are:

1. Whether the prosecution proved its case against the appellant beyond reasonable doubt. F

2. Whether the appeal was improperly struck out for being incompetent.

I have carefully examined the issues formulated by both sides. The appellant's issue 3 and the respondents issue 2 ask the question, whether the Court of Appeal was right to sustain the Preliminary objection. This is fundamental as it questions the jurisdiction of the Court of Appeal to consider an appeal on an incompetent Notice of Appeal. The appellant's issues 1 and 2 and the respondent's issue 2 to my mind would resolve the real grievance in this appeal. I consider once again the respondents issue 2 crucial and fundamental, in that if it is found that the Court of Appeal was correct to sustain the respondents preliminary objection this court would have no jurisdiction to hear the merits of the appeal. It reads: H

Whether the appeal was improperly struck out for being incompetent.

Learned counsel for the appellant observed that the Notice of Appeal before the Court of Appeal was signed by the appellant's counsel instead of by the appellant as provided by the Court of Appeal Rules. He further observed that the appellant was convicted and sentenced and the consequence of such is that the appellant will hardly have access to counsel, contending that the signing of the Notice of Appeal by counsel is an irregularity which derives from a breach of the rules of practice and procedure and ought not to render the Notice of Appeal proceedings a nullity.

In concluding he urged this court to apply the principle in *Ikpasa v. Bendel State* 1981 9 SC p.31 instead of *Uwazuruike v. AG Federation* 2007 8 NWLR pt. 1035 p.1 and hold that the Notice of Appeal which was signed by appellant's counsel is an irregularity incapable of rendering the appeal at the court below incompetent.

Learned counsel for the respondent observed that in criminal appeals the Notice of Appeal can only be signed by the appellant, but where the appellant is insane, or a body corporate or there is sufficient allowable extenuating circumstances counsel could sign on behalf of the appellant. He submitted that the appellant does not come within the exceptions, contending that non compliance with the provisions of Order 16 Rule 4(1), (5) and (6) of the Court of Appeal Rules 2007 renders the Notice of Appeal incompetent. Reliance was placed on *Adekanye v. Federal Republic of Nigeria* 2005 15 NWLR Pt. 949 p.433; *State v. Jammal* 1996 NWLR pt 473 p.384; *Uwazuruike v. Attorney General of Federation* 2007 8 NWLR pt. 1035 p.1.

He urged this court to resolve this issue in favour of the respondent.

The Constitution confers on the Court of Appeal jurisdiction to hear and determine appeals. The jurisdiction is statutory and also controlled by rules of court. The Court of Appeal would lack jurisdiction to hear an appeal if an appellant fails to comply with statutory provisions or the relevant rules of the court.

The originating process in all appeals is the Notice of Appeal once it is found to be defective the Court of Appeal

ceases to have jurisdiction to entertain an appeal in whatever form. See *Olowokere v. African Newspapers* 1993 5 NWLR pt. 295 p. 583.

In force at one time or the other were the Court of Appeal Rules of 2002, 2007 and 2011.

The well laid down position of the Law is that the rule governing practice and procedure is the rule in force at the time of the trial or when the application is taken unless there are any provisions to the contrary. See *Owata v. Anyigor* (1993) 1 NSCC pt. 1 p. 199.

The Notice of Appeal to the Court of Appeal was filed on 7/4/05, but the appeal was heard on 24/3/2011. The applicable rules of court were the Court of Appeal rules 2007.

Order 16 Rule 4(1), (5) and (6) of the Court of Appeal Rules 2007 states who should sign the Notice of Appeal in Criminal Appeals. It reads:

4(1) Every notice of appeal or notice of application for leave to appeal or notice of application for extension of time within which such notice shall be given, shall be signed by the appellant himself except under the provisions of paragraph (5) and (6) of this Rule.

(5) Where on the trial of a person entitled to appeal it has been contended that he was not responsible according to law for his actions on the ground that he was insane at the time the act was done or the omission made by him or that at the time of the trial he was of unsound mind and consequently incapable of making his defence, any notice required to be given and signed by the appellant himself may be given and signed by his legal representative.

(6) In the case of a body corporate where any notice or other document is required to be signed by the appellant himself, it shall be sufficient compliance therewith if such notice or other document assigned by the secretary, clerk, manager, or legal representative, of such body corporate.

The words used in Order 16 Rules 4(1), (5) and (6) supra must be given their ordinary meaning, thereby making it abundantly clear the intention of the President of the Court of Appeal who made the Rules by virtue of the powers conferred on him by section 248 of the Constitution.

By virtue of Order 16 Rule 4(1), (5) and (6) of the Court

of Appeal Rules 2007 every Notice of Appeal in a criminal appeal must be signed by the appellant. Exceptions are if the appellant is insane, or is a company.

Intrinsic in the above is the power of a judge to dispense with the mandatory provisions of Order 16 Rule 4(1) when the interest of justice demands. After all a judge is not a robot. He has discretion forever vested in him and so in deserving cases a judge can approve of counsel signing a Notice of Appeal for a criminal appeal. This discretion vested in a judge was used by Udo Udoma, JSC in *Ikpasa v. Bendel State* (supra) to validate a Notice of Appeal that came before the court on a wrong Form.

Learned counsel for the appellant has asked this court to follow the decision in *Ikpasa v. Bendel State* 1981 9 SC p. 31.

In *Ikpasa* case instead of Criminal Form 1, which ought to have been used in giving notice of appeal, the appellant used a Civil Form. The Acting Director of Public Prosecution objected, submitting that the use of wrong form was a fundamental error and therefore fatal in view of the mandatory provisions of Order 8 Rule 3 of the Old Supreme Court Rules applicable to the Federal Court of Appeal. The Court of Appeal overruled the objection and proceeded to hear the appeal on its merits.

This is what the Supreme Court, Udo Udoma (JSC) said:

"I am of opinion that this is a proper case in which to exercise judicial discretion..."

The appellant was already confined in a condemned cell. He was no longer a free agent nor an ordinary prisoner undergoing ordinary incarceration. He was therefore at the mercy of the Prison Authorities..."

It is clear from the above that Udo Udoma, JSC exercised judicial discretion in favour of the appellant because His lordship was satisfied that it was difficult or impossible to gain access to the appellant within the time to appeal since he was in a condemned cell.

Where rules provide that a Notice of Appeal in a Criminal Appeal shall be signed by the appellant, but it is shown to the satisfaction of the court that due to extenuating circumstances compliance was impossible the court would readily exercise its discretion in favour of the appellant, making appropriate orders to enable the appellant proceed with his

appeal. Can this be said to be the position of the appellant?

Learned counsel for the appellant said in his brief. I quote him:

“In the instant case the appellant was convicted and sentenced and the consequence of such is that the appellant will hardly have access to his counsel.”

My lords, in this case the appellant was sentenced to 5 years imprisonment or N500, 000.00 fine. He could very well have been a free agent, and if he was not he was undergoing ordinary incarceration completely different from Ikpassa who was in a condemned cell. Learned counsel for the appellant did not say that he was unable to have access to the appellant. Consequently learned counsel for the appellant has not shown that he had difficulty taking the Notice of Appeal to the appellant to get it signed or why the appellant did not sign it. When no credible excuse or reason for failure of the appellant to sign the Notice of Appeal is given no indulgence can be granted. The Court of Appeal was right to uphold the Preliminary Objection and strike out the appeal for being incompetent. On these facts a judge would be in grave error to exercise his discretion in favour of the appellant.

In deciding to follow the decision in *Uwazuruike v. A.G. Federation* (supra) instead of *Ikpassa v. Bendel State* (supra) the Court of Appeal reasoned as follows:

“Even though those two decisions are diametrically opposed on the point. I am nonetheless not hamstringing in the circumstances. The reason is plain enough. The law is trite that where the decisions of the Supreme Court are in direct conflict on a point, I have licence of the law to follow the one that is later in time. The case of Ikpassa v. State (supra) was decided on 18/9/81 whilst that of Uwazuruike v. Attorney General, Federation (supra) was delivered on 25/2/07. It is axiomatic, from these dates that the case of Uwazuruike v. Attorney General of Federation (supra) is more recent than that of Ikpassa v. Bendel State (supra). On the promise of the binding authority of Osakwe’s case, supra, I must willy-nilly bow to the decision in the case of Uwazuruike v. Attorney General, Federation supra.”

Uwazuruike’s case is authority for the position of the applicable rules of court that a Notice of Appeal in a Criminal Appeal must be signed by the appellant. This is mandatory. The only exceptions

are if the appellant is insane or a body corporate, then his counsel can sign on his behalf. The rules of court were applied to the letter in Uwazuruike's case.

On the other hand in Ikpassa's case the appellant used Civil Form to give Notice of Appeal, instead of Criminal Form 1. This court exercised judicial discretion to enable the appellant appeal, because he was in a condemned cell and access to him was difficult or impossible. To my mind both decisions are correct and not in conflict whatsoever. In Uwazuruike's case this court applied rules of court, while in Ikpassa case this court exercised judicial discretion in favour of the appellant to enable him appeal because a good reason was given for failure to comply with the rules of court.

It must be said once again that rules of court are to be obeyed. The appellant is at liberty to appeal if he so desires and this can be done by filing an application for extension of time to appeal, supported with an affidavit explaining the reason for the delay. The courts would readily grant leave to appeal if satisfied that the facts relied on are genuine.

In view of all that I have been saying this appeal is dismissed as there is no merit whatsoever.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother Bode Rhodes-Vivour, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit.

Put briefly, the Notice of Appeal at the Court of Appeal was signed by counsel instead of the appellant in person contrary to the dictate of Order 16 Rule 4(1) of the applicable Rules of 2007. The exception provided by paragraphs (5) and (6) cannot be invoked since the appellant has not been shown to be a person of unsound mind or a body corporate. The unauthorized step taken by the counsel rendered the said Notice of Appeal incompetent. See: *Uwazuruike v. Attorney-General, Federation* (2007) 8 NWLR (pt. 1035).

Appellant's counsel tried to cling tenaciously to substantial justice principle. I dare say it that same can only come into play where the initiating process - Notice of Appeal is competent. The appellant

should appreciate the point that rules of court are meant to be obeyed. Failure to obey can be costly for a recalcitrant appellant. See: Afolabi v. Adekunle (1983) 14 NSCC 398 at 405; University of Lagos v. Aigoro (1985) 1 NWLR (pt. 1) 143. For my above remarks and the reasons ably set out in the judgment of my brother, I too feel that the appeal lacks merit. The court below was right in striking out the appeal for being incurably incompetent. I endorse same. I hereby dismiss the appeal. B

PETER-ODILI JSC

I agree with the decision and reasoning as made by my learned brother, Bode Rhodes-Vivour, JSC in the judgment just delivered. To emphasize my support, I shall make some comments.

This is an appeal from the judgment of the Court of Appeal, Kaduna Division delivered on the 24th day of June, 2011 in which that appellate court dismissed the appeal of the Appellant challenging his conviction and sentence by the Federal High Court presided over by Adeniyi E. A. Ademola J on 11th March, 2005. D

FACTS:

The Appellant was arraigned on the 24th February, 2005 before the Federal High Court Kano on a two count charge under the provisions of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C34, Laws of the Federation of Nigeria, 2004. F

In the first count of that charge the Appellant was charged with manufacturing fake Barbicilin Ampicillin Syrup (Powder) and Rampiciline Ramsey Syrup (Powder) on 18th October, 2004 and thereby committed an offence contrary to Section 1 (a) of the Act. In count two, he was charged with possession of fake Barbicillin Ampicillin Syrup (Powder) and Rampicillin Ramsey Syrup (Powder) and thereby committed an offence contrary to Section 1 (a) of the Act. G

The trial commenced on the 24th February, 2005 with the Appellant pleading guilty to both counts. Thereafter, the prosecution fielded their first witness (PW1) who tendered Exhibits N11 - N16 A - D and was thereafter discharged. On the same day the prosecution examined and the PW2 was discharged and the case adjourned to a later date when the PW1 was recalled and had through him ten- H

dered Exhibits N17 N111 after which PW3 testified.

The Appellant was not represented by counsel, stood for himself and did not cross-examine any of the witnesses. He also did not enter any defence. The trial court convicted and sentenced the Appellant to a term of five years with an option of Five Hundred Thousand of (N500, 000.00) on each count, both to run concurrently.

The Appellant not satisfied with what the trial court did, appealed to the Court of Appeal which dismissed the appeal. Again aggrieved, the Appellant has appealed to the Supreme Court with five grounds of appeal.

On the 21st November, 2013 date of hearing, learned counsel for the Appellant, Mr. B. C. Igwilo adopted the Brief of Argument, he had settled and filed on the 22nd November, 2011. In the Brief were distilled three issues for determination as follows:-

1. Whether the recall of the prosecution witness did not occasion miscarriage of justice and whether the Court of Appeal was right in upholding the conviction and sentence of the Appellant by the trial court, solely on Appellant's plea of guilty notwithstanding that there was a break in the chain of conversation from the time the allege (sic) fake drug were recovered to the time the same were presented to the laboratory for analysis? (Grounds 2, 3 and 4).

2. Whether the non service of proof of evidence on the Appellant and failure of the trial court to explain the charge to the Appellant was not unfair and resulted in a miscarriage of justice. (Ground 1).

3. Whether the Court of Appeal was right in upholding the preliminary objection of the Respondent (Sic) counsel solely on technicality instead of doing justice. (Ground 5).

Mr. Tuduru Ede learned counsel for the Respondent adopted their Brief of Argument which he settled and filed on 5/4/12. It was crafted for the Respondent, two issues for determination which are thus:-

(a) Whether the prosecution proved its case against the Appellant beyond reasonable doubt? (Grounds 1, 2, 3 & 4.)

(b) Whether the appeal was improperly struck out for being incompetent? (Ground 5.)

It seems to me neat to utilize issue 3 of the Appellant or issue (b) of the Respondent. I shall make use of the issue 3 crafted by the

Appellant as it concerns the ground of the competence or otherwise of the appeal at the Court of Appeal which I see as the main theme.

ISSUE 3:

Whether the Court of Appeal was right in upholding the preliminary objection of the Respondent counsel solely on technicality instead of substantial justice. B

Learned counsel for the Appellant, Mr. B. C. Igwilo said the Notice of Appeal filed by the Appellant in the Court below was signed by the Appellant's counsel instead of the Appellant himself as provided for by the Rules of the Court of Appeal. He stated on that a Court of law must do substantial justice and not a technical one. That the irregularity was not a fundamental breach and would not render the proceedings a nullity as it can be regularized by the court. C

Mr. Igwilo of counsel contended that the current trend of legal opinion is that cases should be decided on their merits and not based on unnecessary technicalities as a court of justice should not sacrifice justice on the altar of technicalities. That non-compliance with the Rules of court is curable if it is not intended to over reach the adverse party to score a cheap victory or any victory at all. He cited the cases of *State v. Gwonto* (1983) 1 SCNLR 142; *Okonjo v. Odije* 10 SC 267; *British American Insurance Co. Ltd v. Edema Sillo* (1993) 2 NWLR (Pt. 277) 570; *Adeleke v. Awoliyi* (1962) SCNLR 401. E

Learned counsel for the Respondent, Mr. Tuduru Ede took the contrary view that indeed the Court of Appeal was correct in striking out the appeal as the Notice of appeal was incompetent and so there existed no competent appeal by the Appellant before the Court of Appeal. He referred to the Rules of the Court of Appeal, Order 17, Rules 4 (1) and (6) thereof. He said by the Rules aforesaid the Notice of Appeal in criminal appeals can only be signed by the appellant and not counsel as happened in this case without the existence of the condition upon which the requirement could be deviated from such as appellant being insane or a body corporate. That the requirement is mandatory and cannot be waived. He relied on the cases of *Adekanye v. Federal Republic of Nigeria* (2005) 15 NWLR H (Pt. 949) 433; *State v. Jammal* (1996) 9 NWLR (Pt. 473) 384; *Buwai v. State* (2004) 16 NWLR (Pt. 899) 285; *Uwazuruike v. Attorney General Federation* (2007) 8 NWLR (Pt. 1035). F

I would like to quote the relevant part of the judgment espe-

cially as it related to the preliminary objection of the respondent in the Court below and it is as follows:-

"The learned counsel for the respondent pegged the objection on the provision of Order 4, Rules 3 (1) and (2), 4 (1), 5 and 6 of the Court of Appeal Rules, 2002. I must place on record, pronto, that provision of the Rules, 2002 is defunct and inapplicable to the objection. It is an equivalent provision of the Court of Appeal Rules, 2007 in operation as at 24/03/2011 when the appeal was heard should be the applicable one. The reason is not far-fetched. The applicable rules of court, governing practice and procedure are those that are in force at the time of the trial of a matter. This is because they (the rules) do not donate vested right to a party in any proceedings. It follows that the applicable provision is Order 16, Rules 4 (1), (5) and (6) of the Rules 2007.

Interestingly, the provision of the Rules, 2002 on which the objection is anchored to, and that of the 2007 Rules are in tandem. Indeed, one is a mirror of the order... the appellant does not come within the salvaging provision of sub-rules (5) and (6) if Order 16 of the Rules. There is no evidence that the appellant has no mind of his own so as to benefit under the insanity exemption in sub-rule (5) ... Again, the appellant, even by his nomenclature is a world away from being a body corporate. This makes it impossible for him to take sanctuary under the exception prescribed under sub-rule (6) and save the notice of appeal."

The Lower court came to the conclusion that the appeal should be struck out but had to still go into the merits in line with the prevailing practice in the event that the Supreme Court did not agree on the striking out of the appeal.

Learned counsel for the Respondent had canvassed that this court strikes out the appeal in view of the incompetent Notice of Appeal. In dealing with this position I shall recast the prevailing procedural rule which is Order 16, Rules 4 (1), (5) and (6) of the 2007 Rules of the Court of Appeal which provides as follows:-

"4 - (1) Every notice of appeal or notice of application for extension of time within which such notice shall be given, shall be signed by the appellant himself, except under the provision of paragraphs (5) and (6) of this Rule.

(5) When on the trial of a person entitled to appeal it is con-

tended that he was not responsible according to law for his actions on the ground that he was insane at the time the act was done or the omission made by him or at the time of the trial he was of unsound mind and consequently incapable of making his defence, any notice required to be given and signed by the appellant himself may be given and signed by his legal representative.” B

(6) In the case of a body corporate where any notice or other document is required to be signed by the appellant himself, it shall be sufficient compliance therewith if such notice or other document assigned by the secretary, clerk, manager, or legal representative, of such body corporate.” C

These guiding rules of court, Order 16, Rules 4 (1), (5) and (6) of the Rules of Court of Appeal including the exceptions are explicit, glaring and have left no room either for ambiguity, speculation or option being mandatory. The fact of the matter here is that the Notice of Appeal at the Court below was signed by learned counsel of the Accused/Appellant, a situation not in dispute. It did not arise that the said Appellant was insane or of unsound mind. Also not disputed is that the Appellant is not a body corporate. Clearly the exceptions to the rule as to who must sign a Notice of Appeal being the Appellant himself do not present. Therefore when learned counsel signed the Notice of Appeal, he rendered that appeal dead on arrival without a redeeming anchor or safety valve. That defect is such as cannot be waived or repaired being of a fundamental nature. D E F

I place reliance on the cases of *Uwazurike v. Attorney General Federation* (2007) 8 NWLR (Pt. 1035) 1; *Adekanye v. Federal Republic of Nigeria* (2005) 15 NWLR (pt. 949) 433; *State v. Jammal* (1996) 9 NMLR (Pt. 473) 384.

Nothing else needs be said except that the conclusion by the Court of Appeal that none compliance with Order 16, Rule 4(1) of the Rules of its Court rendered the Notice of Appeal incompetent and fatal, was a conclusion that cannot be faulted. G

From the foregoing and the better articulated reasoning in the lead judgment of my brother, Bode Rhodes-Vivour, JSC, I have no difficulty in also striking out the appeal. I abide by the consequential orders earlier made. H

MUHAMMAD JSC

Having read in draft the lead judgment of my learned brother Rhodes-Vivour JSC just delivered, I agree with his lordship’s reasoning leading to the conclusion that the appeal lacks merit, that same be and stands dismissed.

B The appellant was arraigned before, tried and convicted by the Federal High Court sitting at Kano on a two count charge for manufacturing and being in possession of fake Banbicillin Ampicillin syrup (powder) and Rampicillin Ramsey syrup (powder) contrary to Section 1(a) and punishable under Section 3 of the counterfeit and C Fake Drugs and Unwholesome Processed Foods (miscellaneous provisions) Act CAP 34 laws of the Federal Republic of Nigeria 2004.

D Dissatisfied, he appealed to the Kaduna Division of the Court of Appeal on a notice that was signed by counsel on appellant’s behalf. The respondent to the appeal raised a preliminary objection as to the competence of the appeal contending that appellant’s Notice of Appeal which was signed by his counsel instead of the appellant himself is incompetent. The lower court sustained respondent’s objection and struck out the appeal for being “incurably incompetent.” E This decision of the Court of Appeal the appellant consider unfavourable informs the instant appeal to this Court.

F Appellant contends that the lower court improperly struck out his appeal for being incompetent. The respondent asserts, and rightly too, that the lower court is justified in striking out appellant’s incompetent appeal.

G Appellant’s right of appeal from the decision of the Federal High Court to the Court of Appeal which enures to him by virtue of Section 240 of the 1999 Constitution (as amended), is exercisable subject to the fulfillment of the condition under Section 243 (1) (b) of the same Constitution reproduced herein under for ease of reference.

H “(1) Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court conferred by this Constitution shall be

(b) exercised in accordance with any Act of the Notional Assembly and rules of court for the time being in force for regulating the powers, practice and procedure of the Court of Appeal.”

By the foregoing, it is mandatory on an appellant in the ex-

ercise of his right of appeal under Section 240 of the Constitution to comply with the “*rules of court for the time being in force for regulating the powers, practice and procedure of the Court of Appeal.*” (appeal, right to appeal, Whether appellant’s right of appeal from the decision of the Federal High Court to the Court of Appeal as provided under Section 240 of the 1999 Constitution (as amended),^B is exercisable subject to the fulfillment of the condition under Section 243 (1) (b).

Order 16 rule 4 (1), (5) and (6) of Court of Appeal Rules 2007 applies to appellant’s appeal to the Court of Appeal which^C though heard on 24th March 2011 was filed on 7th April 2005.

The rules provide:-

“4(1) Every notice of appeal or notice of application for leave to appeal or notice of application for extension of time within which such notice shall be given, shall be signed by the appellant himself^D except under the provisions of paragraph (5) and (6) of this Rule.

(5) Where on the trial of a person entitled to appeal it has been contended that he was not responsible according to law of his actions on the ground that he was insane at the time the act was done or the omission made by him or that at the time of the trial he^E was unsound mind and consequently incapable of making his defence, any notice required to be given and signed by the appellant himself may be given and signed by his legal representative.”

From the clear and unambiguous words of the foregoing non^F compliance with the mandatory terms of the rule is fatal. It is not appellant’s contention that “he was insane” at the time of committing the offence in respect of which conviction by the trial court he sought to appeal to the court below.

In *Uwazurike V. A.G. Federation* (2007) 8 NWLR (pt 1035),^G a decision of this Court which learned appellant counsel contends we should not be bound by, this Court per Ogbuagu JSC held as follows:-

“...It is now beyond doubt, argument or speculation that:-

(i) the provision of Order 4 rule 4(1) of the said Rules is not^H one of the exceptions under sub-rules 4(5) and (6) of the Rules;

(ii) that the provision is clear unambiguous and mandatory.

(iii) the Rules of court prima facie must be obeyed in compliance and not in breach;

(iv) that failure to comply with provisions of the Court of Appeal Rules will render the notice of appeal filed fundamentally defective and incompetent and therefore liable to be struck out;

(v) that the said Rules do not permit the filing of a joint notice of appeal nor the signing of such notice by counsel for the appellant's."

^B See also *The State V. Jammal* (1996) 9 NWLR (Pt 473) 384 at 399, *Dr. Femi Adekanye and 2 Ors. V. FRN* (2005) 15 NWLR (Pt 949) 433 at 454-456.

^C Learned appellant counsel has urged us to prefer the decision of this Court in *Ikpasa V. A.G. Bendel State* (1981) 9 SC instead of the foregoing precepts. In *Uwazurikeke V. A.G. Federation* (supra), this Court distinguished the facts of the earlier case from those before it in rejecting the similar plea of the appellants. The Court remarked inter-alia at page 14 of the law report thus:-

^D "Now, in the case of *Ikpasa V. A.G. Bendel* (1981) 9 SC 7, the appellant was a convicted prisoner involving a capital offence and was confirmed in the cell for condemned prisoner. In short, the extenuating circumstances in *Ikpasa's* case are distinguishable from those of the appellant's."

^E Notwithstanding the foregoing, the court remained emphatic on the point at page 15 of the report thus:-

^F "In the case of the *State v. Jammal* (1996) 9 NWLR (Pt. 473) 384 at 399 C. A., it was held that the Court of Appeal ought to take judicial notice of the fact and law, that a notice of appeal in a criminal appeal filed in the lower or trial court which was signed by a counsel for the appellant instead of the appellant himself is defective by virtue of Order 4 rule 4(1) of the Court of Appeal Rules, 1981. That the provisions are clear, unambiguous and mandatory. That the notice of appeal must be signed by the appellant himself and not by his counsel."

^H In the instant case too the appellant's conviction is not in respect of a capital offence by virtue of which access to him would have been made difficult or impossible. The circumstance of the appellant being glaringly different from those of the appellants in *Ikpasa's* *V. A.G. Bendel State* (supra), the principle in the *Ikpasa* case does not, therefore, avail the appellant. The decision of this Court in *Uwazurike V. A.G. Federation* (supra) remains one of the most recent and shuts out whatever extenuating factors the court's earlier

decision in *Ikpasa V. A.G. Bendel State* (supra) would seem to have created.

In sum, appellant's ineffectual notice of appeal stands incapable of activating his right of appeal. For the foregoing and more so the fuller reasons contained in the lead judgment, I also dismiss the appeal.

B

OKORO JSC

I was obliged in advance a copy of the judgment just delivered by my learned brother, Bode Rhodes-Vivour, JSC. For the reasons advanced in the lead judgment, I agree that there is no merit in this appeal at all.

C

A synopsis of the facts are that the Appellant was arraigned on 24th February, 2005 before the Federal High Court Kano on a two count charge under the provisions of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap. C34, Laws of the Federation of Nigeria, 2004. In the first count of that charge, the Appellant was charged with manufacturing fake Barbicilin Ampicilin Syrup (Powder) and Rampicillin Ramsey Syrup (Powder) on 18th October, 2004 and thereby committed an offence contrary to Section 1 (a) of the Act. In count two, he was charged with possession of Ampicillin Syrup (Powder) and Rampicillin Ramsey Syrup (Powder) and thereby committed an offence contrary to Section 1(a) of the Act.

E

F

Trial commenced on the date of arraignment with the Appellant pleading guilty to both counts. Thereafter the prosecution fielded their first witness (PW1) who tendered Exhibits N11 - N16A - D and was thereafter discharged. On the same day, the prosecution examined and discharged the PW2. The case was thereafter adjourned to 3rd March, 2005. On the adjourned date, the prosecution recalled PW1 who further tendered Exhibits N17 - N11 after which another prosecution witness, PW3, testified.

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The Appellant, who was unrepresented by counsel, stood for himself and did not cross-examine any of the witnesses, neither did he enter any defence. The trial court convicted and sentenced the Appellant to a prison term of five years with an option of fine of N500, 000.00 on each count, both to run concurrently.

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Aggrieved, the Appellant filed an appeal at the Court of Appeal. The lower court heard the appeal and unanimously dismissed it. It is against the judgment of the Court of Appeal delivered on 24th June, 2011 that the Appellant has appealed to this Court. Five grounds of appeal were filed out of which the Appellant has distilled three issues for determination. The Respondent however formulated two issues for determination.

One issue which stands out and in fact the kernel of the appeal is Appellant's Issue No. 3 which is in tandem with the Respondent's Issue No. 2 though couched differently. Appellant's Issue 3 states:-

"Whether the Court of Appeal was right in upholding the preliminary objection of the Respondent's Counsel solely on technicality instead of doing and ensuring substantive justice."

On the other hand the Respondent's Issue Two is couched as follows:-

"Whether the appeal was improperly struck out for being incompetent."

Both are distilled from ground of appeal number 5. The learned counsel for the Appellant, after conceding that the notice of appeal was signed by the Appellant's Counsel instead of the Appellant himself as provided by Order 16 Rule 4(1) of the Court of Appeal Rules 2007, submitted that a court of law must do substantial justice and not technical justice. It was his contention that irregularity which derives from a breach of the rules of Practice and procedure or an order of court made thereon ought not render the proceedings a nullity but a mere irregularity which the courts can order to be regularized. He relied on the cases of State V. Gwonto (1983) 1 SCNLR 142, British American Insurance Co. Ltd. V. Edema Sillo (1993) 2 NWLR (pt.277) 570.

It was however the contention of the learned counsel for the Respondent that the order striking out the appeal by the lower court is valid and unassailable because the notice of appeal was incompetent as it offended Order 17 Rule 4(1) & (6) of the Court of Appeal Rules 2011. He cited these cases: Adekanye V. Federal Republic of Nigeria (2005) 15 NWLR (pt. 949) 433, State V. Jammal (1996) 9 NWLR (pt. 473) 384, Buwai V. State (2004) 16 NWLR (pt. 899) 285, Uwazuruike V. Attorney General of the Federation (2007) 8

NWLR (pt. 1035) 1.

As I stated earlier, this issue holds the key as to whether other issues should be considered or not. By Order 17 Rule 4(1) of the Court of Appeal Rules 2011, every notice of appeal or notice of application for extension of time within which such notice shall be given, *“shall be signed by the Appellant himself, except under the provision of paragraphs (5) and (6) of this Rule.”* ^B

By the above provision, which for me is very clear and unambiguous, any aggrieved party to which this Rule applies, who desires to appeal “shall” personally sign the notice of appeal. The use of the word “shall” in the Rule denotes mandatoriness and does not make room for any exercise of discretion. It is a word of command. See *Onochie V. Odogwu* (2006) 6 NWLR (pt. 975) 65, *Amokeodo V. IGP & 2 Ors* (1999) 5 SCNJ 71 at 81. ^C

Again, rules of court are meant to be obeyed. They are not made for the fun of it. They must be followed strictly, unless the court is given discretion under them. These rules bind all parties before the court. No party is allowed to choose when or which to obey and/or disobey. See *G.M.O. Nworah & Sons Co. Ltd. V. Afam Akputa* (2010) 9 NWLR (pt. 1200) 443, *Ajayi & Anor. V. Omorogbe* (1993) 6 NWLR (pt. 301), *Akanbi & Ors V. Alao & Anor.* (1989) 5 SCNJ 10 at 13, *Miss Ezeanah V. Alhaji Atta Mamoud* (2004) 7 NWLR (pt 873) 468 at 502. ^D

There are however two exceptions to the provision that the Appellant must sign the notice of appeal personally. That is to be found still in Order 17 Rule 4 of the Court of Appeal Rules 2011. The exceptions are as follows:- ^F

“Rule 5 - When on the trial of a person entitled to appeal it is contended that he was not responsible according to law for his actions on the ground that he was insane at the time the act was done or the omission made by him or at the time of the trial he was of unsound mind and consequently incapable of making his defence, any notice required to be given and signed by the Appellant himself may be given and signed by his legal representative.” ^G ^H

6. In the case of a body corporate where any notice or other document is required to be signed by the Appellant himself, it shall be sufficient compliance therewith if such notice or document is signed by the Secretary, Clerk, Manager or legal representative of such body

corporate.”

It has to be noted that Order 17 Rules 4(1), (5) & (6) of Court of Appeal Rules 2011 is *impari materia* with Order 16 Rule 4(1), 5 & 6 of the 2007 Rules of the same court.

From the two exceptions, the Appellant was not shown to belong to any of the two groups. He is neither a person of unsound mind or a body corporate. Not being any of the two groups, he was bound by the rules of court to sign the notice of appeal by himself. Failure to do so spells doom for his appeal. The position of the law in this matter was given judicial pronouncement by this court in the recent case of *Uwazuruike V. Attorney General of the Federation* (2007) 8 NWLR (pt. 1035) 1. See also *Adekanye V. Federal Republic of Nigeria* (supra).

There is no doubt that the Court of Appeal stated the correct position of the law on this issue which I agree should be upheld. The none compliance of the Appellant with Order 16 Rule 4(1) of the Court of Appeal Rules 2002 rendered the Notice of Appeal incompetent. It is not issue of technicality here. It goes to the root of the case being an originating process in the appeal.

In sum, I agree with My Learned Brother, Bode Rhodes-Vivour, JSC that this appeal lacks merit. I join him in dismissing same. I abide by the consequential orders made in the lead judgment.

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