

**SUPREME COURT OF NIGERIA**  
FRIDAY 5TH JUNE, 2015. SC. 374/2011  
**CORAM:- J. A. FABIYI, S. GALADIMA,**  
**B. RHODES-VIVOUR, C. B. OGUNBIYI,**  
**K. M. O. KEKERE-EKUN, JJSC**

AMINU MUSA OYEBANJI ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Stealing - Proof - Prosecution must prove inter alia that the thing stolen is capable of being stolen - That accused has intention to permanently deprive the owner of the thing (H1)

FRAUD - Company - Lifting the veil - Court will not allow a party to use its company as cover to defraud an innocent person - Who entered into lawful contract with it (H2)

FRAUD - Misappropriation of funds - Proof - Relationship between the parties is not merely contractual - As appellant's unlawful appropriation of money paid to him - Involves a criminal act (H3)

**FACTS**

Accused/appellant was arraigned before the High Court of Oyo State on a two count charge of obtaining the sum of N1,273,093.75 by false pretences and stealing the said sum contrary to and punishable under sections 419 and 390(9) respectively of the Criminal Code. Appellant pleaded not guilty to both counts. The case as presented by prosecution/respondent is that appellant was the Managing Director of Baminco Nigeria Limited. The company was approached by the officers of Associated Commodities and Foodstuff (Nig.) Ltd. to assist in the importation of tyres, tubes and granulated sugar.

The parties entered into an agreement pursuant to which various sums of money totaling N1,273,093.75 were paid to appellant in cash. He opened letters of credit with his bankers but they were not utilized until they lapsed. The goods were neither supplied nor

appellant return the money. Consequently, he was charged before the court. At the conclusion of the evidence for respondent, a no case submission was made for appellant. It succeeded in respect of the first count of obtaining money under false pretences. However, appellant was called upon to make his defence in respect of count 2 on the charge of stealing. At the end of trial, the court held appellant responsible for the crime. He was therefore found guilty as charged on count 2. Accordingly, he was convicted and sentenced to 5 years imprisonment with hard labour or an option of fine of N5,000.00. Appellant's appeal to the Court of Appeal Ibadan Division was dismissed. Aggrieved further, appellant appealed to the Supreme Court.

### **ISSUE FOR DETERMINATION**

*"2.01. Whether the lifting of the veil of Baminco (Nig.) Limited by both the trial Court and the Court below as the plank for the conviction and sentence of the appellant was not right in the circumstances of this case."*

**HELD** (Unanimously dismissing the appeal per

**GALADIMA JSC)**

*CRIMINAL PROCEDURE - Stealing - Proof*

**1. To sustain a charge of stealing against the appellant, the prosecutor must prove:**

- (i) That the thing stolen is capable of being stolen:**
- (ii) That the accused has intention of permanently depriving the owner of the thing stolen.**
- (iii) That he was dishonest and**
- (iv) That he had unlawfully appropriated the thing stolen to his own use. (p. 2265 C)**

*FRAUD - Company - Lifting the veil*

**2. In my respectful view, the veil of corporation ought to be lifted in the interest of justice and in the circumstance of this case. There can be no better instance when the corporate veil can be lifted as in this case. The court will not allow a party to use its company as a cover to dupe, defraud or cheat innocent individual or a company who entered into lawful contract**

***with it only to be confronted with defence of the company's legal entity as distinct from its directors. As it has been observed elsewhere, most companies in this country are owned and managed solely by an individual, while registering the members of his family as the shareholders. Such companies are nothing more than one-man business! Hence, there is the tendency to enter into contract in such company's name and later turn around to claim that he was not a party to the agreement since the company is a legal entity.***

***This case at hand is a case in which the law should disregard the corporate entity and pay regard to the entities behind the corporate veil.***

***By this provision, the allegation of crime lifts the veil of corporate or voluntary associations and unmasks the face of the suspected criminal to face prosecution.***

***Where the veil is lifted, the law will go behind the corporate entity so as to reach out to individual member of the company whose conduct or act is criminally reprehensible.***

(p. 2266 H)

*FRAUD - Misappropriation of funds - Proof*

***3. I do not agree, with due respect with the contention of the learned counsel for the appellant that the relationship is contractual and that only civil action should be commenced to resolve the subject matter of the dispute.***

***In this case fraud is in issue. Money was paid to appellant for specific purpose. He failed to use it for that purpose and did not refund it. Fraud is a criminal offence. It involves criminal act. The offence of stealing is proved against the appellant who dishonestly, unlawfully appropriated the money paid to him.*** (p. 2267 G)

## NOTABLE POINT OF INTEREST

### **KEKERE-EKUN JSC**

#### ***1. Company - Lifting the veil of incorporation - Meaning***

Lifting the "veil of incorporation" or "piercing the corporate veil" is defined in Black's Law Dictionary 9th edition as:

“The judicial act of imposing personal liability on otherwise immune corporate officers, directors or shareholders for the corporation’s wrongful acts.” (p. 2279 F)

**REPRESENTATION**

- B ADEKUNLE OJO Esq., for the Appellant  
MUTALUBI OJO ADEBAYO (Hon. Attorney-General Oyo State) with  
S. Aborishade (senior Assistant Legal Officer to the Hon. Attorney-  
General), for the Respondent

C **CASES REFERRED TO**

- Muhammed v. State (2000) FWLR (pt. 30) 2623  
Alade v. Alice (Nig.) Ltd. (2010) 12 SC (pt. II) 59  
Bolton Engineering Co. Ltd v. Graham Sons (1957) 1 Q.B. 159  
D Trengo Ltd v. African Real Estate Ltd (1976) 4 S. C. 9  
Otti v. State (1991) 8 NWLR (pt. 207) 103  
Chiamgo v. State (2002) 2 NWLR (pt. 750) 225  
Shodiya v. State (1992) 3 NWLR (pt. 230) 457  
State v. Odimayo (1967) NMLR 92  
E R. v. Orizu (1954) 14 W.A.C.A 455  
Sagoe v. Queen (1963) 1 All NLR 290  
FDB Financial Services Ltd. v. Adesola (2002) 8 NWLR (pt. 668)  
170  
F Adeyemi v. Lan & Baker (Nig.) Ltd. (2000) 7 NWLR (pt. 663) 33

**STATUTES REFERRED TO**

Criminal Code Cap. 30 Vol. II Laws of Oyo State of Nigeria 1978, ss.  
390(9), 419

G **BOOK REFERRED TO**

Black’s Law Dictionary Sixth Edition pp. 77-78

**LEAD JUDGMENT BY GALADIMA JSC**

- H This appeal is against the judgment of the Court of Appeal,  
Ibadan Division, delivered on the 22nd day of June, 2011. The Court  
affirmed the conviction and sentence of the appellant by the trial  
High Court Ibadan Judicial Division handed down on the 30th day  
of October, 1992. The trial Court found him guilty of stealing the

sum of N1,273,093.75 contrary to and punishable under Section 390(9) of the Criminal Code, Cap 30 VOL. II Laws of Oyo State of Nigeria, 1978. The appellant was sentenced to five years imprisonment with hard labour or to pay a fine of N5,000.00 (Five Thousand Naira) in lieu.

Dissatisfied with the decision of the Court of Appeal, Appellant B has further appealed to this Court.

The Five grounds of appeal contained in the Appellant's notice of appeal filed on the 5th July, 2011 with particulars read as follows:

*"(I). The Court of Appeal erred in law by holding at page 8 of the judgment as follows:*

*"It is on record that monies were paid to the Appellant in cash for the purchase of tyres, tubes and granulated sugar. If money given for a specific purpose is neither used for that purpose nor returned on demand or at a reasonable time thereafter, the case comes within the provision of stealing by conversion under the criminal code."*

**PARTICULARS OF ERROR**

*a. There was no evidence of payment of money to the appellant.*

*b. The appellant is a separate legal entity, different from Baminco Nigeria Limited.*

*c. There was no evidence from the records that the sum of N1,180,593.75 was given to the appellant.*

*(II) The Court of Appeal erred in law by holding at page 8 of the judgment as follows:*

*"I am inclined to agree with the learned counsel for the Respondent's submission that the contention of the Appellant's Counsel that the relationship is contractual and that only civil action should be commenced to resolve the subject matter of the dispute is misconceived."*

**PARTICULARS OF ERRORS**

*a. There are evidence on records that the agreement regarding the transaction was between Associated commodities & food-stuffs Nigeria Limited and Baminco Nigeria Limited.*

*b. The learned Justices of the Court of Appeal should have in view of the evidence of witnesses and exhibits at the lower court, hold that there was a contractual relationship between two corporate*

*entities and that the question of stealing does not arise.*

*(iii) The Court of Appeal erred in law by holding at page 9 of the judgment as follows:*

*“In my opinion, this is a case in which the law should disregard the corporate entity and pay regard to the entities behind the legal veil of incorporation. Allegation of Crime lifts the veil of corporate or voluntary association and opens up the body to prosecution upon good substantial facts placed before a competent jurisdiction.”*

*a. The learned trial Judge and the Justices of the Court of Appeal did not follow the due procedure in law in lifting the veil of the company suo motu and thereby caused a miscarriage of justice to the appellant.*

*b. The learned Justice of the Court of Appeal wrongly lifted the veil of Baminco Nigeria Limited and upheld the conviction of the appellant because he is a director in Baminco Nigeria Limited.*

*(IV) The learned Justice of the Court of Appeal wrongly upheld the conviction of the Appellant on the ground that the letter of credit had lapsed on 10th of April, 1987.*

**PARTICULARS OF ERROR:**

*a. The learned Justices of the Court of Appeal erred in law on page 11 of the Judgment of the court as follows:*

*“The lower court has rightly lifted the veil of incorporation having found that the Appellant was dishonest from the evidence before it. At page 74 lines 27-33 of the record, the learned trial Judge found as follows: As there was no existing letter of credit after 10th April, 1987 the money collected under Exhibits 6 and 7 was fraudulent when no goods were forthcoming. Associated Commodities caused their Solicitor as per Exhibit ‘8’ to write Baminco demanding the supply of the goods or the refund of the money paid. Neither was effected till date.”*

*b. There were enough evidence on records establishing that the Letter of credit was opened by Baminco Nigeria Limited through Nigeria Merchant Bank Lagos in favour of Trappofin S.A Switzerland.*

*c. The letter of credit was not intended to be deployed to steal from Associated Commodities & Foodstuffs (Nig) Limited.*

*d. That on the contrary the opening of the letter of credit was enough evidence that Baminco Nigeria Limited, genuinely through*

*its Managing Director, the appellant, entered into a lawful and valid contractual transaction.*

*e. That the fact that the letter of credit was not renewed beyond 10th April, 1987 was not in law improper as to amount to an intention to steal.*

*(V). The Court of Appeal was wrong in law in upholding the conviction of the appellant when the prosecution has failed to discharge the one upon it to prove the guilt of appellant beyond reasonable doubt.*

#### **PARTICULARS OF ERROR**

*a. The evidence relied upon by the Court of appeal are not sufficient to affirm the conviction of the Appellant.*

*b. The Appellant was an agent of disclosed principal and cannot in law be personally held liable on a contract he entered into on behalf of his principal when there is no evidence that the appellant had acted outside the scope of his authority.*

*c. The ingredients of the offence of stealing were not proved by the evidence at the trial court.*

Briefs of argument were filed and exchanged by the parties.

In the appellant's brief settled by his learned counsel, Adekunle Ojo Esq. and filed on 2/11/2011, the following 4 issues were identified for determination of the appeal:-

*"1. Whether or not the learned Justices of the Court of Appeal and the trial Judge followed the legal procedure in lifting the veil of Baminco Nig. Limited suo motu.*

*2. Whether or not it is a misconception in law of the Court below to hold that the failure of a contracting company in an ongoing commercial transaction to renew a letter of credit amounts to an intention to defraud by one of its director.*

*3. Whether or not the transaction for which the Appellant was tried and convicted was purely civil and a contractual relationship between Association Commodities and Foodstuffs (Nig.) Ltd and Baminco Nigeria limited.*

*4. Whether the prosecutor proved the guilt of the appellant beyond reasonable doubt."*

In the Respondent's brief settled by his counsel, M.O. Adebayo, Hon. Attorney-General of Oyo State Ministry of Justice and deemed filed on 24/3/2013, a lone issue was raised for the consideration of

the appeal thus:

*“2.01. Whether the lifting of the veil of Baminco (Nig.) Limited by both the trial Court and the Court below as the plank for the conviction and sentence of the appellant was not right in the circumstances of this case.”*

B The appellant’s learned counsel deemed it necessary to file a Reply brief and this he did on 10/10/2012.

At this stage, I think it is proper to summarize the facts of this case. An agreement was entered in 1986 between BAMINCO (NIG.) LIMITED and ASSOCIATED COMMODITIES and FOODSTUFF (NIGERIA) LIMITED. The Appellant was the Managing Director of the former company which was approached by the officers of the latter company to assist them to import tyre, tubes and granulated sugar, as they could not secure foreign exchange to procure these goods. For this reason a total sum of N1,180,593.75k (One Million, One Hundred and Eighty Thousand, Five Hundred and Ninety Three Naira, Seventy-Five Kobo) was paid in several installments on certain dates to the Appellant.

E A letter of credit was issued in favour of the Appellant by the Nigerian Merchant Bank which expired on the 10th day of April, 1987, even before the Appellant collected the 2nd payment, which was evidenced by Exhibit 7 from the Associated Commodities and Foodstuff (Nig.) Ltd. The letter of Credit was never renewed. After repeated demands, which the appellant ignored a report was lodged with the police which culminated into arraignment before the Oyo State High Court, Ibadan. As I have stated earlier, the appellant was convicted and sentenced for stealing by the trial court, and the court below affirmed the conviction and sentence.

G On the 19th day of March 2015, when this appeal was heard, learned counsel for the parties adopted their briefs of argument. Without further adumbrating on the issues raised for determination, appellants’ counsel urged the court to allow the appeal whilst the respondent’s counsel urged that the appeal be dismissed for lacking H in merit.

I am often bewildered why in a simple matter like this; learned counsel for the appellant would deem it necessary to proliferate issues in his brief; a practice this court loathes. In the court below two issues formulated by the parties were similar. The court rightly con-

sidered the respondent's two issues. It was the decision based on those issues that the appeal to this Court was predicated. In this appeal, I am of the respectful view that a sole issue raised by the respondent herein is apt and it suffices for my determination of the appeal.

The totality of the arguments put up by the learned counsel for the appellant on all the 4 issues he raised for determination dovetails with one another. The summary of these arguments and submissions are as follows:

(i) That the prosecution failed to prove that the specified sum of N1,273,093.75 contained in the charge against the appellant were traced to him and that it was stolen from the Associated Commodities and Foodstuffs (Nig.) Ltd and they were collected by the appellant;

(ii) That the money had passed from Associated Commodities and Foodstuff Limited to Baminco (Nig.) Ltd and there was no evidence adduced that the appellant to the exclusion of every other person had access to the money allegedly stolen;

(iii) That the prosecution did not establish that the appellant acted outside the scope of his authority while acting for his company. Hence he cannot be convicted for working as an agent of a disclosed principal; and

(iv) That the prosecution did not prove that the appellant had a mens rea to steal money belonging to Associated Commodities (supra).

The summary of the above submissions and contentions of the appellant are questioning the propriety of lifting of veil of Baminco (Nig.) Ltd to get to the appellant who is said to be behind the mask. Hence the rationale behind the formulation of sole issue by the respondent for determination. This issue has earlier been reproduced in this judgment.

Arguing the sole issue, learned counsel for the Appellant, referred to the second count of the charge in the information under which the Appellant was convicted and sentenced by the trial court. He submitted that the appellant was neither charged as a Director or Agent of Baminco (Nig.) Limited nor as a Trustee; but that the ownership of the sum of N1,273,092.75, the subject matter of the said Count II, was traceable to the company that paid it.

It is pertinent to state here that although the appellant was arraigned on a two count charge of obtaining by false pretence and stealing, it was on the latter charge the trial court found him guilty and sentenced him. Court II of the charge reads:

*“COUNT II - STATEMENT OF OFFENCE*

B *Stealing contrary to and punishable under section 390(9) of the Criminal Code Laws of Oyo State of Nigeria Cap 30 Vol. II, 1978.*

*PARTICULARS OF OFFENCE*

C *AMINU MUSA OYEBANJI “M”, between July, 1986 and November 1987 at Molete, Ibadan in the Ibadan Judicial Division stole a total of N1,273,093.75 belonging to the Association Commodities and Foodstuff (Nig.) Limited.”*

D The definition of stealing is given in Section 383(1)(2)(3) and (4) of the Criminal Code Laws of Oyo State of Nigeria Cap 30 Vol. II, 1978 is given thus:

*“(1) A person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or to the use of any other person, anything of capable of being stolen, is said to steal that thing.*

E *(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following interests:*

F *(a) an intent permanently to deprive the owner of the thing of it;*

*(b) an intent permanently deprive any person who has any special property in the thing of such property;*

*(c) an intent to use the thing as a pledge or security;*

G *(d) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;*

*(e) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;*

H *(f) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.*

*(3) The taking or conversion may be fraudulent, although it is effected without secrecy or attempt at concealment.”*

*(4). In the case of conversion, it is immaterial whether the thing*

*converted is taken for the purpose of conversion or whether it is at the time of the conversion in the possession of the person who converts it. It is also immaterial that the person who converts the property is holder of a power of attorney for the disposition of it, or is authorised to dispose of the property.”*

It is not disputed that the various sums of money was paid to the appellant for the purpose of purchasing tyres, tubes and granulated sugar. The question however, is whether there is basis for inferring fraudulent intent by the appellant to covert the money to his own use.

**To sustain a charge of stealing against the appellant, the prosecutor must prove:**

**(i) That the thing stolen is capable of being stolen:**

**(ii) That the accused has intention of permanently depriving the owner of the thing stolen.**

**(iii) That he was dishonest and**

**(iv) That he had unlawfully appropriated the thing stolen to his own use.** See MUHAMMED vs. THE STATE (2000) FWLR (pt. 30) 2623 at 2626.

The evidence of witnesses called by the prosecution, particularly PW 1 - PW 6 and numerous exhibits tendered at the trial court, corroborate that the fact that appellant was paid various sum of money to import tyres, tubes and granulated sugar on behalf of the Associated Commodities and Foodstuffs Ltd.

PW2, Juliana Titilope Raimi at page 30 lines 23-31 of the record stated as follows:

*“On 19th March, 1987 my company paid accused N516,000.00 for the purpose of ordering tyres and tubes for my company. Also in June 1988 my company paid another sum of N606,093.75 to accused’s company for granulated sugar. Accused did not issue a receipt in respect of the first payment of N516,000.00k. Accused issued a receipt in respect of the second payment of N606,093:75k after much pressure.”*

The question is did the appellant keep to terms of agreement to supply the goods? PW2 on page 31 of the record gave evidence in the negative thus:

*“Up till now my company has not recovered any tyre or tube in respect of the first payment of N516,000.00 nor has my company*

*received the payment made to the accused bank. In respect of the 2nd payment my company has not received any supply of granulated sugar nor has received a refund of the money paid.”*

The conduct of the appellant is reprehensible. He failed to supply the goods. He did not; neither did he refund the money he collected.

B The learned trial judge found as follows:

*“I therefore find proved that monies paid to the accused for specific purpose i.e. for the purchase of tyres, tubes and granulated sugar had not been utilized for that purpose. Learned counsel for the accused argued that the accused is not liable and that the company C BAMINCO is liable. The role of a corporation is well stretched out by Viscount Haldane L. C. in LENNARDS CARRYING CO. v. ASIATIC PETROLEUM CO. LTD (1915) A.C. 705 when in delivering judgment he said at pages 713-714.*

D *“My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own, it’s active and directing will must consequently be sought in person of somebody who for some purpose may be called on again, but who is really the directing mind and will of the corporation, the very ego and centre of the E personality of the corporation.”*

The courts below rightly disregarded the corporate entity of the Baminco (NIG.) Limited and paid regard to the entities behind the legal facade or “veil” of incorporation in the interest of justice.

F It is in BOLTON ENGINEERING CO. LTD V. GRAHAM & SONS (1957) 1 QB 159 at 172-173 that DENNING L.J brought out clearly the human personification of a company where he stated thus:

*“A company may, in many ways, be liken to a human body. It has brain and nerve centre which controls what it does. It also has G hands which hold the tools and act in accordance with directions from the Centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of the company of those managers is the state of mind of the company and is treated by H law as such.”*

***In my respectful view, the veil of corporation ought to be lifted in the interest of justice and in the circumstance of***

**this case. There can be no better instance when the corporate veil can be lifted as in this case. The court will not allow a party to use its company as a cover to dupe, defraud or cheat innocent individual or a company who entered into lawful contract with it only to be confronted with defence of the company's legal entity as distinct from its directors. As it has been observed elsewhere, most companies in this country are owned and managed solely by an individual, while registering the members of his family as the shareholders. Such companies are nothing more than one-man business! Hence, there is the tendency to enter into contract in such company's name and later turn around to claim that he was not a party to the agreement since the company is a legal entity.** See AKINWUNMI ALADE v. ALICE (NIGERIA) LTD & ANOR (2010) 12 SC (pt. II) 59.

**This case at hand is a case in which the law should disregard the corporate entity and pay regard to the entities behind the corporate veil.** Section 35 of the Criminal Code Cap. 38 VOL.II Laws of Oyo State 2000 which is in pari materia with Section 35 of the same code 1978, the law applicable at the time of the trial and conviction of the appellant provides thus:

*"35. A person, who being a member of corporation, or Joint Stock Company, does or omits to do any act with respect to the property of the co-partnership, corporation, or company, which, if he were not a member of the co-partnership, corporation or company, who constitute an offence is criminally responsible to the extent as if he were not such member."*

**By this provision, the allegation of crime lifts the veil of corporate or voluntary associations and unmask the face of the suspected criminal to face prosecution.**

**Where the veil is lifted, the law will go behind the corporate entity so as to reach out to individual member of the company whose conduct or act is criminally reprehensible.**

**I do not agree, with due respect with the contention of the learned counsel for the appellant that the relationship is contractual and that only civil action should be commenced to resolve the subject matter of the dispute.** PW 2 stated at page 31 of the record thus:

*"Apart from the accused, I do not know of any other directors*

of the company; he seemed to be all in all of the company.”

**In this case fraud is in issue. Money was paid to appellant for specific purpose. He failed to use it for that purpose and did not refund it. Fraud is a criminal offence. It involves criminal act. The offence of stealing is proved against the appellant who dishonestly, unlawfully appropriated the money paid to him.** At page 74 of the record, the learned trial judge found as follows:

“As there was no existing letter of credit after 10th April, 1987, the money collected under Exhibits 6 and 7 was fraudulent. When no goods were forthcoming, Associated Commodities caused their solicitor as per Exhibit ‘8’ to write BAMINCO demanding the supply of the goods or the refund of the money paid. Neither was it effected till today.”

The appeal is against the concurrent findings of the two lower courts. This court does not make a practice of interfering with such concurrent findings of facts unless the findings are perverse or there are circumstances to warrant same. The Appellant has not shown any of these. In the circumstance, I cannot disturb the findings.

In sum, this appeal lacks merit. It is dismissed. The judgment of the court below is affirmed. In consequence, the conviction and sentence of the appellant is hereby affirmed.

## F **FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother - Galadima, JSC. I agree with the reasons therein ably advanced to arrive at the conclusion that the appeal is devoid of merit and deserves an order of dismissal.

I seek leave to put in a few words of my own in support of the comprehensive judgment. The appeal is against the decision of the Court of Appeal, Ibadan Division (the court below) delivered on 22nd June, 2011. Therein, the judgment of Oloko, J. of the High Court of Justice, Ibadan, Oyo State, delivered on 30th October, 1992 was affirmed.

The facts of the matter leading to this appeal are not in dispute; in the main. The appellant was the Managing Director of Baminco Nigeria Limited, Ibadan which was approached by the of-

ficers of Associated Commodities and Foodstuff (Nig.) Limited with a view to assisting it to import tyres, tubes and granulated sugar due to its inability to procure the required foreign exchange for the goods.

A total sum of N1,180,593.75 was paid instalmentally to the appellant as the Managing Director of Baminco Nigeria Limited. The goods were never delivered. A report was made to the police for the failure of consideration on the part of Baminco Nigeria Limited. Consequently, the appellant was arrested and arraigned before the trial court which convicted him for the offence of stealing as per count 11 of the charge.

The appellant appealed to the court below which heard the appeal and dismissed it on 22nd June, 2011. The appellant felt unhappy with the position taken by the court below and has decided to further appeal to this court.

Briefs of argument were filed and exchanged on behalf of the parties herein. On 19th March, 2015 when the appeal was heard, each learned counsel for the parties adopted and relied on the brief filed. The appellant's counsel urged that the appeal should be allowed while the respondent's counsel urged that same should be dismissed.

I wish to confine myself to issue No. 1 decoded on behalf of the appellant. It reads as follows:-

*"Whether or not the learned Justices of the Court of Appeal and the trial Judge followed the legal procedure in lifting the veil of Baminco Nigeria Limited suo motu."*

On behalf of the respondent, the determinant issue was couched as follows:-

*"Whether the lifting of the veil of Baminco (Nig.) Limited by both the trial court and the court below as the plank for the conviction and sentence of the appellant was not right in the circumstances of this case".*

Let me start my remarks by pointing it out right away that the appellant qualifies as the 'alter ego' of Baminco Nigeria Limited. At page 31, lines 15-17 of the record, PW2 stated as follows:-

*"Apart from the accused, I do not know of any other directors of the company. All (sic) seemed to be all in all of the company".*

'Alter ego' is said to mean 'second self'. Under the doctrine of 'alter ego', court merely disregards corporate entity and holds indi-

vidual responsible for act knowingly and intentionally done in the name of the corporation. *Ivy v. Plyler* 246 Cal. App. 2d 648. To establish the doctrine, it must be shown that the individual disregarded the entity of the corporation and made it a mere conduit for the transaction for his own private business. The doctrine simply fastens liability on the individual who uses the corporation merely as an instrumentality in conducting his own personal business. Liability springs from fraud perpetrated not on the corporation but on third persons dealing with corporation. *Garvin v. Mathews* 193 Wash. 152, 74 P. 2d 990, 994 (Black's Law Dictionary Sixth Edition pages 77-78).

Perhaps, I should further say that the appellant was the directing mind and/or arrow head of Baminco Nigeria Limited when the role carried out by him in properly considered. The appellant was the human personality behind the activity of the company. Human personification of a company was clearly brought out in *Bolton Engineering Co. Ltd v. Graham Sons* (1957) 1 Q.B. 159 at 172-173 by Denning LJ.

As found by the trial court and affirmed by the court below, a total sum of N1,180,593.75 was paid instalmentally to the appellant in cash by officers of Associated Commodities and Foodstuff (Nig.) Limited for purchase of tyres, tubes and granulated sugar which he never delivered. No evidence points to the fact that such fund was paid into the company's account by the appellant. Even when there was no existing letter of credit issued to the appellant or his company after 10th April, 1987, he fraudulently collected money thereafter when no goods were forthcoming. Despite repeated demands, the appellant failed to return the money collected by him. There is no shred of doubt about it that the fraudulent acts of the appellant called for the lifting of the veil of his company which opened him up for prosecution before the trial court. See: *Chinwo v. Owhonda* (2008) 3 NWLR (Pt. 1074) 341 at 362. He was rightly found guilty of stealing by conversion of the stated sum of money.

This court will not interfere with the concurrent findings of the two lower courts as they have not been demonstrated to be perverse or against the current of evidence adduced. See: *Kale v. Coker* (1982) 12 SC 252. I am at one with the two courts below. I pitch my tent with their own as the issue is resolved against the appellant and in

favour of the respondent.

For the above reasons and the fuller ones adumbrated in the lead judgment, I too, feel that the appeal is clearly devoid of merit as it hit the rock. I dismiss the appeal and affirm the position taken by the court below.

B

### ***RHODES-VIVOUR JSC***

I read in draft the leading judgment delivered by my learned brother, Galadima, JSC. So completely do I agree with it, that I have decided to say a few words on fraudulent acts by a top officer of a Company.

C

The separation of the personality of a company and the members are to be maintained. That is to say a company is legally different from its subscribers and directors. See *Trenco Ltd v. African Real Estate Ltd* (1976) 4 S.C. p. 9.

D

There comes a time though, when that separateness is not maintained. For example when fraud is committed by top officials of the company and these officials want their fraudulent activities to appear as the acts of the company.

E

In such situations the judiciary decides that the separation of the personality of the Company and the members is not to be maintained. This is done by lifting the veil of incorporation, or parting the veil of incorporation to see behind the veil who is responsible for the fraudulent acts.

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My lords, after lifting the veil of incorporation of Baminco Nig Ltd., both courts below were able to see that the Appellant is the alter ego of Baminco Nig Ltd. He collected the sum of N1,180,593.75 from Associated

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Commodities and Foodstuff Nig Ltd to import tyres, tubes and granulated sugar on the company's behalf. The courts further found that the sums collected by the Appellant were not paid into Baminco Nig Ltd's account, neither was letter of credit for the importation of the goods in the name of Baminco Nig Ltd. It becomes clear that the Appellant never imported the goods or returned the money despite repeated demands. The Appellant acted in his own interest and not on behalf of the Company. The Appellant's acts amounts to fraudulent conversion of the sum of N1,180,593.75. A clear case of steal-

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ing.

For this and the comprehensive reasoning and conclusions in the leading judgment, I dismiss the appeal, there being no redeeming features.

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### **OGUNBIYI JSC**

The appeal is against the judgment of the Court of Appeal, Ibadan Judicial Division, delivered on the 22nd day of June 2011 wherein the court affirmed the conviction of the appellant in the judgment of the Oyo State High Court delivered on the 30th day of October, 1992. The appellant herein was found guilty by the trial court of the 2nd count of the Offence of Stealing contrary to Section 390(9) of the Criminal Code, Cap 30, Vol. 11 Laws of Oyo State of Nigeria 1978 and sentenced to 5 years imprisonment or N5,000.00 in lieu.

The facts of the case are simply that the appellant was the Managing Director of Messrs. Baminco Nigeria Limited, Ibadan, whose company was approached by the officers of the Associated Commodities and food stuff (Nig.) Limited (hereinafter referred to as the Company) with a view to assisting the company to import tyres, tubes and granulated sugar due to the inability of the company to procure the required foreign exchange for the goods. The sum of N1,180,593.75k (One Million, One Hundred and Eighty Thousand, Five Hundred and Ninety Three Naira, Seventy Five kobo) was paid installmentally to the appellant as the Managing Director of Baminco Nigeria Limited but the goods were never delivered. A report was lodged to the police by the Company for the total failure of consideration on the part of Baminco Nigeria Limited consequent upon which the appellant was arrested and arraigned before the High Court of Oyo State, Ibadan Judicial Division, which convicted the appellant as per count II of the charge.

The appellant was dissatisfied with the conviction and appealed to the Court of Appeal which heard and dismissed his appeal; hence an appeal now before us. The appellant raised four issues for determination in his brief of argument while the respondent adopted the appellant's 1st issue as the only issue for determination and upon which I will anchor my contribution. The respondent's issue reads as

follows:-

*“Whether the lifting of the veil of Baminco (Nig.) Limited by both the trial court and the court below as the plank for the conviction and sentence of the appellant was not right in the circumstance of this case.”*

The reproduction of the count predicated the conviction and sentence of the appellant reads thus:-

*“COUNT II STATEMENT OF OFFENCE stealing contrary to and punishable under Section 390(9) of the Criminal Code, Cap. 30, Vol. II. Law of Oyo State of Nigeria, 1978.*

*PARTICULARS OF OFFENCE*

*AMINU MUSA OYEBANJI “M” between July 1986 and November 1987 at Molete, Ibadan in the Ibadan Judicial Division stole a total sum of N1,273,093.75 belonging to the Associated commodities and foodstuff (Nig) Limited.”*

The appellant in the case at hand was convicted for the offence of stealing simpliciter. To sustain a charge of stealing against an accused person, the prosecution must prove the following requirements:-

- (a) that the thing stolen is capable of being stolen;
- (b) that the accused has the intention of permanently depriving the owner of the thing stolen;
- (c) that the accused was dishonest and
- (d) that the accused had unlawfully appropriated the thing stolen to his own use. See the cases *Otti Vs. The State* (1991) 8 NWLR part 207 page 103 at 118 and *Muhammed Vs. The State* (2000) FWLR Part 30 page 2623 at 2626.

Section 383(1) of the Criminal Code also defines stealing in the following terms:-

*“(1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use, or the use of another person anything capable of being stolen, is said to steal that thing.*

*(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents...*

*(i) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards*

to repay the amount to the owner.

(3) *The taking or conversion may be fraudulent, although it is effected without secrecy or attempt at concealment.* ”

It is on record and borne by evidence that the amount of money enumerated and subject of contention was paid to the accused/ap-  
B appellant for the purpose of purchasing tyres, tubes and granulated sugar. There is no controversy or dispute relating that.

A man’s intention is subjective in nature and can neither be read on pages of paper or on the face. It can only be deduced from  
C the actions which, when it is exhibited, will often speak louder than voice. The conclusion as to whether or not the appellant acted in good faith is best deduced and explained from the evidence given before the trial court. For instance the evidence of P.W.2 at the trial court is very informative. At page 30 of the record he said thus:-

D “On 19th March 1987 my company paid accused company N516,000:00k for the purpose of ordering tyres and tubes for my company. Also in June 1988 my company paid another sum of N606,093:75k to accused’s company for granulated sugar. Accused did not issue a receipt in respect of the first payment of N516,000:00k.  
E Accused issued a receipt in respect of the second payment of N606,093:75k after much pressure.”

Also at page 31 of the record, the witness continued and said:

F “Up till now my company has not received any tyre or tube in respect of the first payment of N516,000.00k nor has my company received the payment made to the accused back. In respect of the 2nd payment, my company has not received any supply of granulated sugar nor has received a refund of the money paid.”

There is no hide and seek in the behaviour exhibited by the  
G appellant in his intention to permanently deprive the Associated Commodities and Foodstuffs Ltd of their money. See the cases of Chiamgo Vs. The State (2002) 2 NWLR pt. 750 page 225 at 228 and Shodiya V. The State (1992) 3 NWLR Pt. 230 pages 457 at 460 where it was held thus:

H “the offence of stealing occurs when a person fraudulently converts to his own use or to the use of any other person anything capable of being stolen.”

It is on record that monies were paid to the appellant in cash for the purchase of the items, which he failed to supply. The appel-

lant did not adduce evidence that he did use the money for the purpose it was meant for. He did not also return the money either on his own volition or even on demand, despite the pressure mounted on him by the company. It is not out of place to conclude in the circumstance that the case falls rightly within the provision of stealing by conversion under the criminal code. See the case of State V. Odimayo & 3 others (1967) NMLR at 92, R. V. Orizu (1954) 14 W.A.C.A at 455 and Sagoe V. The Queen (1963) 1 All NLR at 290. B

It is submitted on behalf of the appellant that the lower court also the trial court were in error in lifting the veil of Baminco (Nig) Limited. The principle of "Lifting the Veil of Incorporation" is where it becomes expedient to expose the individual, hiding behind the corporate entity, for purpose of doing justice. The case in issue, especially with reference to the evidence of P.W.2, who described the appellant affirmatively as the "all in all" of the company, gives the reason why the appellant should be exposed. The act against the company is fraudulent and depicts evidence of manipulation and deceit. In the absence of any evidence of a separate bank account in the name of Messrs. Baminco Nigeria Limited, the appellant's dealings with the associated commodities was in his own person and capacity. He cannot now pretend and seek to wriggle out of it. The trial court on the totality of its finding concluded rightly that the accused before him acted dishonestly and in lifting the veil of Incorporation had this to say at pages 74 and 75 of the record: C D E

*"As there was no existing letter of credit after 10th April, 1987, the money collected under Exhibits 6 and 7 was fraudulent when no goods were forth coming, Associated commodities caused their solicitor as per Exhibit 8 to write Baminco demanding the supply of the goods or the refund of the money paid. Neither was effected till today..."* F G

*I therefore find prove that monies paid to the accused for specific purpose i.e. for the purchase of tyres, tubes and granulated sugar had not been utilized for that purpose."*

The finding was conclusively affirmed by the lower court which at page 116 of the record also had this to say:- H

*"The findings of the learned trial judge are supported by evidence, they are not perverse and have not in any way led to any miscarriage of justice. An appellate court lacks the power to interfere*

*or disturb such findings of fact particularly when such findings are supported by the evidence on record.”*

I hereby also endorse the conclusions arrived at by the two lower courts which should not be interfered with in the absence of any convincing reason why and or evidence of a miscarriage of justice. My learned brother Galadima, JSC has considered comprehensively all the issues raised by the appellant. I also adopt his judgment as mine and in the same terms dismiss the appeal as devoid of any merit. I abide further by the orders made therein the lead judgment.

C \_\_\_\_\_

### **KEKERE-EKUN JSC**

I have had a preview of the judgment of my learned brother, GALADIMA, JSC just delivered. I entirely agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

The appellant herein was the Managing Director of an import and export company called BAMINCO NIG. Ltd. The company was approached by the officers of Associated Commodities and Foodstuff (Nig.) Ltd. to assist in the importation of tyres, tubes and granulated sugar. The parties entered into an agreement pursuant to which various sums of money totaling N1,273,093.75 were paid to the appellant in cash. He opened letters of credit with his bankers but they were not utilized until they lapsed. The goods were not supplied nor was the money returned. Consequently he was charged before the High Court of Oyo State, Ibadan Judicial Division on a two-count charge of obtaining the sum of N1,273,093.75 by false pretences and stealing the said sum from Associated Commodities and Foodstuff (Nig.) Ltd. contrary to and punishable under Sections 419 and 390(9) respectively of the Criminal Code Cap. 30 Vol. II Laws of Oyo State of Nigeria, 1978. He pleaded not guilty to both counts.

At the conclusion of the evidence for the prosecution, a no case submission was made on behalf of the appellant. It succeeded in respect of the first count of obtaining money under false pretences. The appellant was however called upon to make his defence in respect of count 2 on the charge of stealing. In a considered judgment delivered on 30/10/92 he was found guilty as charged on count 2. He was accordingly convicted and sentenced to 5 years imprisonment with hard labour or a fine of N5,000.00. His appeal to the

Court of Appeal, Ibadan Division was dismissed on 22/6/2011. Still dissatisfied, he has further appealed to this court.

In support of the lead judgment, I shall comment briefly on the first issue identified by the appellant, which is the sole issue formulated by the respondent for the determination of the appeal. The issue as couched by the respondent better represents the issue in controversy and I shall adopt it in making my comments. The issue is:

*“Whether the lifting of the veil of BAMINCO (NIG.) Ltd. by both the trial court and the court below as the plank for the conviction and sentence of the appellant was not right in the circumstances of this case.”*

Before considering whether the two lower courts were right to lift the veil of incorporation, it is necessary to consider what constitutes the offence of stealing under the Criminal Code and the ingredients of the offence. Section 383 of the Criminal Code defines stealing. The following provisions are relevant to the present appeal:

383(1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents -

(a) An intent permanently to deprive the owner of the thing of it;

(f) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

(3) The taking or conversion may be fraudulent, although it is effected without secrecy or attempt at concealment.”

In order to obtain a conviction for stealing, the prosecution must establish the following facts beyond reasonable doubt:

1. That the thing stolen is capable of being stolen.
2. That the accused person has the intention of permanently depriving the owner of the thing stolen.
3. That the accused was dishonest.
4. That the accused lawfully appropriated the thing stolen to his own use.

After carefully considering all the evidence led by the prosecution along with the exhibits tendered, the trial court reached the following conclusion:

B *“As there was no existing letter of credit after 10th April 1987, the money collected under Exhibits 6 and 7 was fraudulent. When no goods were forthcoming, Associated Commodities caused their solicitor as per Exhibit 8 to write BAMINCO demanding the supply of the goods or the refund of the money paid. Neither was effected till today.*

C *... I therefore find proved that monies paid to the accused for specific purpose i.e. for the purchase of tyres, tubes and granulated sugar had not been utilised for that purpose.*

*Learned counsel for the accused argued that the accused is not liable and that the company BAMINCO is liable.*

D *...I have indicated above that monies were paid in cash to the accused. In my view this is a case in which the law should disregard the corporate entity and should pay regard instead to the economic realities behind the legal facade i.e. when the “VEIL” of incorporation ought to be lifted in the interest of justice.*

E *Being guided by the above principle, I therefore find as proved beyond reasonable doubt that a sum of one million, one hundred and eighty thousand, five hundred and ninety three naira and seventy five kobo (1,180,593.75) was paid in cash to the accused for a specific purpose and was not utilised for that purpose.*

F *... I am therefore satisfied that the prosecution has succeeded in proving the charge of stealing against the accused beyond reasonable doubt.” (See pages 74, 75 & 76 of the record).*

G In affirming the judgment of the trial court, the court below held at pages 112, 113, 114 and 116 of the record:

H *“It is on record that monies were paid to the appellant in cash for the purchase of tyres, tubes and granulated sugar. If money given for a purpose is neither used for that purpose nor returned on demand, or at a reasonable time thereafter, the case comes within the provision of stealing by conversion under the Criminal Code... In the instant case, the money was not utilised for the purpose it was meant for and was not refunded even after repeated demands....*

*In my humble opinion, this is a case in which the law should disregard the corporate entity and pay regard to the entities behind*

*the legal veil of incorporation. Allegation of crime lifts the veil of corporate or voluntary associations and opens up the body to prosecution upon good and substantial facts placed before a court of competent jurisdiction. See the case of CHINWO V. OWHONDA (2008) 3 NWLR (Pt. 1074) at 341 particularly at 362 Para. D....*

*It follows that a company, although having a corporate personality is deemed to have human personality through its officers and agents and will therefore, speaking generally, contract like an individual. The veil of incorporation ought to be lifted in the interest of justice in the circumstances of this case. The lower court has rightly lifted the veil of incorporation having found that the appellant was dishonest from the evidence before it...*

*The findings of the learned trial Judge are supported by evidence, they are not perverse and have not in any way led to a miscarriage of justice. An appellate court lacks the power to interfere or disturb such findings of fact particularly when such findings are supported by the evidence on record. See the cases of IWUOHA & ANOR. V. NIGERIAN POSTAL SERVICES LTD. & ANOR. (2003) 28 W.R.N. at page 11 and EDOHO V. THE STATE (2010) 40 W.R.N. Page 1 at 36 Lines 5-15."*

Having carefully examined the evidence and exhibits tendered, the conclusions reached by the two lower courts are unassailable. All the ingredients of the offence were proved beyond reasonable doubt. The appellant's only contention is that he cannot be held personally liable and that it is the company, BAMINCO NIG. LTD., being a juristic personality that should be held liable.

Lifting the "veil of incorporation" or "piercing the corporate veil" is defined in Black's Law Dictionary 9th edition as:

"The judicial act of imposing personal liability on otherwise immune corporate officers, directors or shareholders for the corporation's wrongful acts."

The circumstance in which the "veil of incorporation" of a company may be lifted was succinctly stated in the case of: Alade V. ALICE (Nig.) Ltd. & Anor. (2010) 19 NWLR (Pt.1226) 111 @ 130 E-H & 142 C-E where this court held thus: Per Galadima, JSC at 130 E-H:

One of the occasions when the veil of incorporation will be lifted is when the company is liable for fraud as in the instant case. In FDB Financial Services Ltd. V. Adesola (2002) 8 NWLR (Pt.668) 170

at 174, the court considering the power of a court to lift the veil of incorporation held thus:

*“The consequence of recognizing the separate personality of a company is to draw a veil of incorporation over the company. One is therefore generally not entitled to go behind or lift this veil. However,*

*since a statute will not be allowed to be used as an excuse to justify illegality or fraud it is in the quest to avoid the normal consequences of the statute which may result in grave injustice that the court as occasion demands have a look behind or pierce the corporate veil.”*

*See further Adeyemi V. Lan & Baker (Nig.) Ltd. (2000) 7 NWLR (Pt.663) 33 at 51.” Per Muntaka-Coomassie, JSC at 142 C-E:*

*“It must be stated unequivocally that this court, as the last court of the land, will not allow a party to use his company as a cover to dupe, cheat and or defraud an innocent citizen who entered into a lawful contract with the company only to be confronted with the defence of the company’s legal entity as distinct from its directors.”*

In the instant case, there was evidence that monies were paid in cash directly to the appellant for the purchase of goods, which he failed to deliver. There was no evidence that the monies were paid into the company’s account. Letters of credit, which he opened expired and were not renewed. The money was not returned in spite of repeated demands. The actions of the appellant were clearly fraudulent and showed an intention to permanently deprive the owners of their money. He then sought refuge behind his company’s corporate veil. The court has a responsibility to look behind the facade and prevent the appellant from benefiting from his fraudulent acts by relying on legal technicalities. I fully agree with the court below that there were sufficient facts before the trial court to warrant the lifting of the “veil of incorporation” in the circumstances.

I therefore agree entirely with my learned brother, GALADIMA, JSC for the more detailed reasons given by him in the lead judgment that this appeal lack merit and should be dismissed. I dismiss it accordingly and affirm the judgment of the court below.

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