

SUPREME COURT OF NIGERIA
MONDAY 1ST JULY, 2016. SC. 371/2013
CORAM:- O. RHODES-VIVOUR, S. N. NGWUTA, M. U.
PETER-ODILI, M. D. MUHAMMAD, A. SANUSI, JJSC

THE STATE APPELLANT
V.
OLALEKAN OMOYELE RESPONDENT

APPEALS - Preliminary objection - Determination of - Where the objection is raised challenging competence of appeal - Court is to first of all consider and dispose of the objection (H1)

APPEALS - Grounds - Mixed law and facts - Leave - Appeal on such grounds without leave of court - Is incompetent and will be struck out (H2)

APPEALS - Grounds - Distinction - Appellate court must always distinguish nature of grounds - Because the nature of a ground determines - Whether or not appellant can appeal as of right (H3)

APPEALS - Grounds - Determination - In determining ground of appeal - It is vital to thoroughly examine both the ground and its particular (H4)

APPEALS - Competence - Filing time - The appeal having been filed 25 days after judgment of CA was filed out of time - And as such the late filing renders it incompetent (H5)

APPEALS - Filing - Time frame - Judicial etc Offices & Appeal by Prosecutors Act No. 10 limiting period of appeal to 7 days - Is aimed at encouraging prosecutor to be up and doing (H6)

LEGISLATION - Application - Judicial etc Offices & Appeal by Prosecutors Act No. 10 of 1963 - SC having applied provisions of the Act in State v. Adili - It shows that the Act is still extant (H7)

FACTS

Before the Lagos State High Court, accused/respondent was arraigned for the offence of murder contrary to Section 319 (1) of the Criminal Code Cap 17 vol. 2 of Lagos State 2003. Respondent pleaded not guilty to the charge. The case as presented by prosecution/appellant is that respondent and the deceased one Wole Mogbojiri worked in the same place. Respondent worked as a sand loader and on a certain day, dispute arose between the two workers. The deceased threatened to kill respondent. To actualize his intention, the deceased used a plank and hit respondent on the head which resulted into profuse bleeding as a result of which the latter was rushed to a chemist shop for first-aid treatment.

The next day, the deceased continued with the threat to attack respondent. As the deceased wanted to hit respondent with a plank, respondent picked up a knife and stabbed the deceased in self-defence. Consequently, the deceased bled to death before he could get immediate medical attention. Thereupon, respondent was arrested and subsequently charged with murder before the trial Court. At the trial, three witnesses testified for appellant, while respondent testified for his defence. At the end of the trial, respondent was convicted and sentenced to 14 years imprisonment for causing the death of the deceased. Not satisfied, respondent successfully appealed to the Court of Appeal Lagos Division. The Court discharged and acquitted respondent. Dissatisfied, appellant appealed to the Supreme Court.

HELD (Unanimously striking out the appeal per

SANUSI JSC)

APPEALS - Preliminary objection - Determination of

1. The age-long practice in this apex court is that where preliminary objection has been raised challenging the competence of the appeal, for instance, on ground that the notice of appeal or grounds of appeal is incompetent, the court is to first of all consider and dispose of the preliminary objection. In this instant case, as I said above, the respondent after filing Notice of Preliminary objection challenging the competence of all the six grounds of appeal in the notice of appeal filed by the appellant, he also argued the Preliminary objection in the

Respondent's brief of argument at pages 3 to 11 of his brief of Argument. I shall therefore consider the Preliminary objection first, before I later consider the merit of the appeal if need be. (p. 3879 D)

APPEALS - Grounds - Mixed law and facts - Leave

2. It therefore needs to be stressed here, that if any grounds of appeal do not come under the categories listed above, the litigant must obtain leave of this court or of the court below before such grounds become valid and competent. In other words, an appeal on grounds of fact or mixed law and facts without leave of court is incompetent and will be struck out. Now looking closely and dispassionately at the six grounds of appeal reproduced above, I am fully convinced that none of them is in true sense, a ground of law simpliciter and therefore the appellant, as of necessity requires leave before the grounds became competent in view of principles I already mentioned above. Virtually all of them raised issue of evidence or proof beyond reasonable doubt or posed challenges on documentary evidence e.g. the confessional statement of the respondent etc. Similarly, those grounds labelled as "Misdirection " had raised in their particulars, issues of facts and evidence. Again, the grounds of appeal encapsulated as 'Error in law' are really not grounds of law simpliciter, but could at best be regarded as grounds of mixed law and facts. It is therefore my considered view, that all the grounds are of facts or at best, of mixed law and facts which do really require leave in order to be raised competently. They are therefore caught by the provisions of Section 233(2) of the 1999 Constitution (as amended) and rendered incompetent for want of leave sought and obtained in advance before raising them. As a corollary, they are liable to be struck out and I hereby accordingly do same. With regard to the issues raised or formulated from them, such issues also deserve to be struck out or discountenanced since no issue of determination can stand independently, without it flowing from a competent ground or grounds of appeal. (pp. 3887 E/3889 H)

APPEALS - Grounds - Distinction

3. A ground of appeal may, generally complain of three matters namely (1) question of law, (2) question of fact, or (3) question of mixed law and fact. An appellate court must always endeavour to distinguish these three subjects, because the nature of the question determines whether an appellant has a cause to appeal as of right or would need to obtain prior leave to raise such ground. Where the ground of appeal complains of law simpliciter, the litigant can appeal as of right without necessarily seeking leave, as opposed to where the litigant's ground complains of fact or mixed law and facts, in which case leave is a prerequisite to file a valid or competent appeal. (p. 3887 G)

APPEALS - Grounds - Determination

4. I must emphasize here, that in determining whether a ground of appeal includes question of law alone or facts or mixed law and facts, it is necessary to thoroughly examine both the ground(s) of appeal and their particular provided, in order to determine whether it is a ground of law alone, or of mixed law and fact. This is because mere labelling of a ground of appeal as one of 'law', or 'Error law' or 'Misdirection' may not necessarily be so, as it could be a misnomer in actual sense. (p. 3889 E)

APPEALS - Competence - Filing time

5. The second leg of the preliminary objection raised by the respondent is that the appeal is incompetent for reason that it was filed outside the time stipulated by law which is seven days from the date the judgment appealed against was delivered. In the present appeal, the record clearly shows that the court below delivered its judgment now being appealed against on 3rd of May 2013, while the notice of appeal was filed on the 28th day of July 2013. That is to say, twenty five (25) days after the delivery of the judgment by the lower court. There is no evidence to show that the prosecutor, now appellant had applied for and seven days period shall not be extended. That is the law as it is now, period. This appeal was therefore filed

out of time and as such the late filing renders it incompetent. This court therefore lacks jurisdiction and competence to hear and determine the appeal. (p. 3890 E)

APPEALS - Filing - Time frame

6. I have read Tawakalitu's case and did not see anywhere this court considered Adili's at all. In fact, the facts in Tawakalitu's case which relates to examination malpractices case are distinguishable from those in Adili's case and even in Tawakalitu's case the offence of examination malpractices attracts a fine not exceeding #50,000 or three years jail term while Adili's case involves murder or manslaughter. It is therefore my considered view, that in Tawakalitu's case the law applicable regarding period within which to appeal is Section 27(2) of Supreme Court Act Cap 515 Laws of the Federation of Nigeria 2004, while the applicable law in Adili's case is the Judicial etc Offices and Appeals By Prosecutors Act No 10 of 1963 in view of the nature of the offence and conviction. We should not lose sight to the fact, that the Judicial etc. Offices and Appeal By Prosecutors Act No.10, is a special legislation promulgated to limit and narrow the scope of application such as cases involving sentence of death or verdict of guilty of manslaughter such as the situation in this instant appeal. Therefore, the period of appeal which has been constricted to only seven days within which a prosecutor can appeal against such sentence, is aimed at encouraging a prosecutor to be up and doing and appeal immediately if he is dissatisfied with the judgment so that the appeal is heard with minimum of delay and also to forestall the possibility of the offender or convict lingering in prison for a long period without his fate being determined finally and expeditiously too. That is more so, when the Act even prohibits court to grant or entertain application for extension of time in such situation. Once a prosecutor fails to appeal within the seven days stipulated by the Act, that is the end of it. (p. 3891 B)

LEGISLATION - Application

7. Another point worth being mentioned, is that since this court

applied the provisions of the 1963 Act in the case of STATE V ADILI (supra) in 1989, that clearly shows that the Act is still extant and applicable till today as an existing law that has not been repealed or superseded. I accordingly so hold and also apply it to the present appeal in holding that the appeal is incompetent by reason of effluxion of time as at the time the notice of appeal was filed. Needless to say, that Sections 213(2)(d) and 213(3) of the 1963 Constitution in which Adili's case was decided and applied by this court in 1989, is in pari materia with the provision of Section 233(2) and (3) of the 1999 Constitution and therefore Adili's case is relevant and applicable to the instant appeal. (p. 3891 H)

REPRESENTATION

R.A.O. Adegoke with O. Oketade for the Appellant
 Andrew Igbokwe with him Joseph Ohakpo Ogochukwu Ofodile (Miss)
 and Nsikak John Inyang for the Respondent

CASES REFERRED TO

- E Kashadadi v. Noma (2007) 13 NWLR (pt. 1052) 510
- State v. Adili (1989) 20 NSCC (pt. 1) 427
- FRN v. Tawakalitu [2013] 14 NWLR (pt. 1375) 581
- Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (pt. 498) 24
- Igidi v. Igba (1999) 6 SC (pt. I) 114
- F Njemanze v. Njemanze (2013) 1-2 SC (pt. I) 106
- NNPC v. FAMFA Oil Ltd. (2012) All FWLR (pt. 635) 204
- UBA v. GMBH (1989) 6 SC (pt. I) 22
- Ogbechie v. Onochie (1986) 3 SC
- G Abdul v. CPC (2013) 5-6 SC (pt. I) 64
- Agu v. Ikewibe (1991) 3 NWLR (Pt. 180) 385
- Odunukwe v. Ofomata (2010) 18 NWLR (pt. 1225) 404
- Anukam v. Anukam (2008) 5 NWLR (pt. 1081) 455
- Odugbo v. Abu (2011) 14 NWLR (pt. 732) 45
- H Obatoyinbo v. Oshatoba (1996) 5 NWLR (pt. 450) 531

STATUTES REFERRED TO

Criminal Code Cap 17 Vol.2 of Lagos State 2003, s. 319(1)
 Constitution of the Federal Republic of Nigeria 1999, s. 233(2)(3)(6)

Constitution of the Federal Republic of Nigeria 1963, s. 213(2)(d) and 213(3)

Judicial etc Offices and Appeals by the Prosecutor Act No. 10 of 1963, s. 4(3)

Supreme Court Act Cap 515 LFN 2004, s. 27(2)

B

LEAD JUDGMENT BY SANUSI JSC

This appeal stems from the judgment of Lagos division of the Court of Appeal (lower court/court below) delivered on 3rd May 2013 which had discharged and acquitted the respondent who was earlier convicted by the Lagos State High Court (trial court) on the offence of murder, contrary to Section 319 (1) of the Criminal Code Cap 17 Vo1.2 of Lagos State 2003 a d sentenced him to 14 years imprisonment.

The facts that gave rise to this appeal as revealed by the record of appeal, are that the respondent was a sand loader and on the 1st day of July 2004, he had a dispute with the deceased one Wale Mogbojuri who threatened to kill him. The respondent and the deceased Wale, were working in the same place and on the 1st day of July 2004, the respondent and the deceased had a dispute and the deceased threatened to kill the respondent. To actualise his intention, the deceased used a plank and hit the respondent on the head which resulted into profused bleeding as a result of which the respondent was rushed to a chemist shop for first-aid treatment in order to stop the bleeding. Then on the second day i.e. 2nd July 2004, the respondent same to the work-site still suffering from pains of the previous day attack. The deceased came to him again and still used a plank and threatened to kill the respondent and hit him on his shoulder with the plank. As the deceased wanted to hit him with the 'plank the third time, the respondent picked a knife normally used for cooking at the work site and stabbed the deceased in self defence.

Consequently, the deceased bled to death before he could get immediate medical attention. Thereupon, the respondent was arrested and charged with murder before the trial High Court on a sole charge of murder, contrary to Section 319 (1) of the Criminal Code, to which he pleaded not guilty. At the trial, the appellant as the prosecution, called three witnesses while the respondent herein testified for his defence. In the end the learned trial judge found the respon-

dent guilty of causing the death of the deceased Wale and sentenced him to 14years imprisonment.

Dissatisfied with the judgment of the trial court, the respondent successfully appealed to the court below, whereby the court below discharged and acquitted him, when it on page 243 of the

B Record held as below:-

“...The result is that this appeal succeeds and consequently, the conviction of the appellant by the learned trial judge D.O. Oluwayemi J in Suit No. LCD/31/2007 at the court 14 criminal division, High Court of Lagos State on the 2nd March 2011 is hereby
C quashed. The appellant’s sentence to 14years imprisonment is hereby set aside. The appellant Olalekan Omoyele is hereby discharged and acquitted”.

Aggrieved by the decision of the court below, the appellant
D herein appealed to this court on 28/5/2013 by filing a notice of appeal containing six grounds of appeal. Briefs of argument were filed and exchanged as required by rules and practice applicable in this court. The appellant’s brief of Argument settled by one Dr. Muiz Banire was filed on 31/10/2013 wherein three issues for determination were
E distilled from the six grounds of appeal contained in the notice of appeal.

The said issues are:-

1- Whether the lower court was right to have set aside the
F decision of the trial court on the ground that the appellant failed to prove its case beyond reasonable doubt (Grounds 1, 3, 4 and 5 of the Notice of Appeal)

2- Whether any material contradiction(s) existed in the testimony of PW1 to warrant the lower court to set aside the decision of
G the trial court (Ground I of the notice of appeal)

3 - Whether the defence of self defence was available to the respondent in the case (Ground 6 of the Notice of appeal).

The appellant also upon being served with Respondent’s brief in which the latter raised and argued a Preliminary Objection, re-
H sponded by filing Appellant’s Reply Brief on 31/3/2016 in which he replied to the respondent’s Preliminary Objection which was incorporated in the respondent’s brief of argument.

Upon being served with appellant’s brief of Argument, the respondent also filed Respondent’s Brief of Argument on 18/12/2013

which was settled by one Andrew C Igbokwe in which three issues for determination were also formulated, which read as below:-

A - Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the Appellant failed to establish the guilt of the Respondent beyond reasonable doubt (Grounds 1, 3 and 5) B

B- Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the evidence of the Appellant was fraught with contradictions which was (sic) fatal to the case of the Appellant (Ground 2) C

C - Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the appellant failed to discredit the defence of self defence of the Respondent (Ground 6).

I will pause here to say that the Respondent when served with Appellant's Reply Brief, he on 12/4/2016 filed a process which he called or titled "Respondent's Reply To The Appellant's Brief In Opposition To The Respondent's Notice of Preliminary Objection." I shall later come to this if the need arises.

The age-long practice in this apex court is that where preliminary objection has been raised challenging the competence of the appeal, for instance, on ground that the notice of appeal or grounds of appeal is incompetent, the court is to first of all consider and dispose of the preliminary objection. In this instant case, as I said above, the respondent after filing Notice of Preliminary objection challenging the competence of all the six grounds of appeal in the notice of appeal filed by the appellant, he also argued the Preliminary objection in the Respondent's brief of argument at pages 3 to 11 of his brief of Argument. I shall therefore consider the Preliminary objection first, before I later consider the merit of the appeal if need be. G

By way of preamble, the respondent raised objection challenging the competence of the appeal and is urging this court to dismiss or strike out the appeal for being incompetent and is contending that this court lack jurisdiction or competence to entertain same. H

The respondent hinged his preliminary objection on five grounds which are as follows:-

(a) *That this appeal is against the acquittal of the respon-*

dent by the court below in a murder charge and was commenced by the Appellant without first of all obtaining leave of the court of Appeal or this court as required by Sections 233(2); 233(6) of the 1999 Constitution.

(b) The grounds of appeal in the notice of appeal are all grounds of facts and or mixed law and facts which require leave of the court in order to be competent.

(c) Ground No4 of the Notice of Appeal is fundamentally defective and does not constitute a valid and competent ground of appeal in court.

(d) The Appellant's notice of appeal was filed outside the seven days period provided under Section 4(3) of the judicial etc Offices and Appeal by prosecutors Act No 10 of 1963 read along with Section 233(6) of the 1999 constitution; and .

(e) The Honourable court lacks the competence and or jurisdiction to entertain this appeal.

When proffering arguments on the preliminary objection which he filed notice on and argued in his brief of argument, the learned counsel for the respondent submitted that the appeal is incompetent in view of the provisions of Section 233(2) (3) and (6) of the 1999 Constitution. He said that a close look at the grounds of appeal reveals that they are grounds of facts or mixed law and fact which require prior leave to be obtained before filing them and such leave was not so obtained, hence the appeal becomes incompetent and liable to be dismissed or struck out. He stated that grounds 1, 2, 5 and 6 complained against the judgment of the court which was based on the evidence, adding that those grounds of appeal which were based on evidence, cannot be ground of law alone. See KASHADADI V NOMA (2007) 13 NWLR (pt.1052) 510. He further contended that despite the way the appellant couched grounds 3 and 4 and captioned them "Error of Law", they are really grounds involving law and facts which also require leave and in the absence of such leave sought and obtained those grounds are rendered incompetent. See THE STATE VS ADILI (1989) 20 NSCC (pt. 1) 427 at 444. Again on ground 4, learned counsel for the respondent argued that that ground challenged the holding that is nowhere to be seen in the judgment. He stated further, that even if there was such statement which purportedly led to that holding, such statement was merely an

‘Obiter dictum’ as opposed to ratio decidendi of the decision of the court below. On that premise, learned counsel urged that the appeal be struck out or dismissed.

The second leg of the preliminary objection relates to the point that the appeal was filed outside the seven days stipulated by the provisions of Section 4(3) of the judicial Offices and Appeals by the Prosecutor Act N .10 of 1963 read alongside Section 233(6) of the 1999 Constitution for filing an appeal by prosecutor. He argued further that the Notice of Appeal was show to have been filed on 28th May 2013 while the judgment purportedly appealed against was delivered on 3rd May 2013, that is to say, 25 days after the delivery of the judgment by the court below *See STATE VS ADILI (supra)*. He urged this court to allow the preliminary objection and strike out or dismiss the appeal.

In his reaction to the arguments advanced by the respondent on the preliminary objection, it is the contention of the appellant’s counsel as per his ‘Appellant’s Reply Brief’, that the position of the law has been modified in the case of FEDERAL REPUBLIC OF NIGERIA VS RAJI SADE TAWAKALITU [2013] 14 NWLR (pt.1375) 581 at 660/661. Were it was held that the provisions of Judicial etc. Offices and Appeals by Prosecution Act No.10 of 1963 had been superseded by the Constitution and that is why the said Act was not compiled as part of the constitution. He said by the omission of the *Act* in the Constitution, it means that the provisions of the *Act* was modified. *See the case of AG ABIA ST TE VS AG OF THE FEDERATION (2003) 4 NWLR (pt.809) 124 at 179.*

On the second leg of the preliminary objection, the learned counsel for the appellant regarding ground No.4, the appellant’s counsel submitted that the said ground of appeal had attacked the ratio decidendi of the decision and not obiter dictum. He referred to pages 233 to 234 of the record and also page 239 and submitted that this is part of the reasoning of the lower court on which basis it came to the conclusion that the appellant did not prove its case beyond reasonable doubt. The appellant had contended that that portion of the decision was reached per incuriam, at page 6 of its brief of argument and that the issue whether statement was attested to was never an issue before the trial court which means that the court below raised the issue suo motu. He urged this court to hold that ground 4 of the

notice of appeal is a valid ground as one wonders what version of the judgment the respondent read for his contention that the ground challenges a holding that is nowhere in the judgment of the lower court.

Then on the issue of not seeking and obtaining leave, the learned counsel for the appellant submitted that the need to seek leave to appeal to this court only arises where the issue had to do with fact or mixed law and facts. He thereupon invited this courts attention to consider the grounds of appeal to see whether they have to do with law or facts. He cited the authority of *KWARA STATE WATER CORPORATION VS AIC NIGERIA LTD (2008) LPELR4414*, in order to determine whether the ground of appeal is of law or facts.

Learned counsel submitted that the grounds of appeal in this case should be read together with their particulars in order to determine whether they are of law or facts. He finally submitted that even if the grounds are of fact or mixed law and facts, interest of justice demands that this appeal be heard and determined on the merit rather than using technicalities to defeat the justice of the case.

As I posited above, the learned counsel for the respondent had upon being served with Appellant's Reply Brief on 12 /4/2016, filed a reply Brief in answer to the Appellant's Reply brief on the notice of preliminary objection. Therein, he submitted that the decision of this court in *STATE VS ADILI (SUPRA)* was not modified by the decision in *FRN VS TAWAKALITU (SUPRA)* because the two cases are distinguishable as the facts in the two cases differ. He said while the case of *FRN VS TAWAKALITU* relates to examination malpractices punishable by a fine not exceeding #50,000 or an imprisonment term of three years, the facts in *STATE VS ADILI (SUPRA)* relates to an appeal filed by the State in criminal matters involving a sentence or verdict of guilt of manslaughter. He contended that the Supreme Court applied Judicial etc. Offices and Appeals by Prosecutors Act No. 10 of 1963. He further submitted that the existing law cannot be repealed or cease to exist by inference or by implication. He argued that in the absence of any law repealing the said 1963 Act, he urged this court to reject the argument of the appellant that the said Act was repealed by the omission as his submission on this does not represent the true position of law. He referred to the case of *IBIDAPO V LUFTHANSA AIRLINES (1997) 4 NWLR (pt.498) 24*.

He then submits that the 1963 Act is still valid and subsisting in the absence of any law repealing it.

Finally, the learned counsel for the respondent submitted that the grounds of appeal filed by the appellant together with their particulars reveal that they are all grounds of mixed law and facts which require leave to be obtained. Hence having failed to obtain such leave before filing them, they are all incompetent and liable to be struck out and as none of the grounds can sustain the appeal, the appeal becomes incompetent and liable to be dismissed or struck out. He urged us to so hold.

In considering the first leg of the respondent's preliminary objection, I deem it apposite to reproduce below, the six grounds of appeal including their particulars as contained in the notice of appeal which is the pith of the respondent's preliminary objection. The six grounds of including their particulars as contained in the notice of appeal are therefore set out below for ease of reference and consideration. They read, thus:-

GROUND 1: Misdirection

The Court misdirected itself when it held that the Appellant had failed to establish the guilt of the Respondent beyond reasonable doubt.

PARTICULARS of MISDIRECTION

i. *There is no dispute regarding the fact that the Respondent stabbed the Deceased with a knife, which caused the death of the Deceased.*

ii. *Both in his extra-judicial confessional statement and his testimony in court, the Respondent confirmed that he stabbed the deceased with a knife, thereby, causing the death of the deceased.*

iii. *The evidence before the court is credible direct, cogent and points to the fact that the Respondent killed the deceased.*

iv. *The confessional statement of the Respondent, which satisfied all the requirements of the law, was neither retracted nor challenged by the Respondent as to its voluntariness.*

v. *The confessional statement is sufficient to discharge the burden placed on the Appellant to convict the Respondent.*

vi. *Raising self-defence presupposes that the Respondent committed the offence of murder*

GROUND2: Misdirection

The Court misdirected itself when it held that the evidence of the prosecution was fraught with contradictions and as such was fatal to the case of the Prosecution.

PARTICULARS OF MISDIRECTION

- B *i. It is an established position of law that contradictions that do not affect the substance of the issue to be decided are irrelevant.*
- ii. Contradictions, to be worthy of note, must relate to the substance and vital ingredients of the offence charged.*
- C *iii. The alleged contradictions are immaterial in relation to the (sic)*
- iv. The essential ingredients of murder enjoined by the law to be proven beyond reasonable doubt were proven.*
- v. At best, it can only be argued that negligible discrepancies exist between the testimony of PW2 and his extrajudicial statement to the Police.*
- vi. Both in his extra-judicial confessional statement and his testimony in court, the Respondent confirmed that he stabbed the deceased with a knife, thereby causing the death of the deceased.*

E GROUND3: Error in law

The Court of Appeal erred in law when it held that the Medical Report tendered was for identification purposes only and as such the cause of death and the identity of the deceased were not ascertainable particularly when the part of the body stabbed was in dispute.

F PARTICULARS OF ERROR

- i. There was no evidence before the court to show that the part of the body of the deceased stabbed was ever in contention by both parties as the Respondent actually admitted that he stabbed the deceased from behind.*
- G *ii. There was no mistake or contradiction as to the identity of the deceased as it was not in contention.*
- iii. The Respondent's plea of self-defence is an admission of committing the offence of murder.*
- H *iv. A medical report is not a sine qua non to establishing the cause of death in all cases.*
- v. The evidence of a medical report is immaterial insofar as there are direct and satisfactory evidence as to the cause of death of the deceased.*

GROUND 4: Error in law

The Court erred in law when it held that the failure of a Superior Police Officer to attest to the confessional statement of the Respondent was a requirement of the law and as such was fatal to the case of the prosecution.

PARTICULARS OF ERROR

i. It is not a mandatory requirement of the law In Nigeria that confessional statements must be attested to before a Superior Police Officer.

ii. The Rules are merely for convenience and the non-observance does not render the Confessional Statement inadmissible or unreliable.

iii. The issue of attestation by a Superior Police Officer was never raised at the trial court but only raised suo motu by the court of Appeal.

iv. The Confessional Statement of the Respondent was not challenged either by retraction or involuntariness at any time during the trial.

v. The confessional statement of the Respondent was tendered and admitted in evidence without any objection from the Respondent or his counsel.

vi. The Judges Rules is only relevant in the determination of the voluntariness or otherwise of the Confessional Statement.

GROUND 5 Misdirection

The Court Appeal misdirected itself when it held that the intention of the Respondent to kill the deceased was not established.

PARTICULARS OF ERROR

i. The Respondent, in his extra-judicial confessional statement and his testimony in court, admitted to stabbing the deceased with a knife, which caused the death of the deceased.

ii. An offender's intention to cause grievous harm to the deceased or another person is sufficient for the commission of the offence of murder.

iii. The Respondent knew that stabbing the deceased would either kill him or cause him grievous harm.

iv. The Appellant had proved beyond reasonable doubt all the ingredients of the offence.

GROUND 6

The court misdirected itself when it held that Appellant failed to discredit the defence of self-defence of the Respondent.

PARTICULARS OF ERROR

i. *There were sufficient facts before the court to establish the fact that the Respondent who had earlier been involved in fracas with the deceased a day earlier premeditated the crime.*

ii. *The testimony of the Respondent alone, without more, cannot sustain the defence of self-defence.*

iii. *The Respondent's testimony in court was that the deceased hit him twice on the shoulder with a stick, and in order to avoid being hit with a stick a third time, he stabbed the deceased with a knife.*

iv. *The alleged self-defence was neither proportionate nor commensurate to the alleged act of the deceased.*

v. *The Respondent knew that the probable consequence of his act was the likelihood of the death of the deceased by stabbing the deceased with a knife.*

vi. *The Respondent had no reasonable ground to stab the deceased with a knife.*

vii. *From the evidence of PW2, it was apparent that the Respondent stabbed the deceased with a knife unprovoked.*

viii. *The Appellant had established all the essential ingredients of the offence charged satisfactorily and as such the charge is proved beyond reasonable doubt.*

ix. *There was no material doubt created in the mind of the court to warrant the discharge and acquittal of the Respondent.*

x. *The evidence of the PW2 already displaced the evidence of Respondent that he was not the aggressor.*

By the provisions of Section 233 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), right of appeal from the decision of the Court of Appeal by parties aggrieved by the decision, to the Supreme Court has been provided. Section 233 (2) of the the 1999 Constitution has itemised the instances when a party dissatisfied with the decisions of the Court of Appeal has a right to appeal to the Supreme Court as of right as follows:-

(a) *Where the ground of appeal involves question of law alone, decisions in civil criminal proceedings before the Court of Appeal;*

(b) *Decisions in any civil or criminal proceedings on questions as to the interpretation or application of this constitution.*

(c) Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened to any person

(d) Decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;

(e) Decisions on any question -

(i) Whether any person has been validly elected to the office of President or Vice-President under this Constitution.

[ii] Whether the term of office of resident or Vice-President has eased,

(iii) Whether the office of President or Vice-President has become vacant;

(iv) Whether any person has been validly elected to the office of Governor or Deputy Governor under this Constitution;

(v) Whether the term of office of a Governor or Deputy Governor has ceased;

(vi) Whether the office of Governor or Deputy Governor has become vacant; and Such other case as may be prescribed by an Act of the National Assembly.

It therefore needs to be stressed here, that if any grounds of appeal do not come under the categories listed above, the litigant must obtain leave of this court or of the court below before such grounds become valid and competent. In other words, an appeal on grounds of fact or mixed law and facts without leave of court is incompetent and will be struck out. See IGIDI VS IGBA (1999) 6 SC (pt. I) 114; NJEMANZE VS NJEMANZE (2013) 1-2SC (pt. I) 106; NNPC FAMFA OIL LTD (2012) ALL FWLR (pt.635) 204. **A ground of appeal may, generally complain of three matters namely (1) question of law, (2) question of fact, or (3) question of mixed law and fact. An appellate court must always endeavour to distinguish these three subjects, because the nature of the question determines whether an appellant has a cause to appeal as of right or would need to obtain prior leave to raise such ground. Where the ground of appeal complains of law simpliciter, the litigant can appeal as of right without necessarily seeking leave, as op-**

posed to where the litigant's ground complains of fact or mixed law and facts, in which case leave is a prerequisite to file a valid or competent appeal.

The Supreme Court has over the years evolved some criteria to be applied in distinguishing a ground of law from that of mixed law and facts. Few of these criteria are summarised hereunder:-

[i] First is the thorough examination of the grounds of appeal in the case to see whether they reveal a misunderstanding by the lower court of the law, or a misapplication of the law to the facts already proved or admitted.

[ii] Where a ground complains of a misunderstanding by the lower court of the law or misapplication of the law to the facts already proved or admitted, it is a ground law.

[iii] Where a ground of appeal questions the evaluation of facts before the application of the law, it is ground of mixed law and fact.

(iv) A ground which raises a question of pure fact, is a ground of fact.

(v) Where the lower court finds that the particular events occurred although there is no admissible evidence before the court that the event did not occur, the ground is that of law.

(vi) Where admissible evidence has been led, the assessment of that evidence is entirely for the court. If there is a complaint about the assessment of the admissible evidence, the ground is that of fact.

[vii] Where the lower court approached the Constitution of a Legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, the ground is that of law.

(viii) Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained lawyer, this is a question of law.

(ix) Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the appeal court will assume that there has been a misconception of the law. This is a ground of law.

(x) Where the conclusion of the lower court is one of possible resolutions but one which the appeal court would not have reached if seized of the issue, that conclusion is not an error in law.

(xi) Where the court of Appeal finds such application to be wrong and decides to make its own findings such findings made by

Court of Appeal are issues of fact and not of law.

(xi) *Where the Court of Appeal interferes in such a case and there is a further appeal to a higher court of appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower court of appeal is a ground of law not of fact.*

[xiii] *A ground of appeal which complains that the decision of the trial court is against evidence or weight of evidence or contains unresolved contradictions in the evidence of witnesses, it is purely a ground of fact (which requires leave for an appeal to a court of appeal or a further court of appeal).*

See the cases of *BOARD OF CUSTOM AND EXCISE V BARAU* (1982) 10 SC 48, *OR* (1982) 10 SC (Reprint) 23 AND *OGBECHIE VS ONOCHIE* (1986) 3 SC 58 64 *OR* (1986) 3 SC (Reprint) 32, where this court had interpreted the provisions of Sections 213(3) and 214(3) of the Constitution of Federal Republic of Nigeria 1963, which are in pari materia with the provisions of Sections 233 (3) and 232(2) (a) of 1999 Constitution. See also the cases of *OLEMEN V MOMODU II* (1983) 3 SC 17; at 207; *RABIU V ATTORNEY GENERAL KANO STATE* (1980) 8 - 11 SC 130; *NWADIKE V IBEKWE* (1987) 12 SC 14; *ABIDOYE VS ALAWODE* (001) 3 SC I; *IFEDIORA VS UME* (1988) 3 SC (Reprint) 278; *OFORKIRE VS MADUIKE* (2003) 1 SC (pt. III) 74; *IDOWU V STATE* (2000) SC (pt. II) 50.

I must emphasize here, that in determining whether a ground of appeal includes question of law alone or facts or mixed law and facts, it is necessary to thoroughly examine both the ground(s) of appeal and their particular provided, in order to determine whether it is a ground of law alone, or of mixed law and fact. See *UBA VS GMBH* (1989) 6 SC (pt.I) 22; *OGBECHIE V ONOCHIE* (1986) 3 SC NJEMANZE (supra), DR. ABDUL VS CPC & 3 ORS (2013) 5-6 SC (pt. I) 64. ***This is because mere labelling of a ground of appeal as one of 'law', or 'Error law' or 'Misdirection' may not necessarily be so, as it could be a misnomer in actual sense.***

Now looking closely and dispassionately at the six grounds of appeal reproduced above, I am fully convinced that none of them is in true sense, a ground of law simpliciter and therefore the appellant, as of necessity requires leave before the grounds became competent in view of principles I already

mentioned above. Virtually all of them raised issue of evidence or proof beyond reasonable doubt or posed challenges on documentary evidence e.g. the confessional statement of the respondent etc. Similarly, those grounds labelled as “Misdirection” had raised in their particulars, issues of facts and evidence. Again, the grounds of appeal encapsulated as ‘Error in law’ are really not grounds of law simpliciter, but could at best be regarded as grounds of mixed law and facts. It is therefore my considered view, that all the grounds are of facts or at best, of mixed law and facts which do really require leave in order to be raised competently. They are therefore caught by the provisions of Section 233(2) of the 1999 Constitution (as amended) and rendered incompetent for want of leave sought and obtained in advance before raising them. As a corollary, they are liable to be struck out and I hereby accordingly do same. With regard to the issues raised or formulated from them, such issues also deserve to be struck out or discountenanced since no issue of determination can stand independently, without it flowing from a competent ground or grounds of appeal.

The second leg of the preliminary objection raised by the respondent is that the appeal is incompetent for reason that it was filed outside the time stipulated by law which is seven days from the date the judgment appealed against was delivered. In the present appeal, the record clearly shows that the court below delivered its judgment now being appealed against on 3rd of May 2013, while the notice of appeal was filed on the 28th day of July 2013. That is to say, twenty five (25) days after the delivery of the judgment by the lower court. There is no evidence to show that the prosecutor, now appellant had applied for and seven days period shall not be extended. That is the law as it is now, period. This appeal was therefore filed out of time and as such the late filing renders it incompetent. This court therefore lacks jurisdiction and competence to hear and determine the appeal. See *STATE VS ADILI* (*supra*); *QUEEN V NDA* (1957) 2 FSC 29 (1957) SC NLR 346; *FROBIDE V STATE* (1969) 1 ALL NLR 255; *OKODON V STATE* (1981) 9 SC 1; *OJOJO V THE STATE* (1970) 1 ALL NLR 33.

The learned counsel for the appellant raised the point, that this court had in the case of *FEDERAL REPUBLIC OF NIGERIA VS TAWAKALITU (2013) 14 NWLR (Pt.1175) 587* modified its earlier stance in the case of *STATE VS ADILI (supra)* on the period within which a prosecutor can appeal in murder or manslaughter case, where the court acquits the respondent. **I have read Tawakalitu's case and did not see anywhere this court considered Adili's case at all. In fact, the facts in Tawakalitu's case which relates to examination malpractices case are distinguishable from those in Adili's case and even in Tawakalitu's case the offence of examination malpractices attracts a fine not exceeding #50,000 or three years jail term while Adili's case involves murder or manslaughter. It is therefore my considered view, that in Tawakalitu's case the law applicable regarding period within which to appeal is Section 27(2) of Supreme Court Act Cap 515 Laws of the Federation of Nigeria 2004, while the applicable law in Adili's case is the Judicial etc. Offices and Appeals By Prosecutors Act No 10 of 1963 in view of the nature of the offence and conviction. We should not lose sight to the fact, that the Judicial etc. Offices and Appeal By Prosecutors Act No.10, is a special legislation promulgated to limit and narrow the scope of application such as cases involving sentence of death or verdict of guilty of manslaughter such as the situation in this instant appeal. Therefore, the period of appeal which has been constricted to only seven days within which a prosecutor can appeal against such sentence, is aimed at encouraging a prosecutor to be up and doing and appeal immediately if he is dissatisfied with the judgment so that the appeal is heard with minimum of delay and also to forestall the possibility of the offender or convict lingering in prison for a long period without his fate being determined finally and expeditiously too. That is more so, when the Act even prohibits court to grant or entertain application for extension of time in such situation. Once a prosecutor fails to appeal within the seven days stipulated by the Act, that is the end of it.**

Another point worth being mentioned, is that since this court applied the provisions of the 1963 Act in the case of

STATE V ADILI (*supra*) in 1989, that clearly shows that the Act is still extant and applicable till today as an existing law that has not been repealed or superseded. I accordingly so hold and also apply it to the present appeal in holding that the appeal is incompetent by reason of effluxion of time as at the time the notice of appeal was filed. Needless to say, that Sections 213(2)(d) and 213(3) of the 1963 Constitution in which Adili's case was decided and applied by this court in 1989, is in *pari materia* with the provision of Section 233(2) and (3) of the 1999 Constitution and therefore Adili's case is relevant and applicable to the instant appeal.

In my discourse above, I have held that all the grounds of appeal in the notice of appeal filed by the appellant herein, are incompetent for failure of the appellant to obtain prior leave before raising them as all of them are grounds of mixed law and fact. They are therefore incompetent and liable to be struck out and I hereby do same. The first leg of the preliminary objection is therefore well-taken and upheld.

Secondly, the other leg of the preliminary objection is equally sustained by me because the notice of appeal as filed by the appellant outside the seven days period stipulated by the Act, the appellant being the prosecutor. The appeal is therefore incompetent and is accordingly struck out for being caught by exfluxion of time when it was filed outside the seven days period stipulated by the Act. This court is therefore loath of the competence to hear and determine same. There is therefore no need to consider the merit of the appeal since both the grounds and issues raised are incompetent and have been struck out by me.

On the whole, I adjudge the appeal incompetent and it is hereby accordingly struck out.

RHODES-VIVOUR JSC

I read in draft the leading judgment delivered by my learned brother, Sanusi, JSC. I agree with his lordship that the grounds of appeal are incompetent and so the appeal ought to be struck out.

The six grounds of appeal and the three issues formulated from them were set out in the leading judgment just delivered and need

not be repeated.

In *NNPC v Famfa Oil Ltd* (2012) ALL FWLR (Pt. 635) p.204. I observed that the difference between a ground of law and a ground of mixed law and facts can be narrow. Labelling a ground of appeal error of law, or misdirection may not necessarily be so. For the correct classification of ground of law and ground of mixed law and fact the grounds of appeal and their particulars should be examined to identify the substance of the appeal. See further, *Ogbechie & ors v Onochie & ors* (1986) 1 NSCC p.443. B

A ground of appeal which complains of a misunderstanding by the court below of the law or a misapplication of the law to the facts already proved or admitted is a ground of law. A ground of appeal which questions the evaluation of facts before the application of the law, is a ground of mixed law and fact. If the ground of appeal complains that the judgment of the trial court is against the weight of evidence it is a ground of fact. Where the grounds of appeal are not of law but of mixed law and facts or facts, leave must be obtained before the appellant can have a competent appeal. See Section 233 of the Constitution. When no issue is formulated from a ground of appeal, the ground of appeal is abandoned and should be struck out. See *Are v Ipaye* (1986) 3 NWLR (Pt29) p.146. Two or more issues cannot be formulated from one ground of appeal, but one issue can be formulated from more than one ground of appeal. By the appellants own admission Issue 1 was formulated from grounds 1, 3, 4, and 5 while Issue 2 was formulated from ground 1, this is clearly wrong as two issues were formulated from one ground of appeal (i.e. ground 1), and as my lord Ngwuta, JSC pointed out, it makes no difference that other grounds of appeal were involved. No issue was formulated from ground 2 and so ground 2 is abandoned and struck out. Issue 3 is formulated from ground 6. The substance of ground 6 is that the judge failed to evaluate evidence properly before concluding that the defence of self defence did not avail the appellant. This ground of appeal questions the evaluation of facts before the application of the law. It is a ground of mixed law and fact. It is an incompetent ground of appeal since leave was not obtained before it was filed, as provided by section 233 of the Constitution. For these brief reasons as well as those more fully given in the leading judgment, I strike out the appeal for being incompetent. C D E F G H

NGWUTA JSC

I read in draft the lead judgment just delivered by my learned brother, Amiru Sanusi, JSC. I agree with the reasons given in the lead judgment leading to the conclusion that the appeal is incompetent and liable to be struck out.

Though the merit *vel/non* of the appeal cannot be considered, I think there is need to comment on the appellant's formulation of Issues.

Issue one is said to have been framed from "Grounds 1, 3, 4 and 5 of the Notice of Appeal" and Issue two was framed from "Ground 1 of the Notice of Appeal". An issue for determination in an appeal can be raised from a ground of appeal, but it is raised basically from a combination of grounds of appeal. See *labiyi v. Anretiola* (1992) 10 SCNJ 1 at 2. The reverse is not the case.

On no account should the issues be more in number than the Grounds of Appeal from which the issues arose. See *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 385. In the case at hand, issues framed from Ground one are more in number than the said ground one. It makes no difference that other grounds of appeal were involved.

It is a breach of the principle of formulation of issues in an appeal and ought to be discouraged.

I also strike out the appeal for being incompetent.

Appeal struck out.

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, Amiru Sanusi JSC and in support of the reasoning I shall make some remarks.

The defendant now respondent was charged at the trial High Court with the offence of murder which court delivered its judgment with the conviction of the respondent and a sentence of 14 years imprisonment. The prosecution appealed to the Court of Appeal Lagos Division or court below which set aside the decision of the trial court on the ground that the appellant did not prove the case beyond reasonable doubt and thereafter acquitted and discharge the respondent.

Dissatisfied the appellant has come before the Supreme Court through a Notice of Appeal filed on the 28/5/2013. The detailed background facts are well captured in the lead judgment and so no need to have them recast herein.

On the 14th day of April, 2016 date of hearing, R. A. O. Adegoke of counsel adopted the Brief of Argument of appellant settled by Dr. Muiz Banire and filed on the 31/10/13. He formulated three issues for determination which are as follows:

1. *Whether the lower court was right to have set aside the decision of the trial court on the ground that the appellant failed to prove its case beyond reasonable doubt. (Grounds 3, 4, and 5)*
2. *Whether any material contradictions existed or in the testimony of PW2 to warrant the lower court to set aside the decision of the trial court. (Ground 2)*
3. *Whether the defence of self-defence was available to the respondent in this case. (Ground 6)*

Also to be stated is that learned counsel for the appellant also adopted the Reply Brief filed on the 14/4/16.

Learned counsel for the respondent, Andrew C. Igbokwe raised a Preliminary Objection which arguments were made in the respondent's Brief of Argument filed on the 18/12/13. Brief of adopted by the learned counsel. Also adopted was a Reply to the appellant's Brief in opposition to the respondent's Notice of Preliminary Objection filed on 12/4/2016 and deemed filed on 14/4/16. For the respondent were distilled three issues for determination in the event that the preliminary objection was not upheld and these are thus:

1. Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the appellant failed to establish the guilt of the respondent beyond reasonable doubt.
2. Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the evidence of the appellant was fraught with contradictions which was fatal to the case of the appellant.
3. Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the appellant failed to discredit the defence of self defence of the respondent.

The objection raised by the respondent has to be dealt with first before the court can go into the merits of the appeal since a

Preliminary Objection is a hurdle that must be scaled and the court is assured of the jurisdiction or competence to go forth and in the alternative that there is no need to continue if there is no competence.

PRELIMINARY OBJECTION

The respondent urges this court to dismiss or strike out the appeal because the same is incompetent and this court therefore lacks the jurisdiction and or competence to entertain it.

The grounds upon which this objection is based are thus:

1. *That the appeal was commenced by the appellant without first obtaining leave of the Court of Appeal or the Supreme Court contrary to sections 233(2); 233(3) and 233(6) of the 1999 Constitution.*

2. *The grounds of appeal in the appellants notice of appeal are all grounds of facts and or mixed law and facts which require leave of court to be competent.*

3. *Ground 4 of the Notice of Appeal is fundamentally defective and does not constitute a valid and competent ground of appeal in law.*

4. *The appellants Notice of Appeal was filed outside the seven days period provided for under S. 4(3) Judicial etc. Offices and Appeal by Prosecution Act No. 10 of 1963 read along with S.233(6) of the 1999 Constitution.*

5. *This honourable court lacks the competence and or jurisdiction to entertain this appeal.*

The respondent raised a sole issue in the determination of this preliminary objection which is as follows:

Whether from the facts and circumstances of this case, this honourable court had the competence and/or jurisdiction to entertain this appeal.

Mr. Andrew Igbokwe of counsel for the respondent/objector contended that grounds 1, 2, 5 and 6 of the complainants of the appellant against the judgment of the court below are all grounds of facts and or mixed law and facts. That Grounds 3 and 4 are also grounds of facts and/or mixed law and facts and so require leave of court to be competent. He stated further that ground 4 is fraught with fundamental errors which renders it totally incompetent as a ground of appeal since that ground challenges a holding that is nowhere in the judgment of the court below, which at best is an obiter

dictum. He cited *Odunukwe v Ofomata* (2010) 18 NWLR (Pt. 1225) 404 at 446; *The State v Adili* (1989) 20 NSCC (Pt. 1) 427 at 444, *Anukam v Anukam* (2008) 5 NWLR (Pt. 1081) 455 at 466.

Responding, learned counsel for the appellant submitted that the objector was not right in his submission that this appeal was filed out of seven days as prescribed by section 3 of the Judicial etc. Officers and Appeal by Prosecutors Act No. 10 of 1963 and so incompetent. That position had been modified by this court in *Federal Republic of Nigeria v Baji Sode Tawakalitu* (2013) 14 NWLR (Pt. 1375) 587 at 600 - 601.

That the appeal going by the Record was filed 25 days after the judgment of the Court of Appeal within the prescribed time of the Supreme Court Act, the extant law on the matter. Also that the Act of 1963 has been superseded by the Constitution of the Federal Republic of Nigeria, 1999 and he said judicial, etc. Officers and Appeal by Prosecutors Act No. 10 of 1963 does not form part of the laws regulating appeal to the Supreme Court by virtue of the fact that same had been supersede by the 1979 Constitution and a fortiori, the 1999 Constitution (as amended). That the said Act No. 10 of 1963 has been modified by the appropriate authority in order to bring same into conformity with the constitution of the Federal republic of Nigeria, 1999. He cited in support, section 315 (1), (2), (4) of the constitution; *A. G. Abia v A. G. Federal* (2003) 4 NWLR (Pt. 809) 124 at 176.

Mr. Adegoke of counsel for the appellant contended that what the objector said was not part of the judgment was really part of what constituted the ratio decidendi of the case which is the validity or otherwise of the confessional statement and could be appealed against and so ground 4 of the Notice of Appeal is a valid ground. He cited *Odugbo v Abu* (2011) 14 NWLR (Pt. 732) 45 at 100.

On the issue whether the grounds of appeal were of facts or mixed law and facts for which there was need to seek leave to appeal, failure of which vitiated the Notice of Appeal, learned counsel for the appellant contended that Grounds 1, 2, 5 and 6 were of law and needed to no leave to appeal against. He cited *Kwara State Water Corporation v AIC Nigeria Limited* (2008) LPELR - 4414 (CA).

That the grounds of appeal are best read together with the particulars in order to determine whether they are of law or fact even

if the grounds are labelled “Misdirection”. He referred to *Obatoyinbo v Oshatoba* (1996) 5 NWLR (Pt. 450) 531 at 549.

For the appellant it was further contended that whether the threshold of proof or standard of proof has been attained in a particular case is a matter of the application of the law which though
B might involve a consideration of facts and it is strictly within the jurisdiction of the judge to state it as of law. He cited *Metal Construction (WA) Ltd v Migliore* (1990) 1 NWLR (Pt. 126) 299 at 312; *Nwadike v Ibekwe* (1987) 4 NWLR (Pt. 67) 718 at 744.

C Learned counsel for the appellant submitted that assuming without conceding that the grounds were one of fact or mixed law and fact the interest of justice dictated that the appeal be heard since the freedom of the accused for a heinous offence was in issue.

Learned counsel for the respondent/objector in reply on points
D of law submitted that the 1963 Act is a special legislation with limited and narrow scope of application has not been repealed. He cited *The State v Adili* (supra); *Adigun v A. G. of Oyo State* (1987) 2 NWLR (Pt. 56) 197; *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124 at 163.

E Having perused the submissions of counsel on either side in the arguments featured in the Brief of Argument of the respondent/objector, the Reply Brief of the appellant and then the Reply to the response of the appellant in context with the hearing in court
F it seems to me there is the need to first quote the guiding constitutional provisions which are specified in section 233(2) (a) of the 1999 constitution as amended, which are thus:

(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases:

G (a) Where the ground of appeal involves questions of law alone decisions in any civil or criminal proceedings before the Court of Appeal.

I shall quote extensively the said grounds of appeal, the respondent has complaints about which are as follows:

H “Grounds

Ground 1: Misdirection

The court misdirected itself when it held that the appellant had failed to establish the guilt of respondent beyond reasonable doubt.

PARTICULARS OF MISDIRECTION

(i) *There is no dispute regarding the fact that the respondent stabbed the deceased with a knife, which caused the death of the deceased.*

(ii) *Both in his extra-judicial confessional statement and his testimony in court, the respondent confirmed that he stabbed the deceased with a knife, thereby, causing the death of the deceased.* B

(iii) *The evidence before the court is credible, direct, cogent and points to the fact that the respondent killed the deceased.*

(iv) *The confessional statement of the respondent, which satisfied all the requirements of the law, was neither*

PARTICULARS OF MISDIRECTION

 C

(i) *There is no dispute regarding the fact that the respondent stabbed the deceased with a knife, which caused the death of the deceased.*

(ii) *Both in his extra - judicial confessional statement and his testimony in court, the respondent confirmed that he stabbed the deceased with a knife, thereby, causing the death of the deceased.* D

(iii) *The evidence before the court is credible, direct, cogent and points to the fact that the respondent killed the deceased.*

(iv) *The confessional statement of the respondent, which satisfied all the requirements of the law, was neither retracted nor challenged by the respondent as to its voluntariness.* E

(v) *The confessional statement is sufficient to discharge the burden placed on the appellant to convict the respondent.*

(vi) *Raising self-defence presupposes that the respondent committed the offence of murder.* F

GROUND 2: MISDIRECTION

The court misdirected itself when it held that the evidence of the prosecution was fraught with contradictions and such was fatal to the case of the prosecution. G

PARTICULARS OF MISDIRECTION

1. *It is an established position of law that contradictions that do not affect the substance of the issue to be decided are irrelevant.*

2. *Contradiction I to be worthy of note, must relate to the substance and vital ingredients of the offence charged.* H

3. *The alleged contradictions are immaterial in relation to the ingredients of the offence.*

4. *The essential ingredients of murder enjoined by the law to*

be proven beyond reasonable doubt were proven.

5. *At best, it can only be argued that negligible discrepancies exist between the testimony of PW2 and his extrajudicial statement to the police.*

6. *Both in his extra-judicial confessional statement and his testimony in court, the respondent confirmed that stabbed the deceased with a knife I thereby, causing the death of the deceased.*

GROUND 3: ERROR OF LAW

The Court of Appeal erred in law when it held that the Medical Report tendered was for identification purposes only and as such the cause of death and the identity of the deceased were not ascertainable particularly when the part of the body stabbed was in dispute.

Particulars of Error

1. *There was no evidence before the court to show that the part of the body of the deceased stabbed was ever in contention by both parties as the respondent actually admitted that he stabbed the deceased from behind.*

2. *There was no mistake or contradiction as to the identity of the deceased as it was not in contention.*

3. *The respondent's plea of self-defence is an admission of committing the offence of murder.*

4. *A medical report is not a sine qua non to establishing the cause of death in all cases.*

5. *The evidence of a medical report is immaterial insofar there are direct and satisfactory evidence as to the cause of death of the deceased.*

Ground 4: ERROR IN LAW

The court erred in law when it held that the failure of a Superior Police Officer to attest to the confessional statement of the respondent was a requirement of the law and as such was fatal to the case of the prosecution.

Particular of Error

i. *It is not a mandatory requirement of the law in Nigeria that confessional statements must be attested to before a superior police officer.*

ii. *The Rules are merely for convenience and the non-observance does not render the confessional statement inadmissible or unreliable.*

iii. *The issue of attestation by the superior police officer was never raised at the trial court but only raised suo motu by the Court of Appeal.*

iv. *The confessional statement of the respondent was not challenged either by retraction or involuntariness at any time during the trial.* B

v. *The confessional statement of the respondent was tendered and admitted in evidence without any objection from the respondent or his counsel.*

vi. *The Judges Rules are only relevant in the determination of the voluntariness or otherwise of the confessional statement.* C

GROUND 5: MISDIRECTION

The Court of Appeal misdirected itself when it held that the intention of the respondent to kill the deceased was not established. Particulars of Error D

i. *The respondent, in his extra-judicial confessional statement and his testimony in court, admitted to stabbing the deceased with a knife, which caused the death of the deceased.*

ii. *An offender's intention to cause grievous harm to the deceased or another person is sufficient for the commission of the offence of murder.* E

iii. *The respondent knew that stabbing the deceased would either kill him or cause him grievous harm.*

iv. *The appellant had proved beyond reasonable doubt all the ingredients of the offence.* F

GROUND 6

The court misdirected itself when it held that the appellant failed to discredit the defence of self-defence of the respondent.

Particulars of Error G

i. *There were sufficient facts before the court to establish the fact that the respondent who had earlier been involved in fracas with the deceased a day earlier premeditated the crime.*

ii. *The testimony of the respondent alone, without more, cannot sustain the defence of self-defence.* H

iii. *The respondent's testimony in court was that the deceased hit him twice on the shoulder with a stick, and in order to avoid being hit with a stick a third time, he stabbed the deceased with a knife.*

iv. *The alleged self-defence was neither proportionate nor com-*

mensurate to the alleged act of the deceased.

v. The respondent knew that the probable consequence of his act was the likelihood of the death of the deceased by stabbing the deceased with a knife.

vi. The respondent had no reasonable ground to stab the deceased with a knife

vii. From the evidence of PW2, it was apparent that the respondent stabbed the deceased with a knife unprovoked.

vii. The appellant had established all the essential ingredient of the offence charged satisfactorily and as such the charge is proved beyond reasonable doubt.

ix. There was no material doubt created in the mind of the court to warrant the discharge and acquittal of the respondent.

x. The evidence of the PW2 already displaced the evidence of respondent that he was not the aggressor."

Briefly the objector contends that close examination of all the 6 grounds of appeal will reveal that they are all grounds of facts and or mixed law and facts for which the failure of the appellant to obtain leave of court to appeal renders the entire appeal incurably bad and thereby renders the appeal incompetent, with the result that this court lacks jurisdiction to adjudicate on the said appeal.

The stance of the objector has been vehemently rejected by the appellant in responding and is submitted that the grounds are of law and the lack of leave prior to the initiation of the appeal was not fatal.

In this delicate manoeuvring as to whether the grounds of appeal herein are one of law simpliciter for which there is no necessity for leave before commencement or they are of facts and or mixed law and facts, I shall call in aid the Court of Appeal case of:

"The courts have very often confessed the difficulty *in* distinguished a ground of law from a ground of mixed law and fact, Ogbechie v Onochie (1986) 1 NWLR (Pt. 70) 370 (where Eso JSC approvingly adopted the scintillating expose on the subject by C.T. Emery and Professor B. Smythe in their article titled, "*Error of Law In Administrative Law*", in Law Quarterly Review Vol. 100 (October 1984); UBA Ltd v Stahlbau GmbH & Co. (1989) 3 NWLR (Pt. 110) 374, 391 - 392; Obatoyinbo v Oshataba (1996) 5 NWLR (Pt. 450) 531, 548; MDPDT v Okonkwo (2001) 3 KLR (Pt. 117) 739 etc.

This handicap, notwithstanding, they have ingeniously fashioned out formulae for navigating through the nuances of the characterization of the grounds. The first formula aims at facilitating the ascertainment of what constitutes a ground of appeal. It comes to this: a court has a duty to do a thorough examination of the grounds of appeal filed. B

The main purpose of the examination will be to find out whether if from the grounds of appeal, it is evidence that the lower court misunderstood of law or whether the said court misapplied the law to the facts which are already proved or admitted. In any of these two instances, the ground will qualify as a ground of law. C

On the other hand, if the ground complains of the manner in which the lower court evaluated the facts before applying the law, the ground is of mixed law and fact. The determination of grounds of fact is much easier. Put in very simply terms, this formula simply means that it is the essence of the ground; the main grouse: that is the reality of the complaint embedded in that name that determines what any particular ground involves, *Abidoeye v Alawode (2001) 3 KLR (Pt. 118) 917, 919; NEPA v Eze (2001) 3 NWLR (Pt. 709) 606; Ezeobi v Abang (2000) 9 NWLR (Pt. 672) 230; Ojukwu v Kaine (2000) 15 NWLR (Pt. 691) 516*. In effect, it is neither its cognomen nor its designation as Error of Law” that determines the essence of a ground of appeal, *Abidoeye v Alawode (supra) 927; UBA Ltd v Stahlbau GmbH & Co (1989) 3 NWLR (110) 374, 377; Ojemen v Momodu (1983) 3 SC 173, per Nweze, JCA (as he then was) pp 25 - 26*. D
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It is to be stated that the grounds of appeal involved in this case should be read together with the particulars in order to determine whether they are of law or fact regardless of the fact that counsel christened Grounds 1, 2, 5, and 6 “Misdirection”. We refer to *Obatoyinbo v Oshataba (1996) 5 NWLR (Pt. 450) 531 @ 549 para A*, where Ogundare JSC stated thus: G

“In construing a ground of appeal complained, the ground as formulated and its particulars are to be considered together.”

Another way to chart the course is shown in this court’s decision: H

Metal Construction (WA) Ltd. v. Migliore (1990) 1 NWLR (Pt. 126) 299 @ 312 paras F- G where Karibi-whyte, JSC held that:

“The third meaning is in respect of those questions which are

committed to and answered by the authority which normally answers questions of law only. Thus, any question which is within the province of the Judge instead of the Jury is called question of law, even though in actual sense it is a question of fact."

Another guide in the determination of which way to go as to labelling the ground of appeal, one of law or otherwise is found in this court's decision in:

Nwadike v Ibekwe (1987) 4 NWLR (Pt. 67) 718 @ 744 para A - D, wherein the Supreme Court held as follows:

- (i) *It is an error in law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion or applied some wrong standard or proof or, if although applying the correct criteria, it gave a wrong weight to one or more of the relevant factors: See O'Kelly v Trust House Forte P.I. C. (1983) 3 ALL ER at P. 468.*
- (v) *If the tribunal errs in its conclusion (that is, in applying the law to the facts) in a case where this process requires the skill of a trained lawyer, it is error in law".*

From these judicial authorities applied to the grounds with the particulars which must be read together to properly situate the category of the grounds of appeal.

In a nutshell the stand of the respondent/objector is that the appeal grounded on complaint of facts or mixed law and facts which deserve leave to ignite them as an appeal, the absence of that leave therefore has vitiated the process and thereby robbed the appeal of the competence for which this court cannot adjudicate. He relied on Section 233(2), (3) and (6) of the 1999 Constitution. That this appeal is not one as of right for which there *is* no necessity for leave firstly sought for and obtained and so this appeal should be struck out as all the *six* grounds are so affected.

The contrary position of the appellant is that what is sought in this appeal is whether the threshold of proof or standard of proof had been attained and that is a matter of the application of law which might involve a consideration of facts but thereby remained strictly within the jurisdiction of the judge to state it as it is which is that of law. That whether the grounds were of fact or mixed law and fact, the interest of justice dictates that the appeal be heard with or without leave.

Section 233 (2) (a) of the 1999 Constitution has stipulated as

follows:

“(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases:

(a) Where the ground of appeal involves questions of law alone I decisions in any civil or criminal proceedings before the Court of Appeal”

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The above provision has been severally given effect to in interpretation even by this court to mean that where the ground of appeal involves questions not of law alone, leave is mandatorily required and in the absence of such leave the appeal lacks competence and liable to be struck out. See B. A. S. F. Nig. Ltd v Faith Enterprises Ltd (2010) 4 NWLR (Pt. 1183) 104 at 128.

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It is therefore that where as in this instance where taking the particulars alongside the grounds, it can be seen that grounds 2, 3, 4, 5 and 6 have made suggestions of an invitation to the court to investigate the existence of certain facts, thereby raising matters that are clearly not simply that of law. Then they are facts or mixed law and facts thereby demanding that the needful ought to have been done which is the leave to be asked for and obtained from court before the appeal can ignited. See Kashadadi v Noma (2997) 14 NWLR (Pt. E 1052) 510 at 522 - 523 per Tobi JSC; FBN Plc v T. S. A. Ind. Ltd (2010) 15 NWLR (Pt. 1216) 247 at 291- 292.

D

This appeal would have been saved by Ground 1 ‘which clearly is one of pure law which complained of the failure to prove the case beyond reasonable doubt. This Ground 1 needs no leave to validate it, however in crafting the issues for determination, the appellant afflicted that ground with getting it mixed up with Grounds 3, 4, and 5 which were already affected by the fundamental vice and so even the otherwise safety *valve* was eroded and has thereby gone down. See The State v Adili (1989) 20 NSCC (Pt. 1) 427 at 444.

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The situation in the circumstances as shown above and from the better articulated lead judgment show there is no saving grace and so the grounds of appeal are incompetent, leave not having been obtained before and the one ground that would have alone sustained the appeal having been sustained by the incompetent grounds lumped with it in the formulation of issues. Therefore, I too strike out this appeal as lacking in competence as I abide by the consequential orders made.

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MUHAMMAD JSC

I had a preview of the lead judgment of my learned brother
Amiru Sanusi JSC, just delivered. I agree entirely with the reasons
contained in the lead judgment which I adopt as mine to strike out
B the incompetent appeal.

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