# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC361/2001

**Petitioner:** Nigerian Air Force
And
**Respondent:** Ex-Squadron Leader A. Obiosa

Date Delivered: 2003-01-31

**Judge(s):** Idris Legbo Kutigi, Uthman Mohammed, Umaru Atu Kalgo, Akintola Olufemi Ejiwunmi, Niki Tobi

## Judgment Delivered

This appeal is against the Judgment of the court below, (per Oguntade, Galadima and Aderemi, JJCA). Before that court, the appellant had appealed against his conviction by the General Court Martial. It is manifest from the records that the appellant was convicted upon the following charges and sentenced accordingly. They read thus. -

\"(1) Making of false negotiable instrument contrary to section 112 (a) of the Armed Forces Decree. 1993 in that he at Lagos on or about 26 Mar; 96 forged CBN Cheque No.00003.

(2) Forgery contrary to section 112(a ) of the Aimed Forces Decree, 1993 in that he at Lagos on or about 27 Mar., 96 forged CBN Cheque No. 00004.

(3) Forgery contrary to section 112 (a) of the Armed Forces Decree, 1993 in that he at Lagos on or about 28 Mar., 96 forged CBN Cheque No. 00005.

(4) Making of forged negotiable instrument contrary to section 112 (a) of the Armed Forces Decree. 1993 in that he at Lagos on or about 29 Mar., 96 forced CBN Cheque No.00006.

(5) Uttering a forced cheque contrary to section 112 (a) of \'he Armed Forces Decree. 1993 in that he at Lagos on or about 28 Mar., 96 fraudulently or knowingly uttered a forced CBN Cheque No.00003.

(6) Uttering a forged cheque contrary to section 112 (a) of the Armed Forces Decree, 1993 in that he at Lagos on or about 27 Mar. 96 fraudulently or knowingly uttered forced CBN Cheque No. 00004.

(7) Uttering a forged cheque contrary to section 112 (a) of Armed Forces Decree, 1993 in that he at Lagos on or about 28 Mar., 96 fraudulently or knowingly uttered forged CBN Cheque No.00005.

(8) Uttering a forge d cheque contrary to section 112(a) of Armed Forces Decree, 1993 in that he at Lagos on or about 29 Mar., 96 fraudulently or knowingly uttered forged CDN\' Cheque No. 00006.

(9) Stealing contrary to section 66 (a) of\' the Armed Forces Decree, 1993 in that he at Lagos on or about 27 Mar., 96 stole the sum of\' Nl6m property of\' the Nigerian Air Force.

(10) Stealing con tiny\' to section 66 (a) of the Armed Forces Decree, 1993 in that he at Lagos on or about 27 Mar., 96 stole the sum of NI 7m property of the Nigerian AirForce.

(11) Stealing contrary to section 66 (a) of the Armed Forces Decree, 1993 in that he at Lagos on or about 28 Mar., 96 stole the sum of N15m property of\' the Nigerian AirForce.

(12) Stealing contrary to section 66 (a) Of the Armed Forces Decree, 1 993 in that he Lit Lagos on or about 27 Mar., 96 stole the sum of N4, 300,000 property of the Nigerian Air Force.

(13) Receiving stolen property contrary to Section 66 (a) of the Armed Forces Decree, 1993 in that he at Lagos on or about 3 April, 96 received part of the N2.8m stolen by Wg. Cdr. PE. Iyen knowing or having reason to believe same to have been stolen.

(14) Disobedience to standing order contrary to Section 57 (l) of the Armed Forces Decree, 1993 in that he at Lagos in April. 96, contravened Administrative Instruction S/ No 3 dated Feb., 96 which Order was known to him or which he might reasonably be expected to know by engaging in private business.\"

Now, having set down as above the charges for which he was convicted, it is necessary to refer to the charges for which he was first arraigned before the General Court Martial, which from henceforth shall be referred to simply as \"GCM\". This is because the amendment of the charge from a five count one to a 14-count charge became an issue before the court below. I think, it is therefore convenient at this stage to give in brief background facts that led to this appeal.

In April 1996, the Chief of\' Air Staff, Air Vice Marshall Femi John Femi was removed from that Office by the then Federal Military Government and was replaced by AVM Nsikak Eduok. At the time when to changes occurred, one Wing Commander PE. Iyen was the Director of Finance and Accounting, and would no\\v be referred to simply as (DFA). It would appear, following his assumption of officer as the Chief of Air Staff. AVMN. Eduok raised the allegation that some Air Force Officers shared between themselves the sum of NI0 million, and that another sum of N48 million was hastily withdrawn from OPS Harmony Account with Central Bank of Nigeria. That sum was allegedly withdrawn for the renovation of the guesthouse of the Chief of Air Staff and also the Air House.

The Chief of Air Staff therefore, then set up a panel to investigate the allegation. As a result, the respondent and eight others were jointly tried, though each accused had his own separate charges levelled against him. At his initial arraignment, the respondent had against him a six-count charge of stealing, receiving stolen property, aiding and abetting service offence, scandalous conduct and disobedience to standing order. In the meantime. the respondent bud on the 27th April, 1996 been discharged from the Air Force, see Ex. 66A to that effect, And on the 6th of August, 1996, the six-count charge was amended to a 14-count charge as stated above. Though objection was raised to the new set of charges, it as overruled and the respondent pleaded \'not guilty to each of them. Also the objection raised to jurisdiction of the GCM to try the respondent was raised and overruled. The GCM, after all these preliminaries, then went on to try the respondent upon the charges as laid. The case for the prosecution is that the respondent forged and uttered tour CBN cheques Nos. 00003, 00004, 00005 and 00006 that amounted to the sum of N48 million and that the proceeds of the said cheques were stolen thereafter by the respondent. It was also part of the case for the prosecution that he also stole the sum of N4.3million in similar circumstances, and that he also received part of another N2.8 million that was also stolen, and that in the process disobeyed standing orders. In support of its case, the prosecution called 14 witnesses in the course of which 70 exhibits were admitted in evidence.

On the other hand, the case for the defence is that the Chief of Air Staff, AVM Femi John Femi who keeps the cheque book, authorised the withdrawal of the N48 million from the OPS Harmony Account with the Central Bank of Nigeria. That the cheques were not forged as they were co-signed by the Chief of Air Staff\'s nominee and he is known only to the former Chief of Air Staff, AVM Femi John Femi. It is also part of his case that the Chief of Air Staff (to be referred to from henceforth as CAS) instructed him to give the money to one Mr. Timi Alaibe at Societe General Bank for settlement of bills who thereafter made returns to AVM Femi John Femi. He also claimed that as per the instructions of AVM Them John Femi, he duly sent the returns to HQ, NAF. The respondent also denied that he received the sum of N2.8 million allegedly stolen from Wing Commander P. Iyen and added also, that he had never engaged in any other profession or business since he was in the Nigerian Air Force. He was not also aware of the NAF Administrative Instruction 3/96.

At the conclusion of the hearing of\' the evidence adduced by the parties, GCM found the respondent guilty as the GCM time to the conclusion that all the charges against the respondent were proved beyond reasonable doubt. The GCM thereafter pronounced sentence upon the respondent as follows:

'Sqn Ldr Obiosa, from the N10 million you got N2.8 million. You stole N48 million. On the renovation of the Air House and the CAS's Guest House, you stole N4.3 million. Sub-total, N55,100,000.00 million. Interest is N82,650,000.00

million. Your restitutions to the Air Force is N137,750,000.00.'

He was also ordered to serve prison sentences annotated thus:

\"Charge I, making of false negotiable instruments, 21years imprisonment.

Charge 2, Forgery 21 years imprisonment. Armed Forces Decree 66.

Charge 3. Forgery, 21 years imprisonment.

Charge 4, making of false negotiable instruments, 21years imprisonment.

Charge 5, Uttering, 21 years imprisonment.

Charge 6, Uttering, 21 years imprisonment.

Charge 7, Uttering, 21 years imprisonment.

Charge 8, Uttering, 21 years imprisonment.

Charge 9, Stealing, 2 years imprisonment.

Charge 10, Stealing, 2 years imprisonment.

Charge 11, Stealing, 2 years imprisonment.

Charge 12, Stealing, 2 years imprisonment.

Charge 13, Receiving, 2 years imprisonment and

Charge 14, Illegal business, 2 years imprisonment.

There is no recommendation for mercy. You will serve 69 years. Charges 1, 2, 3, 9, 13 and 14 will run consecutively, all other charges concurrently.\"

As the respondent was dissatisfied with the judgment and orders of the GCM, he appealed to the Court of Appeal. Upon the grounds of appeal so filed, the following issues were raised for the determination of the appeal.

\"(i) Whether by virtue of section 131(2) (c) of the Armed Forces Decree No.105 of 1993 (as Amended), the proceedings of the General Court Martial is not a nullity in view of the convening order signed by Air Commodore F.O Ajobena purportedly acting on behalf of the Chief of Air Staff on verbal instructions.

(ii) Whether by the first arraignment on 26th July, 1996 of which the whole charges were later withdrawn and struck out and another arraignment of the appellant made on 6th August, 1 996 on new charges, the General Court Martial did not lack jurisdiction to try the appellant in view of section 169(2) of Decree No 105 of 1993.

(iii) Whether the former Chief of Air Staff, AVN Femi John Femi mentioned by the appellant as one who gave him instructions which he earned out and made returns to is not a vital material witness that would ha\\e affected the decision of the General Court Martial.

(iv) Whether the General Court Martial was right in the circumstances of this case to have called a witness (CWI) suo motu at the close of the case for the defence without allowing the appellant to call a witness referred to by the CW 1 in rebuttal.

(v) Whether the General Court Martial was ri2ht to take judicial notice of Nigeria Air Force Administrative Instruction 3/96.

(vi) Whether there was proper basis for the order of restitution for N137,750,000.00 and auction of the appellant\'s properties.

(vii) Whether in the whole circumstances of the case and the evidence adduced the guilt of the appellant was proved beyond all reasonable doubts for the various offences.\"

After due consideration of the issues raised on behalf of the appellant, the court below upheld the appeal. This is because the court below formed the view that only the holders of the offices listed under section 131 (2) of the Armed Forces Decree (AFD) No 105 of 1993 could issue a convening order for a GCM, and that the power granted by the said section cannot be delegated. The court below therefore held that the GCM. which flied and convicted the respondent was not properly convened, and the GCM therefore lacked the requisite jurisdiction to try the respondent.

Secondly, the court below held that the GCM, having struck out the first charge levelled against the respondent following its withdrawal by the prosecution, the GCM no longer had jurisdiction to try the respondent, having regard to the provisions of section 169 (2) of the Armed Forces Decree. Therefore it was held that the trial and conviction of the respondent was a nullity.

Thirdly, the court below after the examination of the evidence led in support of the charges laid against the respondent, came to the conclusion that the prosecution failed to establish each of the 14 charges beyond reasonable doubt. The court below therefore said that it would have discharged and acquitted the appellant even if it had found that the GCM had jurisdiction to try the appellant.

In conclusion, the court below set aside the judgment of GCM and also declared as nullities all the orders made by the GCM, and accordingly discharged and acquitted the respondent.

Now, the appellant being very dissatisfied with the judgment and orders of the court below then appealed to this court. Following the grounds of appeal filed, pursuant to the appeal to this court, briefs of argument were filed and exchanged. For the appellant, the issues identified for the determination of the appeal are: -

\"1. Whether the General Court Martial had been properly convened and had the jurisdiction to try the respondent.

2. Whether the responsibility of assisting the respondent\'s defence by calling a witness rested on the prosecution or on the accused.

3. Whether or not the prosecution had established a case of forgery and stealing against the respondent.

4. Whether or not the evidence led by the prosecution in respect of the 14th count bad been sufficient to ground a conviction.

5. Whether the Court of Appeal was right in setting aside the order requiring the respondent for N137.750, 000.00 as restitution.\"

The respondent in the brief filed on his behalf by his learned counsel also set down issues for the determination of the appeal the issues are clearly similar to those identified in the appellant's brief, I do not consider it necessary to set them down in this judgment. The merit of the appeal will be considered in accordance will issues identified above.

The first issue raised by the appellant is concerned with, whether the GCM had been properly convened and had the jurisdiction to try the respondent. The submission made for the appellant in its brief and by its learned counsel before us is based on the view that the arguments and findings of the learned justices of the court below with regard to the

interpretations given to the provisions of 13 1 of the Armed Forces Decree are basically erroneous. It is then argued for the appellant that the provisions of section 131(3) of the Armed Forces Decree, clearly invests the delegation of the power to convene a GCM by a person in whom that power resides. And it is therefore argued that as there is no doubt that the Chief of Air Staff is an appropriate superior authority, and so also was there any doubt that Air Commodore F. O. Ajobena was a Senior Officer of a detached unit, establishment or squadron. Upon that premise and having regard to the provisions of section 128(i)(b) of the Armed Forces Decree, it is the submission of learned counsel for the appellant that Air Commodore F. O. Ajobena being a senior officer of a detachment unit, establishment or squadron, i.e Director of Personnel Branch, one the 4 branches that constitute the headquarters of the Nigerian Air Force, could properly convene a General Court Martial. In any event, argued learned counsel for appellant, the Chief of Air Staff properly designated Air Commodore F.O. Ajobena to convene the GCM in compliance with section 131 (3) of the Armed Forces Decree. The special circumstances that existed then were that, as the accused who was retired on the 27th April. 1996 had to be tried within three months of his retirement time then became of the essence. In such circumstances, learned counsel contended, the GCM had to be convened within the time frame of sections 168 and 169 of the Armed Forces Decree.

The second leg of the complaint of the appellant in respect of this issue is against the holding of the Court of Appeal, that: - \"On 6-8-96, when new counts were brought against the appellant he had ceased to be subject to service law under section 169 (2) above. The GCM no longer had jurisdiction to try the appellant as at 6-8-96. The trial and conviction of the appellant was therefore a nullity on this score.\"

Against this finding of the court below it is the contention of the appellant that the reasoning of that court was based on this erroneous misconception. This is because the court wrongly held the view that the substituted charges brought on the 6th of August, 1996 constituted a fresh arraignment of the respondent. The case made for the appellant is that the respondent was arraigned on the 26th of July, 1996 and his plea was taken on that date. That date was when his trial commenced and cited Efiom v. The State (1995) 1 NWLR (Pt. 373) 507 at 532 & 582 as support for that proposition. Appellant then further argued that the amended charges brought against the respondent pursuant to Section 162 of the Criminal Procedure Act did not mean that the prosecution of the respondent was commenced when the amended charges were brought against him. In support of that contention, the case of Attah v. The State (1993) 7NWLR (Pt. 305) 257, where the provisions of sections 162 to 165 of the CPA were construed by this count was cited. The respondent in his brief also formulated his argument in respect of issue tin two parts.

The first part is with regard to whether the GCM admitted as exhibit \"At\" was properly constituted having regard to the fact that it was apparently convened by Air Commodore F.O. Ajobena who signed it. In the view of learned counsel for the respondent, the GCM was not properly convened. He contended that ex \"Al\", quite clearly shows that the GCM was convened under by virtue of section l3l (2)(c) of the Armed Forces Decree No. 105 of 1993 (as amended). And having regard to its provisions, Air Commodore F.O. Ajobena did not fall into the class of those enumerated therein to convene a GCM. It is therefore submitted for the respondent that having expressly stipulated those to convene a General Court Martial, the Armed Forces Decree has by implication excluded any other person. And cited in support of that proposition of Gregory Obi Ude v. Clement Nwara and Anor. (1993) 2 NWLR (Pt 278) 638 at 661.

It is also the contention of the respondent that as the convening order was under s.13 1(2), the order must be signed by the Chief of Air Staff himself. He cannot, as the case in hand, delegate his powers in that regard, particularly where the power is statutory in nature. See Chief L. H. Oikherhe v. Chief Joseph M. Inwanfero (1997) 7 NWLR (Pt. 512) 226 at 247. And for the proposition that where persons are charged with statutory duty of depriving others of their liberty, such persons must observe strictly and scrupulously to the forms and the rules of the enabling statute. Reference was made to the following authorities Saidu Garba v. Federal Civil Service Commission (1989) 1 NWLR (Pt. 71) 449 at 477; Halsbury Laws of England Volume 10 at paragraph 720; Dr. Tunde Bamgboye v. University of llorin & Anor; (1999) 10 N\\YLR (Pt. 622) 290 at 329. It was also argued for the respondent in his brief, that the argument in the appellant\'s brief that section 131 (3) of the Armed Forces Decree was applicable in the circumstances of this case be rejected. In the view of the respondent, the combined provisions of sections 128 and 131 of the Armed Forces Decree cannot be employed to the GCM as convened in this case.

With regard to the second part of the argument in respect of issue 1, it is submitted that this court should hold that by the

amended charges filed against the respondent sequel to the withdrawal of first charges filed against him, the tidal of the respondent corn when the amended charges were flied against the respondent which he pleaded, in support of his several submissions, his counsel in his brief, referred to Godspower Asakitikpi v. The State (1993) 5 NWLR (Pt. 296) 641 at 652; Blacks Law Dictionary p.109 and at p.1423; sections 75 and 180 of the Criminal Procedure Act; Madukolu & Ors.v. Nkemdilim
(1962) All NLR (Pt. 4) 2 SCNLR 341, 587 at 392; Attah v. The State (1993) 1 NWLR\"305) 257; Awobotu v. The State (1976)5 SC 49 at p.70. It is submitted for the respondent that if as it has been argued, the commenced with the trial of the respondent on the 6th of 1996 by virtue of the amended charge, then the GCM jurisdiction to try the respondent. This is by virtue of (2) of the Armed Forces Decree, 1993, which stipulates of the respondent must commence within 3 months ft discharge from the Armed Forces.

In view of the argument proffered by learned counsel for the parties in respect of the first part of issue 1, it is manifest that to answer this part of the argument, it is necessary to consider the meaning and effect of the following sections of the Armed Forces Decree 1993. These are sections 128 and 131.

\"Section 128

(1) The following persons may act as appropriate superior officer in relation to a person charged with an offence, that is: -

(a) the commanding officer; and

(b) any officer of the rank of Brigadier or above or officer of corresponding rank or those directed to so act under whose command the person is for the time.

(2) the President may make rules rule for purpose of this section and those rules may confer on the appropriate superior authority power to delegate his functions in such cases and to such extent as may he specified in the rules to officers of a class so specified.

Courts Martial: General Provisions

129. There shall be, for the purposes carrying out the provisions of this Decree, two types of Courts Martial, that is

(a) a General Court of a president and not less than four members, a waiting, member, a liaison officer and a Judge Advocate.

(b) a special Court Martial, consisting of a president and not less than two members, a liaison officer and a Judge Advocate.

130 (1) A General Court Martial shall, subject to the provisions of this Decree, try a person subject to service law under this Decree for an offence which. under this Decree, is triable by a Court Martial and award for the offence a punishment authorised by this Decree for that offence except that where the Court Martial consists of less than seven members it shall not impose a sentence of death.

(2) A General Court Martial shall also have power to try a person subject to service law under this Decree who by law of war is subject to trial by a military tribunal and may adjudge a punishment authorised by law of war or armed conflict.

(3) A special Court Martial shall have the powers of General Court Martial, except that where the Court Martial consists of only two members it shall not impose a sentence that exceeds imprisonment for a term of one year or of death.

131. (1) Subject to the following provisions of this section, a Court Martial may be convened by; -

(a) the President; or

(b) the Chief of Defence Staff; or

(c) Service Chiefs; or

(d) a General Officer Commanding, a Brigadier, Colonel or Lieutenant Colonel or their corresponding ranks having command of a body of troops or establishments; or

(e) an officer for the time being acting in place of those officers.

(2) A General Court Martial may be convened bv: -

(a) the President; or

(b) the Chief of Defence Staff; or

(c) the Service Chiefs; or

(d) a General Officer Commanding or corresponding command; or

(e) a Brigade Commander or corresponding command.

(3) a Special Court Martial may be convened by; -

(a) a person who may convene a General Court Martial; or

(b) the commanding officer of a battalion or of a corresponding unit in the Armed Forces.

3. The senior officer of a detached unit, establishment or squadron may be authorised by the appropriate superior authority to order a Court Martial in special circumstances.

It is clear from a careful reading of sections 129 and 130 of the Armed Forces Decree that it is envisaged that erring serving officers of the armed forces are subject to trial by either a General Court Martial or a Special Court Martial. The General Court Martial, it is stipulated shall consist of a president and not less than four members, awaiting member, a liaison officer and a Judge Advocate. Whereas a Special Court Martial, shall also be constituted by a president, and not less than two members, a waiting member, a liaison officer and a Judge Advocate. And by section 133 (3), a special court martial shall also have the power of a general court martial, except that where the court martial consists of only two members, it shall not impose a sentence that exceeds imprisonment for a term of one year or of death. It is also manifest from the provisions of section 131(2) of the Armed Forces Decree, that the following namely, (a) the President or (b) the Chief of Defence Staff; or (c) Service Chiefs or (d) a General Officer Commanding, a Brigadier, Colonel or Lieutenant Colonel or their corresponding ranks having command of a body of troops or establishment or (e) an officer for the time being acting in place of these officers, may convene a Court Martial.

But, with regard to who may convene a General Court Martial, and with which we are concerned principally in this appeal, the law provides by virtue of section 131(2) that the following officers may convene it. These are either (a) the President, (b) the Chief of Defence Staff or (c) the Service Chiefs, or (d) a General Officer Commanding or (e) a Brigade Commander or corresponding command. For completeness, I need to add that the person who may convene a General Court Martial may also convene a Special Court Martial and in addition, so also the commanding officer of a battalion or of a corresponding unit in the Armed Forces. it is also provided that by virtue of section 131(3) sic, the senior officer of a detached unit, establishment or squadron may be authorised by the appropriated superior authority to order a Court Martial in special circumstances.

Now, the question that has been agitated by learned counsel for the respondent is that the General Court Martial lacked the jurisdiction to try the respondent as the proper officer detailed under section 131(2) of the Armed Forces Decree as annotated above. It is also argued for the respondent that the law did not provide for the delegation of the power to convene the General Court Martial. Though this argument found favour with the court below, the appellant has argued to the contrary. As the arguments of both parties have been set down in some detail already, I do not need to repeat them here. But in order to appreciate the nature of their respective contention, it is desirable to reproduce the convening order. The convening order exh. \"Al\" which was signed by Air Commodore F.O. Ajobena reads thus: -

\"In pursuance of the powers conferred on me as Chief of the Air Staff, Nigeria Air Force, by section 131(2) (c) of the Armed Forces Decree No. 105 of 1993 (as amended), I AVM NE Eduok (NAF/340), hereby order that a General Court Martial as composed in paragraph 2 below, Assemble at joint Officers Mess, Ikeja on 26th July, 1996 to try the officers named in paragraph 6 below and any other accused person brought before the court\"

It is, as I have already stated above, the convening order refered to above, was declared illegal by the court below and the respondent is also of the view that that holding of the court below be upheld. ( the other hand, is the contention of the appellant that the convening order was validly made for the following reasons viz, that F. O Ajobena who signed the order was entitled so to do because he was validly delegated by A.VM. Eduok so to do, or that he was in his own right able to sign the convening order in that the position occupied at the time fell within the category of officers who could convene a Special Court Martial. and was properly so commissioned to do so. It was also contended for the appellant that the circumstances in this case were the fact that time was of the essence for the valid trial of the respondent by the General Court Martial, in view of the provisions of sections 168 and 169 of the Armed F Decree.

I must point out that the case was concerned with whether General Court Martial was properly convened. I do not therefore consider that it is helpful to refer to how a Special Court Martial could be convened and by whom. And on this point I need not say anymore. However, what is relevant for consideration in this appeal is whether Air Commodore F.O. Ajobena was properly delegated to convene the General Court Martial that tried the respondent. It is clear that following the convening of the General Court Martial, and it had started sitting the Chief of Air Staff AVM N.E. Eduok authorised the holding of the General Court Martial with this letter admitted in evidence with exhibit Al. It reads: -

\"Authority to Sign The Convening Order For The Trial Of

1. I write to confirm that I had duly authorised Air Commodore F.O. Ajobena (Director of Personnel HQ. NAF) to sign the Convening Order, Charge sheets and other Documents relating to the above Court Martial.

2. The directives are verbal and perfectly normal and I hereby confirm that.\"

It is the argument of the respondent however, that this authority cannot, given the circumstances give validity to the convening order that was wrongly signed by Air Commodore F. O. Ajobena. Two reasons were advanced for this contention. The first is that the letter of authority written by AVMN.E. Eduok and dated 6th August, 1996 was sent to the General Court Martial two days after objection was raised to its jurisdiction and 13 days after the General Court Martial was convened. The second is that as there is no provision for the delegation of the authority to convene a General Court Martial in the Armed Forces Decree, the delegation to convene it given to Air Commodore P.O. Ajobena was illegal in the circumstances. The earlier reason would first be considered. It is clear that the letter of authority was sent to the Genera Court Martial 13 days after\' it started its work. In the determination of the question raised as to the validity of the General Court Martial, I have carefully considered the submission made on behalf of the respondent by his learned counsel, and the authorities cited in support thereof. It is however my view the submission so made is of no assistance in the resolution of the question raised. Based on the assumption that the General Court Martial was improperly constituted: in my humble view, the determination of the question depends on whether the sending of the letter of the authority to the General Court Martial 13 days after commenced its sitting gave validity to it, and if it did give validity to it, can it then be said that the respondent suffered a miscarriage of justice in the circumstances.

The second reason will now be considered. This is, that there is no to delegate the power to convene a General Court

Martial. In my view, this question has to be considered in the context of the provisions of section 286 of the Armed Forces Decree which reads:

\"S.286. An order or a determination by an officer of the Armed Forces or service authority may, unless otherwise prescribed by rules or regulations made under this Decree, be signified under the hand of an officer authorised that behalf, and an instrument signifying the order or determination and purporting to be signed by an officer stated therein to be so authorised shall, unless the contrary is proved, be accepted by all courts and persons as sufficient evidence accordingly.\"

(Italicising mine)

A careful reading of the above provisions of 8.286 of Armed Decree appear to have provisions for an officer of the Armed to delegate his orders under the Decree, provided such orders are not prescribed by rules or regulations made under the Decree. There are however two conditions to be fulfilled. There are (1) that the order or a determination by an officer of the Armed Forces or service authority must be signified under the hand of an officer authorised in that behalf; (2) that an instrument signifying the order or determination must be purportedly signed by an officer stated therein. It would appear that with these conditions satisfied, and there are no rules or regulations prescribing the issuance of such orders, then the orders so made, unless the contrary is proved, become acceptable by all courts and persons as sufficient evidence accordingly.

The letter of authority would now be considered in the light of the above provisions of 5. 286 of the Armed Forces Decree. From the evidence on record, it is manifest that AVMN N. E. Eduok, the Chief of Air Staff instructed Air Commodore F. O. Ajobena to convene the General Court Martial, and it was convened accordingly. Then after the General Court Martial had commenced sitting, the Chief of Air Staff issued the Letter of Authority signed by him confirming his earlier instruction or order he gave to Air Commodore F.O. Ajobena. It is also clear that the contents of the said Letter of Authority are in accordance with his earlier instruction to Air Commodore F. O. Ajobena. In the absence of any rules or regulations in the Decree that the Chief of Air Staff AVMN. E. Eduok can not signify this order to Air Commodore Ajobena to convene the General Court Martial, any Court as provided bys. 286 (supra), be taken as properly issued by the said AVM Eduok moreso, where in the instant case, there is no contrary evidence to challenge order so made.

From all I have said above, it is my firm resolve that the Letter of Authority was properly issued by the officer who had the right and authority to order Air Commodore F.O. Ajobena to convene the General Court Martial and which was duly convened accordingly.\' Furthermore, it has been for the respondent to show that he suffered a miscarriage of justice on account of how the General Court Martial was convened. This he has not done and I do not think that in all the circumstances, it can be said that his trial was adversely affected as a result. It is also my view that the trial and conviction of the appellant cannot be declared as null and void as urged in the respondent\'s brief. What now remains to be considered is whether the General Court Martial lacked jurisdiction to try the respondent upon the new charge filed against him.

The submission made for the respondent in this regard must he viewed against the provisions of section 169(2) of the Aimed Forces Decree which provides, thus: -

\"A person shall not be triable by virtue of sub-section (1) of section 168 of this Decree unless his trial is begun within three months after he ceases to be subject to service law under this \'Decree or the trial is for civil offence committed outside Nigeria and the Attorney-General of the Federation consent to the trial, but this sub-section shall not apply to offences of muting, failure to suppress muting and secession under this Decree.\"

The facts from the printed record disclose that the respondent was retired with effect from 27th April, 1996, the respondent was first charged on the 26th July. 1996, but the charges were withdrawn following his arraignment. They were struck out accordingly by the President of the General Court Martial. After the charges were withdrawn, fresh charges were brought the against the respondent. Upon the premise that the original charges were so withdrawn by the

appellant, it is argued for the respondent that tile General Court Martial no longer had jurisdiction to try the respondent for any offence having regard to the provisions of s. 169 (2) of the Armed Forces Decree No. 105 of 1993, and which reads:-

\"A person shall not be triable by virtue of subsection (1) of section 168 of this Decree unless this trial is begun within three months after ceases to be subject to service law under this Decree or the or trial is for civil offence committed outside Nigeria and the Attorney General of the Federation consent to the trial, but this subsection shall not apply to offences of mutiny.\"

Thus by the underground portion of s. 169 (2) and of relevance to the case in hand, a person shall not be tried unless his trial is begun within three months after he ceases to be subject to service law. Hence it is argued for the argued for the respondent that, as he was retired on the 27th of April, 1996, he must be tried within three months from that date. Therefore, when he was charged on the 26th July, 1996 and his plea taken, his trial was commenced properly within the provisions of s. 169(2) of Armed Forces Decree. However when was withdrawn and struck out, the new charges in respect of' which the respondent was tried and convicted was not proper. This is because, argued the respondent, the date of that new charge, i.e. 6th August, 1996, fell outside the tree months within which he could be properly charged for any offence by the appellant viz. by virtue of s.169 (2) of the Armed Forces Decree (supra). It is therefore submitted for the respondent that the court blow was right to have declared\' that the respondent was wrongly tried and convicted by the General Court Martial. In support of the submission for the respondent, reference was made to Godpower Asakitikpi v. The State (1993) 5 NWLR (Pt.296) 641 at 652. The appellant, both in the brief filed on its behalf and in the course of the submission of its learned counsel invited the court to hold that the court below was wrong in its approach and conclusion reached with regard to the trial and conviction of the respondent. The appellant\'s contention is that the respondent was properly charged and convicted within the provisions of s.169 (2) of the Armed Forces Decree. In support of this contention, we were referred to the following authorities; Effiom v. The State (1995) 1 NWLR (Pt. 373) 507 at 532 & 582; Attah v. The State (1993) 7 NWLR (Pt. 305) 257 at 279. It is also manifest from the brief filed for the respondent that it was sought to distinguish the Attah's case (supra) from the case in hand. Let me say immediately that in Attah's case (supra), one of the questions raised in this court was whether in the case of an amendment of new counts to a charge, it is mandatory, considering the provisions of S. 164 (1) of the Criminal Procedure Law to take a fresh plea to all the counts in the charge including those which have not been amended. That question was answered in the affirmative.

However, the question that has provoked controversy in this case is, whether the prosecution of the respondent was commenced within the period of three months set down in s.169 (1.) of the Armed Forces Decree. The argument on this question as having been set down above arose on account of the fact that a new charge was substituted for the original charge following its withdrawal by the appellant. This step was taken in the proceedings after the respondent had pleaded to the original charge. It is common ground hat the respondent duly pleaded to the amended charge after it was read out to him in full compliance with the provisions of 5. 164(1) of the 40 Criminal Procedure Act. It is also not in doubt that by virtue of s. 163 of the Criminal Procedure Act, any court and which perforce includes a General Court Martial may alter or add to any charge any time before judgment is given or verdict returned. Hence the right of the appellant to amend the original charge for which the respondent was arraigned cannot be questioned. The critical question however is still, whether by that amended charge, the prosecution of the respondent was commenced within the period of the months following his retirement from the Air Force. It is of course manifest that his prosecution was commenced within the Lit period by virtue of the original charge. It is however argued for him that the amended charge constituted a new trial when it commenced on the 6th August, 1996. It is clear though from the Records, that after the original charges were withdrawn, the charges were struck out. No further orders were made. However, it is of interest to note that the appellant in its concluding part of its brief submitted that by virtue of ex.67 (seep. 510 of Vol.5 of the printed record) all the officers who were affected by this prosecution were granted terminal leave from 30th April, 1996 to 31st May, 1996.

The copy of page 67 reads thus: -

'In lieu of NAF MSG form

From: HQ NAF Mojekwu

To: Lists A, B, C, and D AOP
Info: PSO to c-in-c

292240A APR 96
DHQ NAF/324/
MA-CAS ADM/175

Text: Involuntary discharge offers PD further to HQ NAF rested SIG ADM/143
DTG 291010 CM offers are granted terminal leave WEF 30 APR 96 to 31 May 96 PD all unit are to note and effect NEC PUB/

Commanding Officer releasing OFFERS SIG
Reparations, benefits and service
Personnel Management Center
Nigerian Air Force Rank AVM'

I have however sought in vain the reaction of the respondent to respondent\'s brief. In the absence of anything contention of the appellant is that the prosecution of the respondent was clearly within the 3 months period provided by s. 169(2) of the Armed Forces Decree. It therefore follows that the respondent was duly tried and convicted upon the amended charge. In any event, it is also my view that the amended charge was properly before the General Court Martial and I therefore resolve issue I against the respondent.

Issue2

In respect of this issue, the question is whether the responsibility of assisting the respondent\'s defence by calling a witness rested on the prosecution or on the accused. It is clear horn the Printed Record that this question was raised having regard to the view held by the court below on the failure of the appellant to call the retired Chief of Air Staff AVM femi John Femi as a witness for the prosecution during the trial of the respondent. On this question, the Court of Appeal had held, inter alia, that: -

\"Without eliminating this story or showing it untrue, and the only was to do this was to call the retired C.A.S. to testify, I do not see how the appellant could be found guilty of forger or stealing '..'

The court below upon the same premise that as the retired CAS AVM Femi John Femi was not called by the prosecution to give evidence to deny that he had authorised the respondent to withdraw the money from the bank, he cannot he found guilty of making false negotiable instruments as laid under 1st - 4th counts of the charge. On this issue, it is the contention of the appellant that the court below had placed on the prosecution the burden of proving the defence of the accused. It is therefore submitted for the appellant that the position so taken is contrary to the rules of evidence. In support of that contention, reference was made to the provisions of s. 135 (1): 141(1) and s. 143 of the Evidence Act and also Nwaeze v. The State (1996) 2 NWLR (Pt. 428)1 at 15; and Iziren v. The State (1995) 9 NWLR (Pt. 420) 385 at 387 and 390. It is therefore the submission of the appellant that the appellant having called the witnesses material to the proof of its case beyond reasonable doubt, it does not have to call witnesses that the defence may consider necessary to make his case. It is however the case of the respondent that as the appellant failed to call the retired Chief of Air Staff to give evidence with regard to the allegation made against him that he authorised the withdrawal of the sum of N48 million from the OPS Harmony Account, the view of the court below should be upheld.

According to the respondent, the prosecution had the burden of calling all material witnesses and this was not done in the instant case. In support of this contention, reference was made to the following cases; Alfred Aigbadion v. The State (2000) 7 NWLR ( Pt. 666) 686 at 700; Onuoha & Ors. V. Thee State (1989) 2 NWLR ( Pt.101) 23; Omogodo v. The State (1981) 5 SC 5; R.v.Dora Harris (1927) 2 KBD 587 at 590; Michael Alake v. The State (1992) 9 NWLR ( Pt.265) 260 at 270; Francise Odili v. The State (1977) 4 SC 1 and Mohammed v. The State (1991) 5 NWLR ( Pt.192) 438 at 456. in order to resolve this question raised in this issue, it is clear that from the arguments proffered, both parties recognised that the prosecution in a criminal trial has the burden of proving its case beyond reasonable doubt. This is a

principle, which has also been recognised, in a long line of cases. In Ilori v. The State (1980) 8-11 SC 81, this court set down the principle thus:

\"The basic necessity before a verdict of guilt in a criminal charge can be pronounced is that the jury are satisfied of the guilt of the accused beyond all reasonable doubt. Proof beyond reasonable doubt as Dennin, J (as he then was) stated inMiller v. Minister of pensions (1947) 2 All ER 372, 373; does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted of fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence \"of course it is possible, but not in the least probable\" the case is proved beyond reasonable doubt but nothing short of that will suffice.\"

See also Ameh v. The State (1978) 6-7 SC 27 where it was stated inter alia, that \"It is settled law that, in a criminal case, the onus throughout the trial is on the prosecution to prove its case beyond reasonable doubt...\" In view of this settled principle, it is left to the prosecution to call such witnesses as would enable the proof of its case beyond reasonable doubt. It was however argued that this was a case in which certain persons should have been called as witnesses by the prosecution. One of such witnesses is the Retired Chief of Air Staff, AVM Femi Femi John Femi, and who was supposed to have authorised the issue and encashment of several cheques that formed the basis of the offences of forgery and stealing for which the respondent was charged. Another of such witnesses is SQn. Leader P. Daniel, whose signature was forged on the cheques used to withdraw the money stolen from the account of the appellant. It is sufficient to say in this connection that the law imposes no obligation on the prosecution to call a host of witnesses to prove its case. All that the prosecution needs to do is to call enough material witnesses to prove its case, and, and in so doing it has a discretion in the matter. See Adaje v. The State (1979) 6-9 SC 18 at p.28. In this regard, it has been argued in the respondent's brief that the above mentioned witnesses if called by the prosecution would have helped to exculpate the respondent in that their evidence would have revealed their alleged roles in the commission of the offences for which the respondent was found guilty by the General Court Martial. And in support of that contention, reference was made to the case of Aigbadion v. The State (supra). In that case, the prosecution was rightly castigated for not investigating the case in such a manner as to make available evidence that would assist the court in determining the guilt of the accused. That case is distinguishable from the instant case in that the thrust of the contention of the respondent is not that the witnesses were not known or available but that the prosecution should have called them as part of the case presented to the court.

In my view, if the evidence of a witness is very essential to the defence of the accused, it is for the accused to call him. He should not expect the prosecution to call the witness since the prosecution is not expected to perform the function of the prosecution and that of the defence at the same time. See Asariyu v. The State (1987) 4 NWLR (Pt.67) 709 and Ogbodu v. The State (1987) 2 NWLR (Pt.54) 20. I will therefore for these reasons hold that this issue lacks merit. It is resolved against the respondent.

Issue 3

\"Whether or not the prosecution had established a case of forgery and stealing against the respondent.\"

On this issue. It is argued for the appellant that the court below full into error when it concluded that the offences raised in the issue were not proved against the respondent. In support of this contention, learned counsel for the appellant argued that by virtue of s.112 of the Armed Forces Decree, knowledge on the pail of the accused that the document was a forged one sufficient to ground a conviction. The mere fact that the respondent uttered the cheques knowing that Sqn. Ldr. P. Daniel had not signed them was all that was necessary to convict the respondent under counts 5-8 for the offence of uttering of forged cheques. It is also submitted for the respondent that the court below apparently misconstrued the provision of S.465 of the Criminal Code in holding that the person whose signature is endorsed on a document must exist to establish that the document was forged. Hence it was further argued that if the court below had properly considered the provision of s. 112 of the Armed Forces Decree and s. 465 of the Criminal Code, the court below would have come to a different conclusion. With regard to the offence of stealing the appellant submitted in its brief that it was clearly established by the evidence before the General Court Martial. For the respondent, his learned counsel has argued in the respondent brief that the offences of forgery and stealing were not proved against the

respondent. In support of this submission, we were referred to several cases including Eze Ibeh v. The State (1997)1 NWLR ( Pt 484) 632 and Alake v. Thu State (1992)9 NWLR (Pt. 265)260 at 270. He therefore urged that the issue be resolved in favour of\' the respondent. It seems to me that after a careful reading of the record and the judgment or the Courts, the central question is, whether facts proved that the respondent uttered forged cheques upon which he was paid the sums which were stolen by him. Now in order determine this question raised in this issue, it is necessary to refer first to the charges upon which the respondent was convicted. Upon reading of the charges. it is clear that the respondent was charged under. S. 112 of the Armed Forces Decree which roads:

\"A person subjected service Law under this Decree who

(a) Fraudulently utters, forges, procures, alters. accepts or r present to another person any cheque, promissory note or other negotiable instrument knowing it to be false, forged, stolen or unlawfully procured; or

(b) knowing and by means of a false representation or with intent to defraud the Federal Government, the Government of any State or any Local Government, causes the delivery or payment to himself or any other person of any property or money by virtue of any forged or false cheque, promissory note or other negotiable instrument whether in Nigeria or elsewhere or;

(c) makes or utters any forged document, cheque promissory note or other negotiate knowing it to be false or with intent that it may in any way be used or acted upon as genuine, whether in Nigeria or elsewhere, to the prejudice of any person or with intent that any person may, in the belief that it is genuine, be induced to do refrain from doing any act or thing, whether in Nigeria or elsewhere, is guilty of an offence under this section and liable, by a Court Martial to imprisonment for a term not exceeding twenty-one years.

After a careful perusal of the provisions of S.112 of the Armed Forces Decree, it is patent that its wordings and formulation differ from the provisions of S.465 of the Criminal Code. For that reason, the first duty of a court called upon to determine the guilty of an accused charged with offences under the provisions of the Armed Forces Decree is to do so within the meaning of the said provisions. After reading critically the said provisions, it seems to me that learned counsel for the appellant is right in the submission made in the appellant\'s brief that by virtue of its provisions, S. 112(a) thereof, knowledge on the part of the accused that the document was forged one is enough to ground his conviction for forgery. With regard to the charges for uttering, it is argued, that the fact that he uttered the cheques to the endorser with which N48 million was withdrawn, knowing that Sqn. Ldr P. Daniel had not signed them was all that was necessary for his convictions in respect of the 5th to the 8th charge.

Now the facts disclose that there is evidence that the respondent signed for himself and also signed as one Sqn. Ldr. P.Daniel. This evidence was given by P.W.9, a handwriting analyst who compared the two signatures on the cheques before concluding that they were both executed by the respondent. This witness at page 391 of volume 2 of the record of the General Court Martial unequivocally that \"my conclusion is that the encircle signatures on the 2 CBN cheques and the specimen signature card as well as the handwriting on the 2 cheques were written and signed by the maker of Annex B I -B-5\" - the respondent. Now, it is argued for the respondent that the General Court Martial wrongly placed reliance on the evidence of this witness to convict the respondent. Hence the Court of Appeal was right to have overturned the conviction of the respondent for forgery and the uttering of forged documents. In support of this argument, reference was made to Michael Alake v. The Stare (1992) 9 NWLR (Pt. 265) 260 where at page 269, Kutigi JSC, said thus: -

\"Starting with the counts for forgery, I agree with Prof. Kasunmu that there was no evidence on record that any of the cheques exhibits F.G. & H was forged by the appellant. In fact the evidence of Mr. Samuel Akinyele Odubiyi who testified as P.W.7 made it abundantly clear that the signature of the appellant was neither on any of the cheques (exhibits F, G & H) nor on any of the payment vouchers (exhibits E. J & K ).

His Lordship then went on to say thus:

\"It is implicit from the foregoing that there was no direct evidence that the appellant forged any of the cheques. It is an

essential ingredient to he proved in a charge of forgery that the accused forged the document in question.\"

In my respectful view the established facts in the instant appeal are clearly different from those disclosed in the Alake case (supra). In the appeal under consideration, there is the clear evidence that it was the respondent who wrote the two signatures on the relevant cheques. He admitted, though. that he wrote his own signature, and it was established that he also forged the other signature allegedly of one Sqn. Ldr. P. Daniel. There is no doubt that even if it is now argued that he forgery of this other name was not established, it is evident that the respondent knew it was a forgery. His conduct in this regard cannot be explained away on that ground. It was open to the respondent to call such evidence as would have exculpated him from the evidence that he uttered the forged documents, which he well knew to have been forged by him. I must therefore hold that the court below was wrong to have overturned the conviction of the respondent for the offences of forgery and uttering. Having held that the respondent was the person who uttered the forged cheques upon which he received the sums for which he was convicted for stealing same, the theft of the said sums was proved beyond reasonable doubt and the General Court Martial was right to have convicted him accordingly. It follows that the decision of the court below setting aside the judgment of the General Court Martial must also be set aside.

Issue 4

\"Whether or not the evidence led by the prosecution in respect of the 14th count had been sufficient to ground a conviction\"

On this issue, the contention made for the appellant is basically that there was sufficient evidence to convict the respondent for the offence charged in the 14th count. That the court below was therefore wrong to have set aside the said judgement of the General Court Martial. In support reference was made to s 57 of the Armed Forces Decree, s 6 of the Manual of Air Force Law, Chapter VI and paragraph 1369,Chapter 13 of Execution Regulation, the breach of which led to the trial and conviction of the respondent on the 14th count. On the other hand, it is argued and that very lucidly in the respondent's brief, that the court below was right to have set aside the conviction of the respondent on this count. The premise for this contention is that an administrative instruction cannot be judicially noticed. In support of this submission, reference was made to Gbaniyi Osafile v Paul Odi (1990) 3 N.W.L.R (pt137) 130 at Pp 159-166. It is also argued for the respondent that the mere appearance of a person's name if Form C07 which is a document filed with the Corporate Affairs Commission, showing particulars of Directors without more cant not be conclusion that the person is participating in the management or running of a business. For that contention, the case of Cecilia Ihuoma Nwankwo v. Emmanuel Chukwumobi Nwankwo (1995) 5 NWLR (Pt.394) 153 was cited. Furthermore, it was also argued that as the knowledge of the administrative instruction is in element of the offence, such knowledge cannot be presumed, it has to be proved. Cites Cyril Areh v. C.O.P (1959) WRNLR 230 at 237.

For the better understanding of the rival contention of the parties in respect of this issue. it is desirable to set down the relevant law and order deemed applicable. These are section 57 of the Armed Forces Decree and Paragraph 6(a) of the Manual of Air Force Law. S. 57 of the Armed Forces Decree, reads: -

\"(1) A person subject to service law under this Decree who contravenes or fails to comply with a provision of an order to which this section applies, being a provision known to him, or which he might reasonably be expected to know is guilty of in offence under this section and liable to imprisonment for a term not exceeding two years or any less punishment provided by the decree.

(2) This section applies to standing order or other routine order of a continuing nature made for any formation, unit or of troops for any area, garrison or place, or for any ship, train or aircraft,\"

Manual of air force law, chapter vi paragraph 6 (a) reads;

'court martial are specially authorized to take notice of all matters within their general service knowledge. Evidence therefore need not be given as to the relative rank of officers, as to the general duties, obligations and authority of different members of the service, or generally as to any matter which an officer as such might reasonably be expected to know\".

The Order alleged to have been disobeyed by the respondent is contained in the executive regulation chapter 13, paragraph 1369, which reads:

\"Except as authorised by HQ, NAF, an officer or airman is not to.

(1) Carry on any profession, engage in trade or accept any profitable employment while still in the NAF service.

(2) Be a member of the governing body of any corporation, company, partnership, undertaking or individual which or who is carrying on any trade, profession or is engaged in trade or is profitably employed\"

There can be no doubt that the above provision enable courts martial to take judicial notice of all matters within their general service knowledge. Hence, evidence need not be given as to the relative ranks of officers, as to the general duties, obligations and authority of different members of the service, or generally as to any matter which an officer as such might reasonably be expected to know. But the case in hand has raised two questions can judicial notice be taken that an officer was aware of the order for which the respondent was charged' If for present purpose such knowledge could be presumed, the next question then is, whether the court martial could properly without any evidence to the effect know that an officer was carrying on any profession, etc while still in the NAF service' I think not. It is my humble view that in order to successfully establish that the respondent was engaged in any other trade, profession or had accepted any profitable employment while still in the NAF service, there must be credited evidence other than what from C07 revealed that affect. As no such evidence had been proved in respect of the 14th count against the respondent, the appeal against the decision of the cunt below must fail. It is therefore dismissed accordingly.

Issue5

\"Whether the count appeal was right in setting aside the order requiring the respondent to pay N137,750,000.00 as restitution\"

It seems to me clear that the answer to that question is rooted in the provisions of sub-sections (1)&(2) of section 174 of the Armed Force Decree, which reads:

(1) The following provisions of the section shall have effect where a person has been convicted by a count martial of unlawfully obtaining a property, whether by stealing, receiving or retaining it knowing or having reason to believe it to have been stolen, fraudulently misapplied or otherwise.

(2) If a property unlawfully obtained is found in the possession of the offender, it may be ordered to be delivered or paid to the person appearing to be owner of the property'".'

With the conclusion reached already in this judgment that the appeal has succeeded in all the counts, apart from the 14th count, it must follow that the order of restitution made against the respondent by the General Court Martial must be upheld. It is therefore upheld accordingly and the judgment of the court below is hereby set aside.

This appeal for all the reason succeeds in part. This is because the appeal in respect of the 14th count ' the fourth issue has failed while it has succeeded in respect of the 1st, 2nd, 3rd and 5th issues. The order of the restitution requiring the respondent to pay the sum of N137,750,000.00 is hereby affirmed.

Judgement delivered by
Idris Legbo Kutigi. JSC

I had a preview of the judgment just rendered by my learned brother, Ejiwumi, J.S.C.he has meticulously dealt with all issues canvassed before us in the appeal. I agree with him to allow the appeal on all counts of charge except the last

count (14). The accused\\ respondent is discharged and acquitted of count (14) and the sentence of 2 years imprisonment thereon is set aside. Convictions and sentence on all the counts by the general court martial are hereby confirmed and restored. The judgment of the court of appeal is accordingly to that extent set aside.

Judgement delivered by
Uthman Mohammed. JSC

I have had a preview of the judgment of my learned brother Ejiwumi, JSC and I agree with him that the appeal has succeeded in all count 14. I set aside the judgment of the court of appeal and affirm the decision of the General Court Martial. I affirm the conviction, sentence and other orders made by the General Court Martial against the respondent.

Judgement delivered by
Umaru Atu Kalgo. JSC

I have had the privilege of reading in draft the judgment of my learned brother Ejiwumi, JSC just delivered in this appeal. I entirely agree with his reasoning and conclusions and have nothing useful to add. I am therefore in full agreement with him that there is merit in the appeal in respect of the convictions and sentences passed on the respondent by the General Court Martial on all the counts the respondent was charged and tried except as to the 14th count. Accordingly the judgment of the court of the of appeal delivered on 28th September, 2000 in respect of count 1-13 and the restitution order, is hereby set aside. The convictions and sentences on the said 13 counts passed on the respondent and the restitution order made there under, by the General Court Martial on 21st October, 1996 are hereby restored.

Judgement delivered by
Niki Tobi. JSC

I have read the judgment of my learned brother, Ejiwumi, JSC and I entirely agree with him. I would like to add this bit in respect of the issues of jurisdiction of the General Court Martial (G.C.M) and the failure on the part of the appellant to call the retired Chief of Air staff, AVM femi john femi to testify before the AVM.

Learned counsel for the respondent, Mr.S.C.Obi submitted that by section 131(2) of the Armed Force Decree No. 105 of 1993 as amended, the power to convene GCM cannot be delegated. He argued that the GCM was accordingly not properly convened and therefore had no jurisdiction to try respondent. Counsel for the appellant, Miss O.M.Lewis, took a different view.

She argued that by section 131(3) of the Decree the power to order a GCM is one that can be delegated by a person in whom that power resides.

Much as the arguments of learned counsel appear attractive they do not seem to push away or push aside the clear statutory provision of section 131(3) of the Decree. The subsection provides as follows:

\"The senior officer of a detached unit, establishment or squadron may be authorised by the appropriate authority to order a Court Martial in special circumstances.\"

In my humble view, the above subsection empowers an appropriate superior authority to authorise a senior officer to orders a Court Martial in special circumstances . By section 128 (1) of the Decree, an appropriate superior authority in relation to a person charged with an offence includes: (a) a commanding officer, and (b) any officer of the rank of Brigadier or above or officer of corresponding rank or those directed to so act under whose command the person is for the lime being. I am firmly of the view that the Chief of Air Staff qualifies as an appropriate superior officer under the

subsection.

The second issue I would like to take is in respect of calling of a particular witness, AVM Femi John Femi. Learned counsel for the respondent urged this court to invoke section 149(d) of the Evidence Act. The subsection provides as follows:

\"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.\"

Section 149(d) has been a subject of judicial interpretation, particularly section 148(d), its equivalent provision in the abrogated Evidence Act, Cap. 62, Laws of the Federation of Nigeria and Lagos. In Ogbodu v. The State (1986) 5 NWLR (Pt.41) 294, the Court of Appeal held that section 148(d) of the Evidence Act, 1958 dealt with the withholding of evidence and not the failure to call a particular witness to testify. The decision was confirmed by this court in the same case on appeal. Karibi-Whyte, JSC said at page 44 of the judgement in Ogbodu v. The State (1987)2 NWLR (Pt.54) 20:

\"I agree with the view of the Court of Appeal that section 148(d) of the Evidence Act, Cap. 62 is not applicable to this case. The subsection of section 148(d) of the Evidence Act is to presume against the prosecution, of evidence withheld by them in that if such evidence were produced it would have been unfavourable. Counsel to the appellant is her not complaining about the withholding of evidence, but of the fact that a particular witness was not called tom give evidence. The subsection is concerned with the failure to call evidence, and not the failure to call particular witness- Francis Odili v. The State (1977) 4 sc 1 AT P.8. The presumption only applies where the prosecution has withheld evidence. See Tewgbede v. Akande (1968) NMLR 404, 408. In this case defence was free to call Sylvanus Egbede if they chose to do so. In such circumstances section 148(d) has no application. There was no withholding of evidence.\"

See also Asariyu v. The State (1987) 4 NWLR (Pt.67) 709. In Oguonzee v. The State (1998) 5 NWLR (Pt.551) 521, Iguh, JSC said at page 553:

\"The first point that needs be emphasised is that the presumption under section 149(d) of the Evidence Act will only apply against whom it is sought that it should operate where that party has in fact withheld the particular piece of evidence in issued and if he did not call any evidence on the point. It only applies when the arty does not call any evidence on issued in controversy and not because he fails to call a particular witness.. The section deals with the failure to call evidence and not the failure to call a particular witness as a party is not bound to call a particular witness if he thinks he can prove his case otherwise' Mere failure to produce the evidence in issued would not necessarily amount to withholding such evidence'.

As it is, section 419(d) clearly provides for evidence, not witness. The rational behind the provision is to ensure that the prosecution has the liberty and right to pick witness and not be foisted with any particular witness. The legal duty of the prosecution is it prove the offence charged beyond reasonable doubt and as long as that burden is discharged, it does not matter whether a particular w3itness was not called to give evidence.

In Ogbodu v. The State ( supra), Karibi-Whyte, JSC rightly said that the defence was free to call Sylvanus Egbede if they chose to do so. In the same way, I say that the respondent was free to call AVM Femi John Femi if he felt that his evidence would exonerate or exculpate him from criminal responsibility. He did not do that and he now complains, hiding under section 149(d) of the Evidence Act. This court cannot hear him. The issued therefore fails.

In sum, this appeal succeeds in part. It succeeds in respect of Issues 1, 2, 3, and 5. If fails in respect of Issue No 4. The order of restitution made against the respondent by the General Court Martial is upheld. The respondent shall therefore pay the sum of N137,750,000.000 as directed by the General Court Martial. The order of the Court of Appeal is accordingly set aside