IN THE SUPREME COURT OF NIGERIA

Suit No: SC362/2001

Petitioner: Nigerian Air Force
And
Respondent: Wing Cdr T.L.A. Shekete

Date Delivered: 2002-12-13

Judge(s): Muhammadu Lawal Uwais Chief, Justice of Nigeria Michael Ekundayo Ogundare; Justice, Supreme Court Sylvest

Judgment Delivered

Wing Com'mander T.L.A. Shekete, the respondent in this appeal, was the 4th accused at the General Court Martial, bearing the acronym, GCM. He was arraigned along with eight other Air Force officers on 22nd July, 1996 on seven counts.

The case of the prosecution can be briefly stated. One of the nine officers charged raised requisition for cash in the total sum of N10,000,000.00 (Ten million naira). The sum was withdrawn from the Bank Account of the appellant. The money was handed over to one of the officers accused along with the respondent. The 6th ac'cused in his written statement admitted receiving the money. He mentioned the various amounts distributed to the officers charged along with him. The officers included the respondent who was al'leged to have been given the sum of N500,000.00 (Five hundred thousand naira) out of the N10,000,000.00. In corroboration of the evidence of the 6th accused, Warrant Officer Paul Tungan, P.W.4, said that he was given some money by the 6th accused in an enve'lope to put inside the boot of the respondent\'s car.

The respondent, in his written statement (Exhibit 11) denied conspiring with any person to share the N10,000,000.00. He said that during the period, that is around the first week of April, 1996, he was preparing to go to Saudi Arabia to perform the 1996 Hajj and so he seldom went to the office. He said that it was when he re'ported back to the office because he could not go to Hajj that he learnt about the N10,000,000.00 matter. He denied collecting any
part of the alleged N10,000,000.00. The respondent was not found guilty of counts 1 and 2. He was found guilty of counts 3 to 7 and sentenced to a total of 23 years incarceration.

Dissatisfied, Wing Commander Shekete appealed to the Court of Appeal, that Court allowed the appeal. The court made the fol'lowing order in the last paragraph of the judgment:

\"On the whole, my conclusion is that this appeal is meritorious. It is allowed. I set aside the judgment ap'pealed against. In its place, I make an order striking out the charge against the appellant... I make an order dis'charging and acquitting the appellant on the counts brought against him.\"

Dissatisfied, the appellant has filed this appeal. Briefs were filed and exchanged. The appellant formulated seven issues for determina'tion as follows:

\"(i) Whether the applications and/or prayers in the appellant\'s motion dated 30th November, 1998 satisfied the condition precedent to the hearing of his appeal against the decision of the General Court Martial as provided under sections 183 and 184 of the Armed Forces Decree, 105 of 1993 (as amended).

(ii) Whether the jurisdiction of the Court of Appeal to hear and determine the appeal against the judgment of the GCM was not ousted by the appellant\'s (now respondent) failure to first obtain leave of the Court of Appeal as required under section 183 of the Armed Forces Decree 105 of 1993 (as amended).

(iii) Whether the power to convene a court martial, vested in the persons set out in section 131 (1) and (2) of the Armed Forces Decree 105 of 1993 (as amended) cannot be delegated.

(iv) Whether the statement of a person who was not jointly charged with the accused person can rightly qualify as a statement that is subject to the provisions of section 27(3) of the Evidence Act.

(v) Whether the evidence of a person who was not jointly charged with the accused person, and which is against the said accused cannot suffice to secure the conviction of the respondent.

(vi) Whether the burden of establishing or otherwise substantiating the defence raised by the accused persons, who admitted receiving a share of the N10m allegedly stolen from the NAF that they thought it was a \"thank you\" gift from the retiring Chief of Air Staff was that of the prosecution or that of the accused persons who sought to rely on it or to take umbrage thereunder (like the respondent).

(vii) Whether the respondent (appellant in the court below) had established a credible and valid defence against all the evidence adduced in support of the charges against him before the General Court Martial (GCM).\"

The respondent formulated the following two issues for determina'tion:

\"(i) Whether the Court of Appeal had jurisdiction to enter'tain the respondent\'s appeal at the court below.

(ii) Whether the prosecution proved its case against the re'spondent as required by law having regard to the oral and documentary evidence adduced and accepted at the trial.\"

Learned counsel for the appellant, Mr. Alade Agbabiaka sub'mitted on issue No. 1 that section 183 of the Armed Forces Decree, No. 105 of 1993 as amended by the Armed Forces (Amendment) Decree No. 15 of 1997 was not complied with as leave of the Court of Appeal to appeal against the decision of the General Court Mar'tial was not sought. He also cited section 184(1) which provides that leave should be sought within forty days of the date of promul'gation of the finding of the Court Martial. He referred to the motion dated 30th November 1998 and argued that the motion was for

leave to appeal out of time and not leave to appeal, which was required by section 183 of the Armed Forces Decree, 1993 as amended. Still on the motion for extension of time within which to appeal, learned counsel submitted that the court cannot grant a party a prayer or relief that was not asked for by him in his motion. To learned coun'sel, all the reliefs granted by the Court of Appeal on the respond'ent\'s motion are limited to those prayed for therein by him.

On issue No. 2, learned counsel submitted that failure on the part of the respondent to comply with such a fundamental condition precedent ousts the jurisdiction of the Court of Appeal and conse'quently renders as a nullity the entire proceedings before that court and the orders made in its judgment on 28th September, 2000. He cited Skenconsult (Nig.) Ltd. & Anor. v. Ukey (1981) 1 SC 6. Con'ceding that the issue was not raised and argued before the Court of Appeal, counsel submitted that being an issue or point of law on jurisdiction, the same can be raised at any time even for the first time in this court. He cited State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 33; Ogunsina v. Ogunleye (1994) 5 NWLR (Pt.346) 625; Shell Petroleum Development Co. Ltd v. Tiebo VII (1996) 4 NWLR (Pt. 445)657.

On issue No. 3, learned counsel submitted that the Court of Appeal was wrong when it came to the conclusion that the authority to convene a General Court Martial cannot be delegated. He cited section 131(3) of the Armed Forces Decree and submitted that the subsection clearly and unequivocally allows for delegation of the power conferred by virtue of section 13 1 (1) and (2) of the Decree.

On issue No. 4, learned counsel referred to page 72 of the Record and submitted that although the Court of Appeal correctly stated the position of the law as provided in section 27(3) of the Evidence Act, the situation in this appeal is different as there were statements made by other persons who were not jointly charged with the respondent. He referred to the evidence of P.W.4 who, counsel said, was not jointly accused with the respondent.

On issue No. 5, learned counsel submitted that P.W.4, not be'ing a co-accused charged along with the respondent, was not sub'ject to the limitation in section 27(3) of the Evidence Act. At worst, P.W.4 was an accomplice whose evidence is not excluded by law from being used in establishing the guilt and/or otherwise securing the conviction of the respondent, counsel submitted. He cited sec'tion 178(1) of the Evidence Act, Nwaeze v. The State (1996) 2 NWLR (Pt. 428) 15 and Nwambe v. The State (1995) 3 NWIR (Pt. 384) 385.

Counsel contended that since P.W.4 was an accomplice, he was a competent witness for the prosecution whose evidence alone is sufficient in law to secure the conviction of the respondent, pro'vided that the Judge Advocate administered the warning as stipu'lated under section 178(1) of the Evidence Act. He referred to pages 199 to 202 where the Judge Advocate provided the statutory want'ing required by the subsection. He cited R. v. Omisade (1964) NMLR 67; (1964) 1 All NLR 233 and Inspector-General of Police v Edosomwan (1957) NRNLR 161.

Counsel contended that even if the Court of Appeal excluded the evidence and statement of the 6th accused as being that of a co-accused charged along with the respondent, the same argument will not avail in respect of P.W.4 as he is not a co-accused and his evidence as an accomplice is admissible and sufficient to secure the conviction of the respondent.

On issue No. 6, learned counsel submitted that the Court of Appeal wrongly shifted the burden of proof that the N10, 000,000.00 was to be shared by the accused persons on the orders of the retiring Chief of Air Staff, as 'a thank you gift

for a loyal service\" on the appellant. He argued that the burden was not consistent with the provisions of section 135 of the Evidence Act. To learned counsel, the burden of proving that the N10, 000,000.00 received by the ac'cused persons was not stolen but was a \"thank you gift\" from the retiring Chief of Air Staff, raised by some of the accused persons and which the respondent was said to be able to take umbrage un'der, is clearly and unambiguously that of the accused persons, that is, the defence who intend to rely on the same as their defence, and not on the prosecution.
Citing section 139 of the Evidence Act, learned counsel sub'mitted that the mere assertion by some of the accused persons that they believed the N10,000,000.00 admittedly received and shared by them was a parting gift from the retiring Chief of Air Staff, with'out more in corroboration thereof, could not have sufficiently estab'lished that fact as to warrant the shifting of the burden on the pros'ecution to call the Retired Chief of Air Staff or to call such other evidence to rebut the same, the prosecution having successfully dis'charged its own burden of establishing that the money was taken by the accused persons without the authority, consent and approval of the NAF, and with an intention to cheat and otherwise deprive the NAF of the said amount.

On issue No. 7, learned counsel submitted that the alibi pleaded by the respondent was not a complete one because he did not say in evidence that he was completely away from office at the material time but that he seldom came to the office. He submitted that the partial alibi cannot be taken as a complete and total defence that he was away from office at the material time that the offences were committed. The fact that the respondent did not proceed on the holy pilgrimage in Saudi Arabia further negated the general alibi, learned counsel argued.

Dealing with exhibit 11, the written statement of the respond'ent, counsel submitted that it was not a specific denial, it being not specific to the peculiar evidence adduced against him with respect to the charges before the General Court Martial (GCM).

With regard to the charge of disobeying standing orders con'trary to section 576(1) of the Armed Forces Decree No. 105 of 1993, learned counsel recalled that one of the defences raised by the re'spondent was that he never operated as \"Taiwo Lateef Adamson\" but as Wing Cdr. T. L. A. Shekete. Counsel pointed out that the international passport tendered in evidence by the respondent (Ex'hibit E) showed his names as \"Taiwo Lateef Adamson Shekete\" Counsel observed that the respondent used the various names for different purposes.

Learned counsel finally submitted that the respondent did not advance credible defence before the GCM in rebuttal of the charges against him and as such, the judgment and sentences entered against him by the GCM were in order and justified and ought not to have been set aside. He urged the court to allow the appeal and set aside the judgment of the Court of Appeal.

Mr. Akin Kejawa, counsel for the respondent, submitted on issue No. 1, which curiously commenced from page 15 of the re'spondent\'s brief, that the appellant\'s argument on pages 7 to 10 that the Court of Appeal lacked the jurisdiction to entertain the respond'ent\'s appeal at the Court of Appeal because of the failure to apply for and obtain the leave of the court, is not only untenable but also totally misconceived. Counsel claimed that the respondent applied for and obtained the leave of the Court of Appeal against the deci'sion of the Court Martial as required by sections 183 and 184(4) of the Armed Forces Decree No. 105 of 1993 as amended.

Referring to the motion dated 30th November, 1998 and filed on the same day, learned counsel submitted that prayer (b) is all encompassing and all embracing. He said that at the hearing of the motion on notice, counsel for the respondent (who was the appel'lant at the Court of Appeal) conformed with the \"three prayer rule\" in Odofin v. Agu (1992) 3 NWLR (Pt. 229) 350 and C.C.B. (Nig.) Ltd. v. Ogwuru (1993) 3 NWLR (Pt. 284) 630.

Conceding that the motion on notice did not specifically state that it was brought under sections 183 and 184(1) and (4), learned counsel submitted that the omission did not in law derogate from the competence of the application and the prayers therein. After all, it is settled law that a relief or remedy which is provided for by law cannot be denied the applicant simply because he has applied for it under wrong law, learned counsel contended. He cited Falobi v. Falobi (1976) 1 NMLR 169 and Obunhense v. Erhahon (1993) 7 NWLR (Pt. 383) 22.

On issue No. 2, learned counsel submitted that by reason of the presumption of innocence created in favour of an accused by sec'tion 33(5) of the 1979 Constitution (now section 36(5) of the 1999 Constitution) and also by reason of the adversary system practised in this country, the law places a legal burden on the prosecution in criminal trials to prove its case against the accused beyond reason'able doubt. He cited section 138(1) of the Evidence Act and the following cases: Woolmington v. D.P.P. (1935) AC 426; R. v. Law'rence (1932) 11 NLR 6 at 7 and R. v. Eka (1945) 11 WACA 39 at 40. Although proof beyond reasonable doubt is not proof beyond all doubt, nonetheless, proof beyond reasonable doubt requires that all the ingredients of the offence charged must be proved, counsel contended. He submitted that the prosecution woefully and dismally failed to discharge this burden.

Learned counsel took most of the counts the respondent was convicted on, in the light of the evidence, particularly the evidence of the P.W.4 and the 6th accused person, and submitted that the pros'ecution did not discharge the burden of proof. He cited Mohammed v. The State (1991) 5 NWLR (Pt. 192) 438.

Emphasising the importance of \"welfare gift\" in the military, learned counsel submitted that an in-depth knowledge of the mili'tary organisation reveals that welfare for officers and soldiers is on the priority list of every commander worth his name and command. Citing the unreported case of Ex Brig. Gen. Gabriel Anyankpele v. The Nigerian Army AFDAC/96/N A/1 (unreported) delivered on 16th May, 1996, learned counsel submitted that welfare scheme as an instrument of command was given judicial recognition in that case. He took time to narrate the facts and the decision of the case. With respect, I do not see the relevance of the case in this appeal.

He submitted that the welfare gift is at the discretion of the commander and the prosecution was in error to query the discre'tion. He also faulted the Court Martial for coming to the conclusion that AVM Femi John Femi was not authorised to disburse such large sums of money for welfare purposes. It was the duty of the prosecution to rebut the defence of \"welfare gift\" when it was raised it the trial by the accused officers. He cited Aguda, Law and Practice Relating to Evidence in Nigeria, page 251, paragraphs 2 1 to 23, and the cases of R. v. Essien; 4 WACA 112 at 113 and The State v. Ajie (2000) 11 NWLR (Pt. 678) 434; (2000) 7 SC (Pt. 1) 23.

Counsel submitted that it is not the duty of the accused in crimi'nal prosecution to prove his innocence. The only evidential burden placed on him is to raise a doubt in the prosecution\'s case and once that is created it must be resolved in favour of the accused. He cited section 33 (5) of the 1979 Constitution, section 138(3) of the Evi'dence Act

and the cases of Alabi v. The State (1993) 7 NWLR (Pt. 307) 5 11 and Morka v. The State (1998) 2 NWLR (Pt. 5 37) 294.

The quantum of evidence required to raise reasonable doubt may be scanty or minimal; it may also be abundant but certainly once raised it must be resolved in favour of the accused, counsel submitted. He cited Ozaki v. The State (1990) 1 NWLR (Pt.124) 92, (1990) All NLR (Reprint) 94 at 107. Contending that AVM Femi John Femi was a vital witness the prosecution ought to have called, counsel argued that the Court of Appeal was absolutely correct in law to hold that failure to call him was fatal to the prosecution\'s case. He cited Onah v. The State (1985) 2 NWLR (Pt. 12) 236; Opolo v. The State (1977) All NLR (Reprint) 313 and section 149 (d) of the Evidence Act. He also submitted that failure of the prosecution to call AVM Femi John Femi was a deliberate design to suppress evi'dence in favour of the accused persons at the trial. Citing Moham'med v. The State, (supra), learned counsel submitted that where evi'dence favourable to all accused person(s) is suppressed, the trial is a nullity.

On the defence of alibi, learned counsel submitted that failure on the part of the prosecution to investigate and rebut the defence entitles him to a discharge and acquittal. He cited Queen v. Eleighe, Vol. 10 Digest of Supreme Court Cases, p.212 and Mangai v. The State (1993) 3 NWLR (Pt. 2 79) 108. In view of the fact that the offence of receiving stolen property alleged against the respondent was said to have been committed on or about 2nd April, 1996, it is compelling and imperative to fix the respondent with that date in order to prove its case against the respondent beyond reasonable doubt as required by law. It is not sufficient for the appellant to describe the alibi raised by the respondent as a partial and/or gen'eral one as such an approach does not relieve him of the legal bur'den of proof placed on him, counsel argued. The failure of the pros'ecution to investigate and rebut the defence of alibi raised by the respondent both at the trial and extra-judicial statement entitles him to a discharge and acquittal, counsel submitted. He cited Ebre v. The State (2001) 12 NWLR (Pt. 728) 617.

Dealing specifically with counts 3, 4, and 5, learned counsel submitted that there is no modicum of evidence whatsoever by the prosecution to prove the allegations. He examined the evidence of P.W.4 and the statement of Sqn. Ldr. Olatunji in exhibit 13 and sub'mitted that no case was made against the respondent.

On count 6, learned counsel cited the case of Carlen (Nig.) Ltd. v. University of Jos (1994) 1 NWLR (Pt. 323) 631 and submit'ted that no case was made against the respondent. On count 7, learned counsel argued that there was no evidence that the company was not ultimately registered nor did the prosecution identify the office from which the company operated. He submitted that in view of the fact that the statement of share capital which was found in possession of the respondent was signed in August 1988, and the respondent was charged and tried in April 1996, the offence is statute barred under section 169(1) of the Armed Forces Decree No. 105 of 1993.

Counsel also submitted that it cannot be an offence to own shares in a company as that will be violative of the right to own property conferred on every citizen of this country under section 40 of the 1979 Constitution (now section 43 of the 1999 Constitution). On the count as it affects the contravention of Administrative In'structions S/No. 3 dated February 1979, learned counsel argued that failure to tender the Administrative Instructions shows that they never - existed. He argued that where a party failed to produce a document in its custody, the presumption is that the document if produced at the trial will be against him. Counsel cited section 149(d) of the Evidence Act; Carlen (brig.) Ltd. v. University of Jos (supra); Onyeukwu v. The State (2000) 12 NWLR (Pt. 681) 256 and Opolo v. The State (1977) All NLR (Reprint) 313 at 317. He urged the court to dismiss the appeal.

I would like to make an observation on the brief of the respond'ent as it affects the stuff on pages 3 to 14. All the pages are devoted to the examination of the power to convene a General Court Martial and the relevant aspect of delegation of power to convene the Gen'eral Court Martial. What bothers me is that the very important argu'ment is not tied to an issue, and so it stands alone. The two issues start from page 15 of the brief.

The stuff examined in the respondent\'s brief from pages 3 to 14 is the basis of Issue No. 3 in the appellant\'s brief. Accordingly, I expected counsel for the respondent to either adopt Issue No. 3 of the appellant\'s brief in respect of his arguments on pages 3 to 14 or formulate his own issue. He did not do that. He merely argued at large the power to convene a General Court Martial. I expected him to relate the discussion to the relevant issue formulated by counsel for the appellant.

The Rules of this court clearly provide for the format and com'ponent parts of a brief. In Ekpan v. Uyo (1986) 3 NWLR (Pt. 26) 63, the Supreme Court had cause to call the attention of both counsel for the appellants and the respondents to Order 6, rule 5(1) of the Supreme Court Rules, 1985. The court advised that the format for the briefs of argument which the appellants and respondents are enjoined to file should follow the guidelines laid down in the rules. Obaseki, JSC said at page 76:

\"The briefs of arguments filed by both the appellants and the respondents contain and show no evidence of any knowledge of the 1985 Supreme Court Rules, Order 6 Rule 5(1) relating to the filing of briefs of argu'ment in this appeal. I hope that in future counsel will, pay more attention to the requirement of the Rules.\"

The stuff on pages 3 to 14 does not qualify as an introduction and cannot therefore be so treated. The stuff, in my humble view, clearly creates an issue in this appeal and a very important issue for that matter. In the light of the decisions in Archbode Engineering Limited v. Water Resources Hydro Technique Wassertechnik, A.G. and Another (1985) 3 NWLR (Pt. 12) 300 and Engineering Enter'prise of Niger Contractor Co. of Nigeria v. The Attorney-General and others (1988) 3 NWLR (Pt. 80) 1, I expected learned counsel to formulate an issue in respect of pages 3 to 14. Sadly, he thought differently.

What is the legal consequence of the respondent not formulat'ing an issue in respect of the stuff on pages 3 to 14' Is the omission on the part of learned counsel for the respondent to formulate an issue on pages 3 to 14 enough to throw out the brief of the respond'ent' In Orji v. Zaria Industries Ltd. and Another (1992) 1 NWLR (Pt. 216) 124, Akpata, JSC said at page 146:

\"It is noted that in the respondents brief issues for determination were not formulated. Neither were the issues proffered by the appellant adopted .... Failure to formulate issues in a brief is sufficient by itself to render the brief incompetent, and arguments canvassed therein would therefore be of no consequence. The brief becomes irredeemably bad if, as in this case, arguments are not based on any issue or semblance of them.\"

Although the Supreme Court held that failure to formulate is'sues in a brief is sufficient by itself to render the brief incompetent, it is necessary to note that the respondent\'s brief contains two is'sues. It is therefore not like Orji where the respondent did not file any issue. The problem with the respondent\'s brief is that of tidiness of arrangement than anything else. Learned counsel argued an issue which he failed to identify. I should be able to deal with the argu'ment on pages 3 to 14 of the brief along with Issue No. 3 of the appellant\'s brief.

In view of the fact that the issue of leave affects the jurisdiction of the court below, I should take it first. Section 183 of the Armed Forces Decree No. 105 of 1993 as amended by the Armed Forces (Amendment) Decree No. 15 of 1997 provides as follows:

\"Subject to the following provisions of this part, an appeal shall lie from decisions of a Court Martial to the Court of Appeal: Provided that an appeal as aforesaid shall lie as of right without the leave of the Court of Appeal from any decision of a Court Martial involving a sentence of death.\"

Furthermore, section 184(1) of the Armed Forces Decree No. 105 of 1993 as amended by the Armed Forces (Amendment) De'cree No. 15 of 1997 provides as follows:

\"Leave to appeal to the Court of Appeal shall not be given except in pursuance to an application in that be'half made by or on behalf of the applicant and lodged, subject to subsection (2) of this section, within forty days of the date of promulgation of the Finding of the Court Martial in respect of which the appeal is brought with the Registrar of the Court of Appeal being an ap'plication in the prescribed form and specifying the grounds on which leave to appeal is sought and such other particulars, if any as may be prescribed.\"

As it is, the requirements of sections 183 and 184(1) of De'cree No. 105 of 1993 as amended by Decree No. 15 of 1997 are clear. By section 183, leave of the Court of Appeal must be sought before an appeal can lie from a Court Martial to the Court of Appeal. Leave is however not necessary if the decision of a Court Martial involves a sentence of death. That is the proviso. The proviso is inapplicable as none of the sentences passed on the respondent in'volved a sentence of death.

Section 184(1) leans on section 183. The subsection gives the time within which all appeal should be lodged. It is forty days from the date the Court Martial promulgated its findings. In other words, an appeal lodged after forty days of the promulgation of the find'ings of the Court Martial, will be incompetent.

In the motion dated 30th November, 1998 and filed on the same day, counsel for the respondent, Mr. Fred Agbaje, asked for the fol'lowing prayers:

\"(a) An order of extension or enlargement of time within which the appellant is to appeal.

(b) Leave to appeal out of time,

(c) Extension of time within which the appellant is to file his Notice of Appeal.

(d) An order directing a departure from the rules of this honourable court.

(e) An order that this appeal be heard on the bundle of docu'ments (Vol. 1-5) being the record of proceedings of a General Court Martial.\"

(See page 1 of the Record of Appeal).

The following is recorded on page 52 of the Record of Appeal:

\"Appearance: Mr. Fred Agbaje for the appellant.

Registrar: The respondent was served on 15/4/99.

Agbaje: This application filed on 30/11/98 seeks the fol'lowing (1) An extension of time within which to seek leave to appeal. (2) Leave to appeal. (3) Extension of time to appeal. (4) Departure from the rules so that the appeal can be heard on exhibits Cl to C5.I rely on the affidavit in support of the application.

Court: Time within which to seek leave to appeal is ex'tended till today. Leave to appeal is granted. Time to appeal is extended by 3 days from today. The appeal when filed is to be beard on the bundle of documents annexed and marked exhibits Cl to C5. Application for bail is adjourned to 29/4/99.\"

It is clear from the above that although the motion did not ask for leave to appeal, the court below granted the applicant such leave in the following words:

\"Leave to appeal is granted.\"

Prayer (b) of the motion was for leave to appeal out of time and not leave to appeal.

There is a world of difference between leave to appeal and leave for extension of time to appeal, which is leave to appeal out of time. Leave to appeal and leave for extension of time to appeal are not synonyms or procedures of a similar or like content. An applica'tion or motion for leave to appeal presupposes that appeal, by the relevant rule, is not as of right. The appellant therefore seeks per'mission of the court to file an appeal. On the other hand, leave for extension of time to appeal presupposes that the statutory time for appeal has expired and so the appellant seeks permission of the court to extend time within which he can appeal. Both counsel and the courts must appreciate the above difference in on our adjectival law.

I see in this case learned counsel misleading the court below. I say this because he indicated to the court below when he moved the motion that one of the prayers was for leave to appeal when the motion did not contain such prayer. Unfortunately, the court below took the words of counsel on their face and made the Order. It is also possible that counsel was genuinely in error. Whatever way one looks at the matter, the Order was not borne out from the prayer and that is my concern.

It is elementary law that a court of law cannot grant a party relief not sought. A court of law cannot grant an applicant prayer not sought. A court of law can only grant a relief or prayer sought. The moment a court of law grants a relief or prayer not sought by the party, it expands the boundaries of the litigation and unnecessarily instigates more litigation to the detriment of the parties and for no reason at all. The litigation is for the parties and not the court. There'fore the court has no jurisdiction to extend or expand the boundaries of the litigation beyond what the parties have indicated to it. In other words, the court has no jurisdiction to set up a different or new case for the parties. See Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566; Ayanboye v. Balogun (1990) 5 NWLR (Pt. 151) 392; Akinbobola v. Plisson Fisko (Nig.) Ltd. (1991) 1 NWLR (Pt.167) 270; Jeric (Nig.) Ltd. v. U.B.N. Plc (2000) 15 NWLR (Pt.691); Akinterinwa v. Oladunjoye (2000) NWLR (Pt. 659) 92 SC.

What is the legal effect of the respondent not seeking leave to appeal against the decision of the GCM' The legal effect is that the appeal from the decision of the GCM to the Court of Appeal is in'competent and therefore null and void ab initio. See Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Tilbury Construction Co. Ltd. v. Ogunniyi (1988) 2 NWLR (Pt. 74) 64; Deacon Oshatoba v. Chief Olujitan (2000) 5 NWLR (Pt. 655) 159 and Abidoye v. Alawode (2001) 6 NWLR (Pt.709) 463; FWLR (Pt. 43) 322. Accordingly, the judgment by the court below is a nullity and I so declare.
As far as I am concerned, section 183 has nullified the appeal. However, let me also take the impact of section 184(1) for whatever the exercise is worth. The Record shows that the findings of the Court Martial were promulgated way back on 21st October, 1996. The motion for extension of time within which to appeal against the findings of the GCM was filed on 30th November, 1998. The mo'tion was moved and granted on 19th April, 1999. Between 1996 when the GCM promulgated its findings and 1999 is three years. Section 184(1) talks of forty days. Perhaps that was why respondent asked for extension of time to appeal. He ought to have complied with section 183 first. He did not. Whatever way one looks at the matter, either from the angle of section 183 or from the angle of section 184(1), the appeal from the GCM to the Court of Appeal is incompetent. I say this at the expense of prolixity.

In the circumstances, I allow the appeal. I hereby set aside the decision of the Court of Appeal and strike out the appeal before that court on the ground that it is incompetent.

Judgement delivered by

Muhammadu Lawal Uwais, C.J.N.

I have had the opportunity of reading in draft the judgment read by my learned brother Tobi, JSC. I agree with him that the appeal before the Court of Appeal was incompetent by rea'son of the respondent herein (who was the appellant thereat) failing to seek for extension of time within which to seek leave to appeal, since the time (40 days) prescribed by Section 184 subsection (1) of the Armed Forces Decree No. 105 of 1993 as amended had lapsed. The Court of Appeal acted in error to have read such prayer into the application before it. The fact that counsel for applicant gratuitously mentioned the prayer in his oral address did not alter the true position of the application before the Court of Appeal. I accordingly, allow the appeal before us, I set aside the decision of the Court of Appeal and strike out the appeal before the Court of Appeal for being incompetent.

Judgement delivered by

Michael Ekundayo Ogundare, J.S.C

I have had the privilege of reading in ad'vance the judgment of my learned brother Tobi, JSC. I agree with him that the appeal to the Court of Appeal was incompetent and should have been struck out. I, however, wish to add a few words of my own.

The respondent in this case was charged before the General Court Martial on seven counts of conspiracy to defraud, contrary to sec.422 of the Criminal Code; stealing, contrary to section 66(a) of the Armed Forces Decree 105 of 1993; receiving stolen property, contrary to section 66(b) of the Decree; forgery, contrary to section 112(c) of the Armed Forces Decree 105 and disobedience to stand'ing orders, contrary to section 57 subsection (I) of the Armed Forces Decree 1993. One of the four counts of receiving stolen property is alternative to count (2) of stealing. There were eight other officers of the Nigerian Air Force that were separately charged on various counts. The General Court Martial (hereinafter is referred to as GCM simpliciter), however, conducted a joint trial of all the nine accused persons. The propriety or otherwise of a joint trial in such a circum'stance is not an issue in this appeal. I will, therefore refrain from commenting on it.

The prosecution called twelve witnesses and closed its case. The respondent gave evidence in his oven defence. The

GCM in its judgment given on 21st October, 1996 found the respondent not guilty of the counts of conspiracy and stealing. The Court however, found him guilty on the four counts of receiving stolen property and the counts of forgery and disobedience to standing orders. He was sentenced to 2 years imprisonment on each of the counts of receiv'ing stolen property and disobedience to standing orders but the sen'tence were to run concurrently. On the charge of forgery he was sentenced to 21 years imprisonment. This sentence was to run consecutively with the other sentences. In effect he was to serve a pe'riod of 23 years imprisonment.

Being dissatisfied with the judgment of the GCM the respond-: appealed to the Court of Appeal which Court in its judgment delivered on 28th of September, 2000 allowed his appeal, set aside e judgment of the GCM and made an order striking out the charges against the appellant on the ground that the General Court Martial was convened contrary to section 131(2) of the Decree in that the authority to convene a Court Martial could not be delegated by the appropriate authority as was done in this case. The Court of Appeal also made an order discharging and acquitting the respondent of all the charges brought against him. It is against this judgment that the appellant - the Nigerian Force has appealed to this court upon four grounds of appeal contained in the appellant\'s amended notice of appeal filed in this Court, with leave, on 14th January 2002.

The appellant in his brief set out the following seven issues as calling for determination in this appeal, i.e. to say:

\"(i) Whether the applications and/or prayers in the appellant\'s motion dated 30th November, 1998 satisfied the condition precedent to the hearing of his appeal against the decision of the General Court Martial as provided under sections 183 and 184 of the Armed Forces Decree, 105 of 1993 (as amended).

(ii) Whether the jurisdiction of the Court of Appeal to hear and determine the appeal against the judgment of the GCM was not ousted by the appellant\'s (now respondent) failure to first obtain leave of the Court of Appeal as required under section 183 of the Armed Forces Decree 105 of 1993 (as amended).

(iii) Whether the power to convene a court martial, vested in the persons set out in section 131 (1) and (2) of the Armed Forces Decree 105 of 1993 (as amended) cannot be delegated.

(iv) Whether the statement of a person who was not jointly charged with the accused person can rightly qualify as a statement that is subject to the provisions of section 27(3) of the Evidence Act.

(v) Whether the evidence of a person who was not jointly charged with the accused person, and which is against the said accused cannot suffice to secure the conviction of the respondent.

(vi) Whether the burden of establishing or otherwise substantiating the defence raised by the accused persons, who admitted receiving a share of the N10m allegedly stolen from the NAF that they thought it was a \"thank you\" gift from the retiring Chief of Air Staff was that of the prosecution or that of the accused persons who sought to rely on it or to take umbrage thereunder (like the respondent).

(vii) Whether the respondent (appellant in the court below) had established a credible and valid defence against all the evidence adduced in support of the charges against him before the General Court Martial (GCM).\"

The respondent, on the other hand, set out in his amended brief of argument only two issues, that is to say -

\"(i) Whether the Court of Appeal had jurisdiction to enter'tain the respondent\'s appeal at the court below.

(ii) Whether the prosecution proved its case against the re'spondent as required by law having regard to the oral and documentary evidence adduced and accepted at the trial.\"

Having regard, however, to the judgment appealed against and the grounds of appeal filed, I think the issues as formulated by the ap'pellant are to be preferred; respondent\'s issue (ii) is too restrictive having regard to the specific complaints raised in the grounds of appeal.

The respondent had in his amended brief and in the oral argu'ments of his learned counsel, objected to ground (ii) of appeal and the issue raised thereon by the appellant. As learned counsel was unable to sustain this objection, I have no hesitation in striking it out.

Issues (i) and (ii) raise the question of the competence of the appeal before the Court of Appeal. It is the contention of the appel'lant that a prayer for leave to appeal was not contained in the re'spondent\'s application before that court. The Court below could not grant him leave to appeal without leave to appeal being specifi'cally sought by him. The appeal before the Court of Appeal was incompetent, it is submitted. Learned counsel for the respondent has contended to the contrary. It is the submission of the learned counsel Mr. Kejawa that the respondent applied for and obtained the leave of the Court below to appeal against the decision of the GCM as required by, sections 183 and 184(4) of the Armed Forces Decree 1993 (as amended).

Section 183 of the Decree (as amended) by the Armed Forces Decree No. 15 of 1997 confers on a convicted officer the right of appeal with the leave of the Court of Appeal from decisions of a Court Martial to the Court of Appeal but where the decision of the Court Martial involves a sentence of death the appeal shall lie as of right without the leave of the Court of Appeal. Section 184 pre'scribes the procedure for applying for leave to appeal. It reads:

\" 184. (1) Leave to appeal to the Court of Appeal shall not be given except in pursuance of an application in that behalf made or on behalf of the application (sic) and lodged, subject to sub-section (2) of this section, within forty days of the date of promulgation of the finding of the court-martial in respect of which the appeal is brought with the Registrar of the Court of Appeal being an application in the prescribed form and specifying the grounds on which leave to appeal is sought and such other particulars, if any, as may be prescribed.

(2) An appeal against a decision involving a sentence of death shall not be entertained by the Court of Appeal unless the appeal is lodged by or on behalf of the appellant within 10 days of the date of promulgation of the finding of the court-martial in respect of which the appeal is brought with the registrar of the Court of Appeal in the prescribed manner.

(3) Rules of court may provide that, in such circumstances as may be specified in the said rules, any such application or appeal which is lodged with such person (other than the registrar) as is specified in the said rules shall be treated, for the purpose of sub-section (1) of this section, as having been lodged with the registrar.

(4) The Court of Appeal may extend the period within which an application for leave to appeal is required by paragraph (a) (sic) of subsection (1) of this section to be lodged, whether that period has expired or not.

(5) In considering whether or not to give leave to appeal, the Court of Appeal shall have regard to any expression of opinion made by a judge advocate, if any, who acted at the court-martial that the case is a fit one for appeal, and, if any such expression is made, may give leave to appeal.

(6) Whether (sic) the court of appeal dismissed an application for leave to appeal it may, if it considers the application to have been frivolous or vexatious, order that any sentence passed upon the application (sic) in the proceedings from which it was sought to bring the ap'peal shall begin to run from the day on which the court dismissed the application.\"

The respondent did not seek leave to appeal against his convic&#65533;tion and sentence by the GCM to the Court of Appeal within the period prescribed in section 184(1) of the Decree. He, however, sought, by way of motion filed on 30/11/98, from the Court of Ap'peal extension of time. In his application the respondent sought for the following:

\"(a) An Order of extension or enlargement of time within which the appellant is to appeal.

(b) Leave to appeal out of time.

(c) Extension of time within which the appellant is to file his Notice of Appeal.

(d) An Order directing a departure from the rules of this honourable court.

(e) An order that this appeal be heard on the bundle of docu'ments (vol. 1-5) being the records of proceedings of a General Court Martial\".

There is no prayer for extension of time within which to seek leave to appeal as required by subsection (4) of section 184, or for leave to appeal as required by sub-section (1). However on 19th April 1999, learned counsel for the appellant in moving his application before the Court of Appeal had this to say:

\"This application filed on 30/11/98 seeks for the following:-

(1) An extension of time within which to seek leave to appeal.

(2) Leave to appeal out of time.

(3) Extension of time to appeal.

(4) Departure from the rules so that the appeal can be heard on exhibits C to C5.

I rely on the affidavit in support of the applica'tion.'

I pause here to observe that prayers (1) and (2) did not form part of the prayers in this application dated 30th November 1998. I have earlier in this judgment set out the prayers contained in that application. Prayers (a), (b) and (c) mean one and the same thing and, that is, extension of time to appeal. None of the prayers in the applica'tion sought extension of time within which to seek leave to appeal and leave to appeal - two essential prayers for compliance with subsections (1) and (4) of section 184 of the Decree. The Court of Appeal ordered as hereunder.

\"Time within which to seek leave to appeal extended till today. Leave to appeal is granted. Time to appeal is extended by 3 days from today. The appeal when filed is to be heard on the bundle of documents annexed and marked exhibits Cl to C5. Application for bail is ad'journed to 29/4/99.\"

It will be seen from the above order that the Court of Appeal ex'tended time within which to seek leave to appeal and granted leave to appeal. These two prayers were not before their lordships of the Court of Appeal. It was clearly wrong of them to make such orders that were not prayed for. This Court has held in a number of cases that the court should not give to a party a remedy or relief he has not asked for - See Nigerian Housing Development Society Ltd. v. Mumumi (1977) 2 SC at 57 at 81; Ekpenyong v. Nyong (1975) 2 SC 71 at 80; Ugo v. Obiekwe (1989) 1 NWLR 506 at 585. In Odofin & Anor., v. Chief Agu & Anor (1992)3 NWLR 350 where the facts are similar to the facts in the present case, that is, where an intending appellant who was out of time to seek leave to appeal and to file his notice of appeal prayed the Court of Appeal for extension of time to seek leave to appeal and leave to appeal against the judgment of the High Court but failed to ask for extension of time within which to appeal against the said judgment of the High Court, this Court held that where an appeal requires leave of court and time within which to lodge an appeal has also expired the intending appellant must in seeking leave to appeal also ask for a prayer for extension of time within which to appeal in addition to seeking extension of time within which to apply for leave and leave to appeal. Nnaemeka-Agu JSC had this to say at pages 371-372 of the report;

\"According to the above record, it does appear that what the appellant whose application on record was for ex'tension of time to seek leave and for leave prayed for in oral argument were for extension of time within which to appeal and for leave. I sought in vain for any oral application to amend the prayers in the motion paper, but could find none. Even assuming that there was such an application, there would still arise the question: could
a person whose time to appeal had expired simply ap'ply for leave to appeal without a prayer for extension of time within which to apply for leave' He cannot.

I wish to pause here to emphasize that a person who wishes to seek leave on any grounds to appeal after the expiration of the statutory periods to appeal under sec'tion 25 of the Court of Appeal Act (No.43) of 1976 (for section 31 of the Supreme Court Act (No. 12) of 1960) requires three substantive prayers, namely:

(i) extension of time to seek leave to appeal;

(ii) leave to appeal; and

(iii) extension of time within which to appeal.

That any such application must contain these three prayers is not a matter of mere cosmetic importance which could be waved off with levity or waived. Rather, it is a matter which goes to the serious issue of the ju'risdiction of court. The periods within which a party can appeal in our courts are prescriptions of statutes; and leave to appeal, where necessary, are a requirement of our Constitution. When necessary, it must be ap'plied for and obtained within the statutory period to appeal unless time to do so has been extended; See Owoniboys Technical Services Ltd. v. John Holt Ltd. (1991)6NWLR (Pt. 198)850,atPP.557-558. This court has also decided in a number of cases that where leave is necessary before an appeal can be validly filed, it ought to be applied for and obtained and notice of ap'peal filed within the statutory period. See Amudipe v. Arijodi (1978) 2 LRN 28; Atanda v. Olarewaju (1988) 4 NWLR (Pt. 89) 394; Lamai

v. Orbih (1980) 5-7 S.C.28.

As this is the case, it follows that if any of the above prayers is absent in an application such as this then such an application is fundamentally defective. An in'tending applicant cannot apply for leave after time to appeal had expired, unless he applies for an extension of time to do so. Leave to appeal obtained after time to appeal has expired and there is no order for an extension of time is useless. An appeal filed out of time is incompetent, so, the three prayers complement one another and are necessary in a case like this.\"

Babalakin JSC in his own contribution said on page 376 of the re'port:

\"But a person whose time to appeal under Section 25 of the Court of Appeal Act of 976 has expired and wishes to appeal out of time requires the following prayers viz:.-

1. Extension of time to seek leave to appeal;

2. Leave to appeal; and

3. Extension of time within which to appeal.

The last prayer includes filing of Notice of Appeal.

For any or all of these prayers to be granted the applicant must give cogent reasons for delay in appealing within time.

If an applicant fails to satisfy the court about reasons for delay on any or all of these prayers the Court of Appeal will lack jurisdiction to entertain such appeal.

By not including a prayer for extension of time within which to appeal in their prayers the present respondents who were appellants before the Court of Appeal, have failed to fulfil one of the conditions precedent for the Court of Appeal to entertain their appeal.

The Court of Appeal nevertheless granted to the respondents extension of time to appeal, a prayer not asked for. It is

erroneous for it to do so. Courts do not grant a person prayer in excess of his requests.

(Italics is mine)

When the Court of Appeal proceeded to hear the ap'peal on merit it lacked jurisdiction to do so.\"

There is nothing on the record to show that counsel for the respond'ent made an oral application to amend the prayers in his application dated 30th November 1991. The conditions precedent to an appli'cation being heard by the Court of Appeal from a decision of a Court Martial not having been fulfilled by the respondent the court below lacked jurisdiction to entertain his appeal. Consequently I must hold that the proceedings before the Court of Appeal leading to its judgment of 28/9/2000 are null and void. This conclusion is enough to dispose of this appeal.

For the reasons given herein and in the judgment of my learned brother Tobi JSC I too allow this appeal set aside the judgment of the court below and declare the appeal before that court incompe'tent and it is accordingly struck out.

Judgement delivered by

Sylvester Umaru Onu, J.S.C

I have had the privilege to read in draft the judg'ment of my learned brother Tobi, JSC just delivered. I entirely sub'scribe to his view that the appeal succeeds and it is accordingly allowed by me.

Judgement delivered by

Aloysius Iyorgyer Katsina-Alu, J.S.C

I have had the privilege of reading in draft the judgment of my learned brother Tobi JSC. I agree with him that the appeal before the Court of Appeal is incompetent by reason of the fact that the respondent who was the appellant before that court failed to seek for extension of time within which to seek leave to appeal since the period prescribed by section 184(1) of the Armed Forces decree No. 105 of 1993 had expired.

I also would allow the appeal and set aside the decision of the Court of appeal. The appeal before the Court of appeal is accord'ingly struck out for being incompetent. I abide by the order for costs.