

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABAKALIKI JUDICIAL DIVISION
HOLDEN AT ABAKALIKI
ON WEDNESDAY THE 2ND DAY OF DECEMBER, 2015
BEFORE HIS LORDSHIP
HONOURABLE JUSTICE M. A. ONYETENU
JUDGE

SUIT NO. FHC/AI/CS/25/2014

BETWEEN:

MR. MUHAMMED ARABO - - - APPLICANT

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- | | | |
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| 1. THE COMPTROLLER GENERAL
2. NIGERIA IMMIGRATION SERVICES
3. THE COMPTROLLER OF IMMIGRATION
SERVICES EBONYI STATE COMMAND
4. NWANOSIKE NGOZI STELLA
5. ALINCHI HILLARY
6. ONOVO CHRISTIAN
7. UGWU NEBECHI | } | RESPONDENTS |
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RULING

By a Motion on Notice filed on 2/10/14 the Applicant prayed this court to enforce his fundamental rights by granting the following reliefs:

- A. **DECLARATION** that the beating, the breaking of head and inflicting of physical bodily injury on the applicant by the 4th – 7th Respondents who are agents of the 1st – 3rd Respondents and under their instructions amount to torture, inhuman and degrading treatment and is unconstitutional, illegal and a gross infringement of the applicant's

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fundamental rights to dignity of his person as guaranteed under section 34 of the 1999 Constitution (As Amended).

B. AN ORDER OF INJUNCTION restraining the 1st to 7th Respondents, whether by themselves, their agents, privies, workmen or any person(s) taking instructions from them from further infringement of the applicant's fundamental rights.

C. AN ORDER DIRECTING the Respondents to tender unreserved public apology to the applicant in a National Daily Newspaper.

D. AN ORDER COMPELLING THE RESPONDENTS jointly and severally to pay monetary compensation to the tune of N50, 000, 000 (Fifty Million Naira) to the applicant for the infringement of applicant's fundamental rights as guaranteed under section 34 of the 1999 Constitution (As Amended).

The Motion is supported by a Statement which contains the reliefs and grounds for the said reliefs.

It is also supported by a 20 paragraph affidavit which the Applicant relied on as well as 4 Exhibits to wit:

Exhibit A1 to A3- Photographs of wound inflicted on the Applicant.

Exhibit B- Medical report on the Applicant.

Briefly stated the case of the Applicants is that he is a foreman in LOC Metals and Minerals Ltd and that in 2012, some Chinese Nationals were invited by his employees to advise them on the possibility of carrying out mining operation at its mining site at Ishieje in Ivo Local Government Area of Ebonyi State.

That on the 28/5/2012 while at the company premises the 4th to 7th Respondents came heavily armed, approached him and Accused him of being the one who caused the Chinese Nationals to escape. That he told then he knew nothing about it, the lady among them then threatened that they will torture him if he did not disclose the where about of the Chinese men. When he would not say anything, the leader of the team held him and asked the rest to beat him which they did. One of them hit his head with the butt of his gun and he lost consciousness. When he recovered, he found out they had gone, whereupon he reported to the Divisional Police Station and was taken to hospital where he was transfused with blood and stayed for 2 days. He tendered the wounds he received as well as the medical report of the hospital as Exhibits.

In his written address in support of this application, his Counsel gave 2 issues for determination to wit:

Whether from the facts disclosed in this application the applicant's fundamental rights to dignity of his person as enshrined in **S. 34 of the 1999 Constitution (As Amended)** has not been infringed.

Counsel answered this in the affirmative and went ahead to define inhuman and degrading treatment as defined in

BLACK'S DICTIONARY 7TH EDITION at pg 787 and in the case of **UZOKWU vs EZEONU II 1991 6 NWLR pt 200 at 708.**

He then cited the cases of :

MOGAJI vs BOARD OF CUSTOM AND EXERCISE 1982 NCLR 552;

ALABOH vs BOYLES & ANOR 1984 NCLR; and also the case of

JAJA vs C.O.P. 2011 2 NWLR pt 121 at 379 which gave the essential elements of what constitutes torture, inhuman and degrading treatment.

Counsel then submitted that paragraphs 7-19 particularly paragraphs 12-14 and the exhibits accompanying the affidavit in support of this application shows that the applicant was subjected to physical and mental pains and agonies by the Respondents breaking of his head citing

JAJA vs C.O.P. (Supra);

SHUGABA DAMAIN vs MINISTER OF INTERIOR 1982 2 NCLR 95

On issue 2 whether the applicant is entitled to any remedy, Counsel answered in the affirmative submitting that where a wrong is found to exist remedies shall follow citing

ODOGWU vs AGF 1996 NWLR pt 455 at 508;

JIM JAJA vs C.O.P. RIVERS STATE 2013 22 WRN 39 at 44.

Counsel urged this court to hold that the applicant has proved the violation of his right as required by law and thus grant him reliefs sought by him.

The Respondent filed a Notice of Preliminary Objection on two grounds to wit:

1. That this suit is statute banned having not been commenced within 3 months of the act complained by virtue of **S. 29 of the Public Officers Protection Act**; and
2. That this application is incompetent as the affidavit in support purportedly deposed to by Arabo Mohammed was not deposed to by him.

In his written address, Counsel to the Respondents on ground one cited the case of **IBRAHIM vs J. S. C.** 1998 14 NWLR 1 at 31-32 which gave the definition of public officer.

Counsel also cited the case of

NWAOGWUGWU vs THE PRESIDENT FEDERAL REPUBLIC OF NIGERIA & ORS 2004 12 WRN 24, 2007 ALL FWLR pt 306 1151.

Counsel submitted that the Applicant in paragraph 4 of his affidavit claimed the incident took place on 28/5/12 and this action was instituted on October, 2014.

There is no doubt the Respondents are Public Officers so they can come under the Public Officer's Protection Act.

Counsel submitted that it is true that **Order 3 of the Fundamental Rights Enforcement Procedure Rules 2009** provides that an application for enforcement shall not be affected by any limitation institute it in a contract with **S. 2 (a) of the Public Officers Protection Act cap p41 Laws of the Federation of Nigeria 2004**.

Counsel submitted that the rule made by Chief Justice is not on the same pedestal as an Act of National Assembly and then there is a complaint the Act of National Assembly will prevail.

On issue 2 Counsel submitted that **Order II Rule 3 and 4** specify that an application such as this shall be supported by an Affidavit setting out the facts upon which the application is made which shall be made by the

Applicant or another person who has personal knowledge of the facts but that in the present case the Applicant who claims to be the deponent was not there.

Counsel submitted that the signature of Mohammed Arabo in the Statement on Oath of Plaintiff's witness deposed on 6/3/13 in suit no FHC/EN/CS/53/13 which later became FHC/AI/CS/36/13, Exhibit K is different from his signature in the supporting affidavit.

The version of his story in that account of what happened in that case is different from that in the 3 affidavits and the Newspaper Daily Trust (Exhibit 3).

Counsel referred to paragraph 6 of the Affidavit in Support of this application which stated that the Chinese men came to study and advise the Applicant's employee on the viability of their venture but Exhibit C and C1 indicated that the Chinese persons were working and were being paid at Dollar rate.

Counsel further submitted that while in paragraph 6 of the Affidavit the Respondent stated that this incident occurred on 28/5/2012 the Nigeria Police report stated it occurred on 28/11/12.

And thus there has been a failure to comply with the requirements as to time, manner or form the failure shall be treated as an irregularity and may nullify such proceeding except as they relate to mode of commencement of the application citing **EFCC vs EKWOCHA** 2006 14 NWLR pt 1106 at 161. He urged this court to dismiss this application.

In his reply, Counsel to the Applicant gave the origin of fundamental right citing

KUTI vs A.G. FEDERATION 1989 F NWLR pt 6 211;

ALHAJI DAHIRU SAUDA vs ALHAJI HALINU ABDULAH 1989 4 NWLR pt. 116 37.

Counsel then submitted that the power of the Chief Justice of the Federation to make laws for the realization of fundamental rights comes from the constitution which has stated that these cases shall not be affected by time.

Counsel submitted then the Constitution empowers the National Assembly to enact the Public Officers Protection Act also empowers the CJN to make laws and there is no conflict and thus there is no conflict in the 2 laws.

On issue 2, Counsel to the Applicant submitted that the Respondent's Counsel submission that the signature is not that of Applicant raised the issue of forgery which is a crime and thus it must be proved beyond reasonable doubt citing

A C N vs LAMIDO 2012 26 WRN 1 at 4 and that the onus is on the Respondent to do so referring to **S. 138 (1) of the Evidence Act 2011** and citing

BUHARI vs OBASANJO 2005 19 WRN 1;

ADEDURI vs FRENEINENDUR 2012 24 WRN 120.

Counsel further submitted that the Applicant can have 2 signatures. There is no law that states it must be only one signature. Counsel urged the court to uphold the said affidavit.

I have carefully considered the Notice of Preliminary Objection filed by the Respondents in this suit. I have also considered the addresses of both Counsel.

I will take as issues for determination the 2 grounds upon this application is based. First, that this application is statute barred and secondly the application is not proper before this court as the affidavit in support is fundamentally defective.

On the first issue, let me state clearly that the Constitution by reason of **S. 46 (3)** empowers the Chief Justice of Nigeria to make rules on fundamental rights. The Fundamental Rights Enforcement (Procedure) Rules 2009 thus has the same force as the 1999 Constitution. Indeed they form part of the constitution. See the cases of:

AKANBI vs ALAO 1989 3 NWLR pt 108 118;

ABIA STATE UNIVERSITY vs ANYAIBE 1996 3 NWLR pt 439 at 646.

The Public Officers Protection Act cannot override the provisions of the Constitution.

Indeed **Chapter 1 part I s. 1 (1) and (3) of the Constitution** itself defines the Constitution as Supreme and states further that if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void. So that as in this case, I agree there is a conflict, as the Fundamental Rights Procedure Laws **Order 3 (1)** provides that an application for the enforcement of fundamental right shall not be affected by any limitation statute while **S. 29 of the Public Officer's Protection Act** provides that an action or proceeding against a public officer in the execution of duties shall not be

instituted unless it is commenced within 3 months next after the act, neglect or default complained of.

But then the Constitution as I stated earlier overrides the statute and thus it is the provisions of Constitution that will prevail with the effect that the Fundamental Rights Enforcement Procedure has no limitation as to period in which it is to be commenced after the act complained of.

On issue 2 that this application is not proper before the court as the affidavit is fundamentally defective the 1st reason given by Counsel to the Respondent is that the signature of the Applicant is different from his signature in another suit FHC/AI/CS/36/2013. I know of no law that prohibits any person from having more than one signature.

As to the contradiction of the affidavits as per account of events and the time within which it occurred, that is not a preliminary objection but is to be argued while considering the main case. It is rather premature.

As to the provisions of **Order 1X** of the Fundamental Rights Enforcement Procedure rules which provides that where there had been a failure to comply with the requirements as to time, place, manner or form the failure shall be treated as an irregularity that may nullify proceedings, that provision is as to time required for during an act under the said rules not

difference in time in account of parties in the suit as to what gave rise to the breach of fundamental right, thus the authority cited by Counsel is not applicable. I thus find that this Notice of Preliminary Objection must fail and I so hold. It is hereby dismissed.

In response to the main application by the Applicant, the Respondents filed a 49 paragraph affidavit which they relied on and Exhibits to wit:

- Exhibit AA- Counter letter dated 31/01/08.
- Exhibit A- Letter of the Respondents to the Police.
- Exhibit B- Letter by Commissioner of Police to the Respondents.
- Exhibit C1 and C2- Copies of Statement of Claim and Deposition on Oath of site Engineer Christopher Obi.
- Exhibit D- Letter of Application for Temporary Work Permit Visa.
- Exhibit E1-7- Copies of Passports of 7 Expatriates showing their business entry visa.
- Exhibit F- Copy of Nitel cable.
- Exhibit G-7- Application Letters of employer of the Applicant.
- Exhibit H- Copies of Temporary Work Permit Visa stickers.
- Exhibit J- Publication of Daily Trust of 20/12/12.
- Exhibit K- Statement on Oath of Plaintiff's Witness i.e. Applicant.

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Exhibit L- Applicant's employer letter to the 3rd Respondent.

In his written address, Counsel to the Respondent gave a sole issue for determination by this court to wit:

Whether the Respondents infringed upon the Applicant's fundamental rights and whether the Applicant is thus entitled to any remedy in law.

Counsel submitted citing **FAJIMIROKUN vs CB (CL) NIG 2002 10 NWLR pt 774 98**, that an Applicant who alleges a breach of his fundamental rights has a duty to place sufficient evidence before the court to prove his allegation which the applicant in this case did not do as their evidence is scanty and unreliable.

Counsel submitted that the Applicant presented a medical report from the Nigerian Police which was completed by a medical doctor and that the report did not state how the Applicant came by injury whether it was caused by a stick or gun or rod, that there is no investigation by the Police that any of the Respondents was found culpable.

Further more, Counsel to the Respondent submitted that the Applicant claimed that he reported a case of assault to the police in 2012 and up till now no action has been taken on it and he and his employer has not complained.

Counsel also submitted that there is a contradiction in the Applicant's affidavit paragraphs 9-14 viz a viz his Affidavit on Oath as a witness in suit no: FHC/AI/CS/36/2013.

Counsel cited the case of **SHORUMO vs STATE** 2010 16 NWLR pt 1218 65 submitting that a party's witness evidence is contradictory when they give inconsistent accounts of same event.

On the present case, Counsel submitted that the Applicant has 2 sides to his story, one in which he stated a lone immigration officer ambushed him, chased and attacked him by inflicting a wound on him and the other that they were many that confronted him with one of them threatening him with a stick.

Counsel then submitted that where a witness evidence is contradictory, it is virtually useless for purpose of adjudication citing

HENRY NWOKE ARU vs THE STATE 2010 15 NWLR pt 1215.

The Respondent Counsel also submitted that the Respondents were not armed when they went to the Applicant's company while the Applicant's company had armed policemen and that it took them 3 visits, 2 gun shots and teargas with a long wait of 3 months and a letter from Commissioner of

Police for them to perform their lawful duties. They never engaged the Police in the company in a gun dual.

Counsel also submitted that they were policemen on duty at all material times and the Respondents would not be so daring to assault the Applicant in their presence.

That even the 2 security men that were taken away by them, they first took them to the D.P.O's office for clearance.

Counsel also questioned the medical report submitting that it is dated 29/11/12 not 28/05/12 or 29/11/12 the day of this incident.

Counsel submitted that if this application is true, there would have been no long wait by the Applicant before he pressed charges.

Counsel further submitted that the Applicant must have sustained the wound trying to sprit the expatriates out through the barbed wire fence at the company site and not through any of the Respondent's action.

He moreover submitted that an allegation of Assault occasioning harm is a crime and that even in a civil suit, it must be proved beyond reasonable doubt by anyone who alleges it which the Applicant in this has not done.

Counsel then opined that this suit is a revenge one instituted because the Applicant employer cannot continue with his proceeding against them in

suit no: FHC/AI/CS/36/2013 which has since been discontinued as the 1st witness the Site Engineer, Engineer Obi is no longer liable to testify on their behalf.

On the 2nd issue Counsel submitted that the Applicant is not entitled to any remedy as there was no breach of his fundamental rights.

He urged this court to dismiss this application as lacking is merit.

The Applicant filed a further affidavit in support of this application of 15 paragraphs. In his address, Applicant Counsel gave 2 issues for determination to wit:

1. Whether paragraphs 7, 8, 9, 10, 38, 40, and 41 of the Respondent's Counter Affidavit is not liable to be struck out for offending the provisions of Evidence Act.
2. Whether Exhibits C1, C2, J and K are admissible being copies of public documents without certification.

Applicant Counsel then submitted that paragraphs 6, 7, 8, 9, 10, 38, 40 and 41 are incompetent as they offend **s. 11 (1) subparagraph 2 of the Evidence Act.**

Counsel also submitted that paragraphs 38 of that counter affidavit is conclusions reached based on the Respondents opinion instead of statement

of facts citing **MILITARY GOVERNOR LAGOS STATE vs OJUKWU** 2001 FWLR pt 50 1779.

That paragraphs 41 of the counter affidavit are not facts borne out of the Respondent's Personal knowledge but facts contained in a publication in Newspaper, the authority of which was not as ascertained. Counsel urged this court to strike out the said paragraphs.

On issue 2 Counsel submitted that exhibits C1, C2, J and K are public documents referring to **S. 102 of the Evidence Act** and citing **OKONMJI vs NJOKAMMA** 1991 14 NWLR pt 638 250; and that by **S. 105 of the Evidence Act** certified copy of the said documents may be produced citing **GAND T INVESTMENT LTD vs WAT AND BUSH LTD** 2011 8 NWLR pt 1250 600.

He urged this court to reject and discountenance those exhibits.

Counsel to the Respondents filed a further counter affidavit in which he now certified the Newspaper Publication and certified all the documents referred to by the Applicant Counsel in his reply on point of law.

The Applicant filed a further and better affidavit with leave of court of 8 paragraphs in which he averred that the newspaper publication was not

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certified by National Library Board and that the now certified and that the now certified documents i.e. Exhibit IMM1, IMM3, IMM4 and IMM5 are documents in a previous suit which was struck out and was never tendered and proved.

In his written address, Counsel to the Applicant stated that the proper body to certify Exhibit J, the Newspaper Publication is the National Library Board citing

OGBUINJINYA vs OKUDO 1979 6- GSC 32 pt 48.

Counsel submitted that documents which has never been used for trial and admitted in evidence to proof the veracity or relevancy can never be used to determine a case.

The Respondents filed a Further Counter Affidavit and now attached to it a certified copy of Newspaper Publication and labeled Exhibit FE C 2.

They also attached a letter written to the Publishers of the newspaper seeking for reaction to applicant's claim and labeled Exhibit FEC 2.

Now I have carefully considered the application sought by the Applicant in this case. I have also considered the reply of the Respondents as well as the addresses of both counsel in this matter.

On going through the records of proceedings of this case, I observed the Respondents filed a Motion for leave to file a further affidavit which they never moved.

However this is a fundamental rights application and the attitude of courts has been that technicality should not be allowed to defeat the course of justice. In **NISHIZUSA LTD vs STRICHAND JETHA VENU** 1984 12 S.C. 285, the court held

“This court has on several occasions insisted that rules of procedure should be obeyed. But all the same, rules should be helpful handmaids and not tyrannical and uncompromising masters. The general view with which I am in complete agreement, is that it is undesirable to give effect to rules which enable one party to score a technical victory at the expense of a hearing on the merit. This statement confirms the prevailing views of the court that the era of technicalities is over and that the courts nowadays insist on substantial justice.”

And in **NNAMDI AZIKIWE UNIVERSITY & ORS vs CASIME NWAFO** 1999 NWLR pt 585 at 133 the court stated:

However, in order to render meaningful the provisions of the Constitution dealing with fundamental rights, the court should not be tied to the apron

*strings of the principle of practice and procedure governing trial of normal civil cases such as parties being bound by their pleadings as enunciated in the cases of **EMEGOKWUE vs. OKADIGBO (1973) 4 S.C. 113** and **OLABANJI vs. AJIBOYE (Supra)** but it seems to me that in the matter of enforcement of the fundamental rights courts are less slavish to the rules of court rather they use them as hand maiden to do substantial justice. The reason is not unconnected with the fact that the issue is fundamental as it involves life and liberty of a citizen.”*

Thus this court will consider that further affidavit.

In my humble view, the sole issue for determination is whether the Applicant has proved his claim to entitle him to the reliefs being sought by him.

Let me first of all comment on the Applicant Counsel submission in his reply on point of law that paragraphs 6, 7, 8, 9, 10, 38, 40 and 41 of the counter affidavit of the Respondents offend the Evidence Acts and that Exhibits C1, C2, J and K are public documents which are not certified.

I have read the said paragraphs 6, 7, 8, 9, and 10 and I agree with Counsel to the Applicants that they are statements of law on the powers of

the Nigerian Immigration under the Immigration Act. I therefore find that they offend **S. 115 (2) of the Evidence Act** and they are hereby struck out.

I also agree with Counsel to the Applicant that paragraph 38 of the said counter affidavit is conclusions based on the belief of the Deponent. It therefore offends **S. 115 of the Evidence Act** and is hereby struck out.

On paragraph 41, I see nothing wrong with it, there the deponent was merely relating information that had come to his knowledge through a newspaper publication. I will therefore leave the paragraph as it is.

On the issue of certification the Respondent through their further counter affidavit and further counter affidavit which they sought leave of court to show that this documents have all been certified.

Though for the documents filed in court they form part of court record and it is trite law that the court can look into its own record.

Counsel to the Applicant has submitted that since the documents were not proved in court, they cannot be used in any proceedings and that the suit is dead.

Let me state quickly a witness deposition on Oath is an Oath as it has no expiring date. The fact that the case in which it is to be used has been

struck out does not mean that it is dead. Neither is Exhibit C1 now Exhibit MMA1, as it forms part of Court's record.

The issue is not whether what is contained in that statement of claim or witness deposition on oath is true or not but that the witness had made previous statement on the same issue which is contradictory to the one he is now making in court.

In the light of the above, the statement of claim Exhibit IMM1 has no place have as it was not made by the Applicant, neither does the witness deposition of Mr. Obi the Site Engineer Exhibit IMM1 since he is not the Applicant in this case.

It is the witness deposition of the Applicant Exhibit K now Exhibit IMM1 that is relevant.

The Newspaper report also Exhibit J now FEC (1) contains previous statement allegedly made by the Applicant. Now the Respondents had deposed that it is what the Applicant stated in a National Newspaper.

In paragraph 29 of the further affidavit of the Applicant he denied the Newspaper stating that the facts there are not to his knowledge.

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That denial in my humble view is not enough. The issue is did he grant an interview to staff of Sunday Trust. That allegation is very material and it behooves the Applicant to make a specific denial with facts contrary to it.

Moreso his employer had sought to use it, in a former proceeding to prove what happened in this case, did he ever made a retraction? If so when and where is it?

The facts stated is that Newspaper Publication FFCI is markedly different from what the Applicant has averred in paragraphs 6 to 16 in his affidavit in support of this case. Indeed it is contradictory as to material facts.

In his affidavit in support paragraph 13 the Applicant stated that one of the 3rd Respondent staff hit his head with the butt of his gun, while many of them were beating him.

In Exhibit FEC 1 he stated that it was only one of the immigration staff that hit him with a long stick.

In paragraph 13 of affidavit in support of this application, he stated that when he was hit, he became unconscious but in the newspaper publication Exhibit FFC 1 he did not state that he lost consciousness.

In Exhibit K now Exhibit IMM 1 he stated under Oath that heavily armed men of Nigeria Immigration Authority descended on him breaking his

head. He did not make any mention of any female leader who threatened that they will torture him if he did not reveal the whereabouts of the Chinese men. He did not state one of the men hit him with the butt of his gun. He did not say he lost consciousness.

Where a person makes a previous statement on Oath while is inconsistent with another one on Oath on material particulars he is treated as an unreliable witness and such statements are discountenanced.

In the present case, the material particulars of the Applicant claims are definitely contradictory making his averments unreliable. The medical report Exhibit B does not help the Applicant case. It did not state what caused the wound on the Applicant's head.

Exhibit A1 to A3 the pictures of the Applicant are not tendered with the negatives.

The Applicant stated he reported to the police. There is no police report in his claim.

As pointed out by Counsel to the Respondents Assault occasioning harm is a crime more or less and even in Civil Proceedings must still be proved beyond reasonable doubt see **S. 135 (1) of the Evidence Act.**

From the above it is quite clear to me that the Applicant has not discharged this burden of proof.

The Applicants evidence has a lot of pot holes in it which he has not been able to explain.

I am therefore of the humble view that the Applicant has not proved his claim before this court and I so hold.

This suit is hereby dismissed.

M. A. Onyetenu
M. A. ONYETENU
JUDGE
2/12/15

Applicant present.

4th, 5th and 6th Respondents present.

S. A. Nwiboku with C. N. Umoke for the Applicant.

J. A. Omezi for the Respondents.

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