**IN THE FEDERAL HIGH COURT OF NIGERIA**
**IN THE ILORIN JUDICIAL DIVISION**
**HOLDEN AT ILORIN**
**ON FRIDAY 11TH DECEMBER, 2015**
**BEFORE THE HONOURABLE JUSTICE A.O. FAJI**
**JUDGE**

**SUIT NO: FHC/IL/12C/2015**

BETWEEN

ATTORNEY-GENERAL OF THE FEDERATION....COMPLAINANT

AND

MOHAMMED ABUBAKAR AND
MOHAMMED QUDUS.....ACCUSED PERSONS

# JUDGMENT

The 2 Defendants are standing trial on a two count charge filed on 21/5/15. The charge reads:

**CHARGE ONE: CRIMINAL CONSPIRACY**

That you Mohammed Abubakar Male, 25 years of Tsaragi area of Kwara State and Mohammed Qudus, Male, 35 years, of Alhaji Adi Compound, Tsaragi Area Kwara State with the aid of one Sambo, Male,

adult of Kanbi, Area Kwara State now at large do criminally conspired on 14th of May, 2015 and offer your selves to import one thousand seven hundred and forty (1740) litres of PMS to Tsaragi without licence or authority to so do and with the intent to distribute or sell of same under the inherent jurisdiction of this Honourable Court thereby committed an offence under the **Section 4(1) and punishable under Section 4(b) of the Petroleum Act CAP 10 Laws of the Federation 2004**.

**CHARGE TWO: DEALING IN PETROLEUM PRODUCT**

That you Mohammed Abubakar, Male, 25 years, of Tsaragi area of Kwara State and Mohammed Qudus, Male, 35 years, of Alhaji Adi Compound, Tsaragi Area Kwara State with the aid of one Sambo, Male, adult of Kanbi Area, Kwara State now at large illegally without lawful authority or an appropriate

licence deal (SIC) with petroleum products by loading one thousand seven hundred and forty (1740) litres in six(6) drums and eight (8) jerry cans in white Toyota Lite Ace with registration number: XA 165 DEK with intent of importing same to Tsaragi and offer same for sale. Thereby committed an offence contrary to **Section 1(17) (a) and (b) of Miscellaneous Offences Act Cap M 17 LFN 2004** and punishable under same Section.

The Defendants pleaded not guilty to the 2 Counts and trial commenced on 7th October 2015. The Prosecution called 2 witnesses: Adeshina Adeyinka Christopher – the arresting officer who tendered **Exhibit A**. PW2 – LAMIDI NURUDEEN –the investigating officer tendered **Exhibits B-K & K1**. At the close of the case for the prosecution,

Defence Counsel made a no-case submission which was overruled by the Court.

The Sole Defence witness was the 1st Defendant – Mohammed Abubakar.

Defence Counsel reiterated the facts and addressed the Court first on the admissibility of **Exhibits C & C1 D & D1**. Counsel submitted that the Yoruba versions of the statements **(Exhibits C and D)** are at variance with **Exhibits C1 and D1** (the English Versions). Those exhibits did not also reflect that the Defendants speak both Nupe and Yoruba languages. Neither of the Officers who recorded and interpreted the statement was called as a witness. The law only recognises the statement of the investigating officer as being admissible under Section 49 and not where one officer interrogates

whilst another records the Defendants' statement. Counsel however referred to **OGUNO & ANOTHER-V-STATE (2013) 3-4 SUPREME COURT (part III) 1 at 36** to the effect that any of the officers involved in investigation can tender a confessional statement if the defence does not object. Counsel however submitted that the statement is inadmissible because the prosecution did not call those who interpreted the document as witnesses. There are contradictions in that some statements were signed by Defendants whilst others were thumb-printed.

Counsel therefore urged the Court to expunge the documents from its records even though admitted without objection from the Defendants. If that is so, what is left is the inconsistent evidence of PW2. That is not sufficient proof.

PW2 was not the person who recorded the statements. None of the recorders was called as a witness. Counsel relied on **NWEZE-V-THE STATE (1996) 2 NWLR (part 428 1 @ 20**. The interpreter was also not called as a witness. Counsel relied on **OLALEKAN-V-STATE (2001) 12 SCNJ 94 and 109, 110**. There are also material contradictions in the statements as some were signed and others thumb-printed. Counsel relied on **IKEMSON & ORS-V-THE STATE (1989) 6 SCNJ (part 1) 54 @ 71-74**.

Even if the Court looks at **Exhibits C & C1 and D & D1,** the prosecution has not discharged the burden of proof.

Counsel submitted that there is no evidence that the product found on the Defendants is petroleum

product within the intendment of Section 15 of the Petroleum Act. There is no scientific evidence. There is also no evidence that the Defendants imported, exported, sold offered for sale or otherwise dealt in crude oil or petroleum products. Counsel referred to **Exhibits F-F6, G1-G8, J and K-K1.** PW2 who had testified that he took samples of the product which he sent for analysis stated under cross-examination that the first time he ever opened **Exhibit E** was when he testified in Court. DW1 also testified that **Exhibit E** – the vehicle – was never opened in his presence at the NSCDC Office and that no sample was collected in his presence for laboratory analysis. PW2 did not therefore open **Exhibit E** from 14/5/15 (day of arrest) until commencement of hearing on 7th October 2015. It was because PW2 is not an expert

that expert opinion was sought. The failure of the prosecution to take the samples in the presence of the Defendants is fatal. Exhibit K1 is therefore valueless. Consequently, there is no expert evidence on which the Court can rely on.

Counsel referred to:

- **ENEWOH-V-STATE(1990) 7 SCNJ 1**
- **CUSTOMS & EXCISE BOARD-V-ADEBAYO & 1 OR (1982) 2 NCR 331 @ 336.**
- **SPDC-V-OTOKO (1990 6 NWLR (Part 159) 693.**

PW2 also admitted that Defendants were mere transporters. DW1 also testified that Defendants never knew they were going to transport

petroleum products for Sambo for whom they usually transported charcoal and wood.

Counsel referred to Section 1(17) of the Miscellaneous Offences Act and the phrase: 'dealing in petroleum products'. Both the Petroleum Act and the Miscellaneous Offences Act require licence or lawful authority to deal in petroleum products. They however do not mention way-bill and there is no evidence before the Court that way-bill and licence are the same. There is no evidence therefore that the Defendants dealt in petroleum products. They cannot therefore be tried under the two Acts.

The prosecution did not also arrest the two persons mentioned by the Defendants to wit: Sambo and Sabo. DW1 was also not cross-examined on his testimony that the product

allegedly found in the possession of the Defendants was never taken for analysis. This same piece of evidence was also elicited from PW2 under cross-examination. It is thus unchallenged and established.

Neither PW1 nor PW2 stated the quantity of product involved in their testimony. The prosecution did not also establish that Defendants' conduct is not within the exceptions in subsection 2 of **Section 4 of the Petroleum Act.**

Counsel urged the Court to discharge the Defendants and direct the prosecution to release **Exhibit E**.

The Learned Prosecutor identified 4 issues which he argued seriatim.

Counsel submitted that the essential ingredients of the offence were established by PW1 and PW2 and the **Exhibits** tendered. DW1 also confirmed **Exhibits C and C1** as his statement. Counsel urged the Court to rely on the said **Exhibits**.

The offence is strict liability in nature. The Defendants were found in possession of 6 drums and 8 jerry cans loaded with PMS products amounting to 1,740 litres without lawful authority. There is also a laboratory report confirming the nature of the product.

Counsel referred to the evidence of PW1 and PW2 and submitted that PW2 being the team leader is qualified to tender **Exhibits C, C1, D & D1.**

Counsel urged the Court to disregard the testimony of DW1 because he is inconsistent. At arraignment, he said he could speak only NUPE. He however gave his testimony in Yoruba language. Counsel thus urged the Court to rely on **Exhibits C and D** which were tendered though PW2. Counsel urged the Court to disregard the objection raised to admissibility at the address stage because it was not timeously raised as stated in **IPINLAIYE-V-OLUKOTUN (1976) 6 MAC 146 @ 147.** DW1 also confirmed **Exhibits C, C1, D & D1** in his testimony. The confessional statements were never contradicted and are thus unchallenged. Counsel repeated the same submission as regards the objection centered upon signatures and thumb-printing of **Exhibits C, C1, D & D1.**

On the laboratory report, Counsel submitted that a government official can tender any certificate issued by an expert or officer in charge of any laboratory established by the appropriate authority, in this case the NNPC. Counsel relied on **Section 55 of the Evidence Act**. Failure to call the expert has thus not prejudiced the prosecution.

**Exhibits F-F6 and G-G8** were also found in the possession of the Defendants and they were transporting same for sale. PW2 also testified as to the chain of events. These fundamental facts were not controverted or denied under cross-examination. Counsel urged the Court not to expunge **Exhibits K and K1** from the record being the report of an expert

tendered in accordance with **Section 55 of the Evidence Act.**

Those were the submissions of Counsel.

I will first consider the objection to **Exhibits C, C1, D and D1. Exhibits C and D** are the statements of the two Defendants, recorded in Yoruba language. **Exhibits C1 and D1** are the supposed translations of **Exhibits C and D** from Yoruba to English language.

PW2 who tendered the Exhibits was not the recorder of the statements to wit: the statements in Yoruba and their supposed translations into English. It is instructive that PW2 testified that after the Defendants' statements were taken down in Yoruba, they were again taken down in English. One wonders why a person's statement should be recorded in two different languages.

Defence Counsel has urged the Court to expunge **Exhibits C, C1, D and D1** for not being admissible. Counsel contended that being an issue of admissibility it can be raised at this point. Counsel contended that both the recorder and the interpreter (as in this case) must be called to testify and be cross-examined. The Prosecutor's position is that being the leader of the investigation team, PW2 could have tendered the statements. Counsel relied on **Section 41 of the Evidence Act**. Indeed, by **Section 39 of the Evidence Act** Section 41 will only apply if the conditions in Section 39 are fulfilled. There is no evidence that the interpreters and recorders of **Exhibits C, C1, D and D1** are dead, cannot be found, are incapable of giving evidence or their attendance in Court cannot be procured without

unreasonable delay and expense. The contention of Counsel on this is thus faulty.

Learned Prosecutor also posits that not having raised an objection when the documents were being tendered, no such objection can now be raised. I do not agree. Where inadmissible evidence has been inadvertently or improperly received in evidence in the Court below even when no objection had been raised, it is the duty of the Court when considering its judgment to expunge such evidence. That can also be done on appeal. See **KANKIA-V-MAIGEMU (2003) 6 NWLR (Part 817) 496 @ 518-519; ITA-V-EKPEYONG (2001) 1 NWLR (Part 695) 587 @ 613.**

I will now consider the issues raised as to the admissibility of **Exhibits C, C1, D and D1.**

**Exhibits C and D** were recorded in Yoruba language. **Exhibits C1 and D1** were also recorded in English language. There is no indication of any translation or interpretation from Yoruba to English or vice versa. **Exhibits C, D and D1** were recorded by Owoniyi B Lanre. **Exhibit C1** was recorded by Aminu Ganiyu. Neither of these two people was called as a witness. PW2 stated that the statements were first recorded in Yoruba language and later also in English language. The Defendants do not however understand English language which is the language of the Court. There is no evidence that it was the statements recorded in Yoruba language that were interpreted vide **Exhibits C1 and D1**. Since there is no such evidence, **Exhibits C and D** not being in the language of

the Court cannot be of any probative value. **Exhibits C1 and D1** not having been shown to have been the translations of **Exhibits C and D** from Yoruba to English language suffer the same fate.

Indeed, it is clear that where the recorder and/or interpreter of a statement is not called as a witness, that statement is inadmissible See: **OLALEKAN-V-STATE (2001) 18 NWLR (part 746) 793 @ 818-819; NWAEZE-V-STATE (1996) 2 NWLR (part 428) 1 @ 20-21.**

I therefore find that **Exhibits C, C1, D and D1** are inadmissible and therefore rejected and expunged from the Court's records.

Even if I am wrong in this conclusion, since **Exhibits C1 and D1** are not expressed to be translations of **Exhibits C and D and Exhibits**

**C and D** are in Yoruba language, **Exhibits C, C1, D and D1** lack probative value and should not be accorded any.

From the testimonies of PW1 and DW1, it is clear that the two Defendants were found in possession of 6 drums and 8 jerrycans of substance said to be petroleum products. The charge says 1,740 litres.

**Exhibit A** and PW1 say it is 6 drums and 8 jerry cans. The substance was in an off-white coloured Toyota Liteace Bus with registration number XA 165 DEK (EKITI). There is unison that the Defendants got the product from one Sambo to transport from Kanbi to Tsaragi. It was to be collected by Sabo in Tsaragi. The vehicle was intercepted by officials of Nigeria

Security and Civil Defence Corps when it developed a fault at Olooru Oke-Oyi.

Count 1 relates to conspiracy to import 1,740 litres of PMS without licence with the intention of distributing or selling same. Count 2 relates to dealing in petroleum products without licence. I am surprised that Defence Counsel did not take up the issue of importation as regards Count 1, more so when it is clear that everything in this matter took place within the hinterland of Kwara State and nothing was brought in through any of Nigeria's international boundaries or borders.

Counsel has dwelt heavily on the sampling procedure adopted in the instant case. DW1 contends that the vehicle – **Exhibit E** - was not opened until it was tendered as an Exhibit in

Court. So no sample could have been and was indeed, not taken. Under cross-examination, PW2 stated that 7/10/15 was the first time he would be opening **Exhibit E** – the vehicle. PW2 in examination-in-chief however stated that the Defendants were present when he (PW2) and PW1 inspected **Exhibit E** and its contents and also wrote a letter which was sent to NNPC Oke-oyi with a sample of the product.

The question is: is it possible to take samples from the contents of the drums and jerry cans in **Exhibit E** without opening **Exhibit E** – the vehicle. The response of PW2 under cross-examination as regards tampering with **Exhibit E**, to my mind has to do with what happened after 14th and 15th May 2015 and not before then. DW1 did not however deny PW2's evidence that

a sample was taken by NSCDC in the presence of the 2 Defendants. Even PW2 agreed that the vehicle was not opened before the day it was tendered in evidence.

My thinking is that the evidence of PW2 on the taking of samples is unchallenged. Furthermore, **Exhibits J, K and K1** show that there was a request to NNPC to examine adulterated PMS recovered from some black marketers at Oloru/Oke-Oyi Road Ilorin. **Exhibit K** however shows that samples were received and examined by NNPC with the analysis attached as **Exhibit K1**. The only challenge to **Exhibits K and K1** was that PW2 was not the maker. I however think that **Section 55 of the Evidence Act permits PW2 to tender Exhibits K and K1**. Should the Defendant wish

to cross-examine the maker, they were at liberty to ask him to come and be cross-examined, but they did not. I must therefore find that **Exhibits K and K1** are unchallenged. Along with the evidence of PW2 therefore, I find that **Exhibit K1** is the result of the laboratory examination conducted on the contents of the 6 drums and 8 jerry cans.

In criminal trials, the burden is on the Prosecution to prove the charge beyond reasonable doubt. A critical ingredient of Count 1 is that the Defendants conspired to 'import'. The Prosecution did not lead any evidence on importation. Indeed, all the activities in this matter took place within Kwara State. Section 4(1) of the Petroleum Act provides:

'Subject to this Section, no person shall import, store, sell or distribute any petroleum products in Nigeria without a licence granted by the Minister'

Count 1 is about conspiracy to offer oneself to import products for distribution or sale without licence. I do not think that falls within Section 4(1) because by the charge, an importation for the purposes of distribution or sale is what is envisaged whereas under **Section 4(1)** importation is disjunctive of the other modes of commission of the crime. By virtue of the charge as couched, importation must occur for the purpose of distribution or sale. The Prosecution has not proved importation. The Count must therefore fail. The Defendants are therefore discharged and acquitted on Count 1.

Count 2 relates to dealing in petroleum products without licence. The evidence is clear on this point. The Defendants were found in possession of 6 drums, 8 jerry cans of PMS in transit. Even though they were not offering for sale, they were by transporting the PMS distributing it as they moved it from one place to another from Sambo in Kanbi to Sabo in Tsaragi. That is clearly distribution and falls under the phrase 'otherwise deals'. It has been contended that the NSCDC merely asked for a way-bill and not a licence.

The Defendants have Counsel. I think it is a matter for the defence to show that Defendants have a licence. It is not possible to prove the negative. By virtue of **Section 4(2)** a licence is required when more than 500 litres is involved.

In the instant case 1,740 litres is involved. The burden was therefore on the Defendants to show that they have a licence.

**Exhibits K and K1** have shown clearly that the substance is PMS. The Defendants were found transporting same from Kanbi to Tsaragi assisting Sambo to distribute the product to Sabo. I think the offence is established once the factor of distribution has been established since the factors are disjunctive.

The evidence of DW1 is a clear admission of the crime. It is clear that, DW1 knew they were being asked to transport petrol. He is not in that line of business but accepted to transport something he knows nothing about.

The defence has contended that the evidence led by the Prosecution is inconsistent. PW1's

testimony fixes the two Defendants at the scene of the crime in possession of the substance which they were transporting from Kanbi to Tsaragi. PW1 arrested the Defendants and handed them over to the investigation department. PW2 took over at the investigation department, it was he who took and forwarded the sample of the product to the NNPC. He took the sample in the presence of the Defendants. This fact was not challenged under cross-examination. I have already commented on the sampling process. PW2 also testified as to the contents of **Exhibit E** and the 6 drums and 8 jerry cans. This was done in the presence of the Defendants. **Exhibits E, F1-F6, G1-G8 and K and K1** were tendered by PW2.

That these Exhibits were recovered from Defendants containing petroleum product was not challenged under cross-examination.

There is thus no inconsistency in the case of the prosecution as regards Count 2.

I therefore find that the prosecution has established Count 2 beyond reasonable doubt. I therefore find you Mohammed Abubakar guilty of Count 2. I also find you Mohammed Qudus guilty of Count 2. The Defendants are therefore convicted as charged in Count 2. They are discharged and acquitted on Count 1.

**A.O. Faji**
**Judge**
**11/12/15**

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