(16)

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN
ON THURSDAY THE 15TH DAY OF SEPTEMBER, 2016
BEFORE THE HONOURABLE JUSTICE N.I. AFOLABI
JUDGE

SUIT NO:FHC/IL/CS/13/2016

BETWEEN:

BABATUNDE OLUWAFEMI PETER .....APPLICANT

AND

1. **COMMISSIONER OF POLICE KWARA STATE POLICE COMMAND**
2. **OFFICER –IN-CHARGE, "X" SQUAD KWARA STATE POLICE COMMAND**
3. **AZEEZ ADETULA**
4. **AJEWOLE DAVIES**

.....RESPONDENTS

JUDGMENT

This is an application brought pursuant to Order 2 Rules 1, 2, 3, and 4 of the Fundamental Rights (Enforcement Procedure Rules (2009), Sections 34, 35 and 41 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended) and under the Inherent Jurisdiction of this Honourable Court. Seeking the enforcement of the applicant's fundamental rights to dignity of persons, personal liberty and Freedom of movement. The relief sought by the applicant are

A declaration that the harassment, embarrassment, arrest and detention of the applicant by the officers of the 1st and 2nd Respondents upon the instruction of the 3rd and 4th Respondents is unlawful, Unconstitutional and a gross violation of the applicants fundamental Human right as guaranteed under Section 34, 35 and 41 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended).

The application is dated the 4th March 2016. A statement was filed along with this application as well as a 35 paragraph affidavit deposed to by the applicant himself. Attached to the affidavit are three exhibits marked as $A_1 - A_3$. A written address in support of the application was also filed on behalf of the applicant, as his argument in support of the application.

The applicant also filed a further and better affidavit dated the 17th May 2016 which was deemed properly filed and served on the 6th May 2016 which is in response to the 1st and 2nd respondent's Counter-affidavit. A reply on points of law was also filed along with the said better and further affidavit.

S. O. Babakebe Esq. Counsel to the applicant relied on all the arguments therein in urging the Court to discountenance the response of the respondent and grant this application. He further contended that a separate further and better affidavit of 15 paragraph was filed in response to the Counter-Affidavit of the 3rd respondent dated the 12th May 2016 but deemed properly filed and

(15)

served on the 6th May 2016. He further stated that in response to the 1st and 2nd respondent Counter-affidavits, a reply on points of law was filed along with the said better and further affidavit and relied on the argument therein in urging the Court to discountenance the response of the respondent and grant this application. In response to the Counter affidavit of the 4th respondent, a 10 paragraph affidavit deposed to by the applicant was filed on the 12th May 2016 but deemed properly filed and served on the 16th May 2016. A reply on points of law was also filed along with the further and better affidavit and relied on same and urged the Court to discountenance the respondents' response and grant the application.

In opposing the application, Garba Esq. stated that the 1st and 2nd respondent had filed a 10 paragraph Counter affidavit dated 12th May 2016 which was deemed properly filed and served on the 16th May 2016. The said Counter-affidavit had two exhibits annexed Exhibits MOJ_1 and MOJ_2. He relied and adopted the Counter affidavit and relied on all the averments as well as the exhibits attached. A written address was also filed in support of the affidavit dated the 14th March 2016.

A further and better affidavit was filed against the said Counter affidavit and he urged the Court to discountenance the averments therein. He submitted that the 1st and 2nd respondent duly complied with the provision of S.35 (1) (C) of the Constitution and that on the

face of MOJ1 the Applicant threatened to get the 3rd respondent killed and the 1st and 2nd respondents acted in line with the said exhibit and in accordance with Section 4 of the Police Act. He argued further that the applicant is not a witness of truth as he constantly changed the number of days he was detained as shown in paragraph 3. 15, 3.16 and 3.17 of his written address while Exhibit MOJ2 showed he was released on the same day he was arrested. He urged the Court to dismiss the relief sought by the applicant since there are no bases for the abuse of his right.

Abdulazeez Esq: Argued in opposition for the 3rd and 4th respondent and to this he filed two sets of Counter Affidavits deposed to by the 3rd and 4th respondent respectively dated 15th March 2016.

The Counter-affidavit of the 3rd respondent had 20 paragraphs while that of the 4th respondent had 13 paragraphs.

There were 3 exhibits annexed thereto marked as AA1 – 3 and relied on all the depositions therein. He adopted the joint written address dated 6th March 2016 and adopted same as his argument before this Court. He argued that exhibit AA, AA2 were made in tranches and the last was paid 25th September 2013 while Exhibit AA1 was made 21st August 2013 and 30th August 2013. He urged the Court to resolve the conflicts against the app0licant.

He argued that paragraph 8, 10, 16, 18 and 19 of the 3rd Respondent's Counter Affidavit are neither legal opinions or conclusion as they were facts within the knowledge of the

deponents. He contended that paragraph 23 of the applicants affidavit in support runs foul of S. 115 (2) & (3) of the Evidence Act, as it was an opinion. He finally asked the Court to dismiss the application with substantial cost as this process is not to shield wrong doing.

Babakebe Esq while replying on points of law, on behalf of the applicant stated that by S. 35 (6) of the 1999 Constitution wrongful detention attracts damages and an apology. That issues have been joined on all facts to which the 3rd and 4th respondent Counsel said were not denied and urged the Court to consider all the depositions in the processes filed. He concluded by saying S. 113 of the Evidence Act supports the applicants deposition and urged the Court to grant application.

In considering this application the Court is guided by the fact that this is an application for the enforcement of the Fundamental Rights of the applicant and whether or not he has placed before this Honourable Court enough material facts and evidence to enable this Court exercise its discretion in his favour.

The crux of this matter is the purchase and supply of cars by the applicant on behalf of the 3rd and 4th respondent. He claims he did and that the cars were auctioned off upon failure to pay the demurrage that had accrued and the respondents claim that he never purchased any vehicle, how much less the cars been auctioned off. That it was based on this perceived fraud that a petition was

written to the 1st and 2nd respondent who swung into action to investigate and arrest the applicant in line with their statutory functions.

The law is elementary that he who asserts must prove the assertion. See the case of **REPTICO S. A. GENEVA V. AFRIBANK NIG PLC (2013) LPELR – 20662 (SC)** Per Ariwoola, J.S.C. (P.42, Paras D – E).

By Exhibit A1, A2 and A3 it is evident that indeed money was transferred abroad for the purported purchase of the said cars as shown by Exhibit A1 and A2 attached to the applicant's affidavit. However by exhibit A2 which is the bill of Laden, the content of the container did not include the Toyota Camry "Pencil" said to have been purchased on behalf of the 3rd respondent.

The applicant had earlier deposed to facts in his application that the 3rd respondent didn't give him any money and then made an about face in his further and better affidavit filed to the 3rd respondent Counter affidavit that indeed the 3rd respondent paid him sum money even though not up to the sum of ₦1, 271,000 and exhibited as Exhibits AA1 and AA2. There is a conflict but on the strength of Exhibits AA1 and AA2, I resolve this conflict in favour of the 3rd respondent.

The applicant also went ahead to say that the Cars had been auctioned by the Nigerian Customs and Excise for failure to pay demurrage to the tune of ₦12,000,000. This fact is not corroborated by any piece of evidence especially in the face of the averments by

the respondents that the cars were not auctioned by the Nigeria Customs and Excise and that in fact nothing was shipped into Nigeria by the applicant.

The law is trite that he who would fail if a piece of evidence is not produced in support of a given fact has the Onus to produce such evidence. See the case of **Buhari & Anor v. Obasanjo & Ors** 2005 LPELR – 815 (SC) where it was stated per Uwais J.S.C. " In general, in Civil Case, the party that asserts in its pleadings the existence of a particular fact is required to prove such fact by adducing credible evidence. If the party fails to do so, its case will fail." (Pp 34 – 35 Paragraph F – A). Also by virtue of Section 131 (1) and (2) of the Evidence Act the Onus of proof falls squarely at the door steps of the Applicant.

Furthermore, the 4th respondent has also stated categorically that he never made a report to the 1st and 2nd respondent and the act of adding him to this application by the applicant is to forestall him from seeking redress against the applicant as per paragraph 9 and 10 of his Counter-affidavit dated the 15th March, 2016. This piece of evidence has remained uncontroverted and this Court has no choice but to accept same as admitted and true. See **FALANA VS. BELLO (1995)** 9 NWLR (Pt. 418) 182.

From the foregoing, the 3rd respondent/applicant had reasonable belief that he had been defrauded and consequently

made a complaint to the 1st and 2nd Respondent who are constitutionally empowered among other things to investigate and detect crimes. See **Section 4 of the Police Act**. A Petition alleging a crime was written to the Police and the Police are duty bound to investigate it.

From available evidence and facts the applicant was with the Police for only a few hours before he was granted bail. As shown by the bail bond which is exhibit MOJ2 dated the 7/1/2016. I find that merely coming to Court to state I was harassed, embarrassed and intimidated without more is not enough to discharge the burden of proof on the applicant especially in the face of contrary documentary evidence: The burden of proof lies on the applicant to establish by credible evidence that his fundamental right was breached. See **Cosmos Onah & Ors. v. Desmond Okenwa** (2010 LPERL – 4781 (C.A.)

In the circumstance, I find that the applicant has failed woefully to discharge this burden of proof and to prove his allegations by placing cogent and credible material evidence before this Court to enable it exercise its discretion in his favour.

I therefore find that this application is brought malafide and lacks merit. It is hereby dismissed.

I make no order as to cost.

N. I. AFOLABI
JUDGE
15/9/2016

S. O. Babakebe Esq. for the Applicant.
K.O. Garuba (S.C.) Esq. for the 1st and 2nd Respondent.
I. Abdulazeez Esq. for the 3rd and 4th Respondent.