TITLE PAGE

CRITICAL ANALYSIS OF THE MILITARY JUSTICE SYSTEM IN NIGERIA

BY

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DECLARATION

I hereby declare that this research work was written by me in the Department of Public Law under the supervision of Barrister S. K. Musa. The information derived from the literature has been dully acknowledged in the test and a list of references provided. Part of this research work was previously presented for another degree or diploma at any institution.

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CERTIFICATION

This research work titled "CRITICAL ANALYSIS OF THE MILITARY JUSTICE SYSTEM IN NIGERIA" meets the regulations governing the award of the Postgraduate Diploma in Military Judge Advocacy of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This research work is dedicated to God Almighty, my creator, my God, the reason for my existence, the breath I take, shield, love, provider, ever present help, strength and my source of inspiration throughout the period of the course. Also to my darling husband, my pride.

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LIST OF ABBREVIATIONS

AA	-	Army Act
AFA	-	Armed Forces Act
AHQ	-	Army Headquarter
ASA	-	Appropriate Superior Authority
Capt	-	Captain
CFRN	-	Constitution of Federal Republic of Nigeria
CJ	-	Chief Judge
CM	-	Court Martial
CO	-	Commanding Officer
COA	-	Chief of Administration
Col	-	Colonel
COS	-	Chief of Staff
CPC	-	Criminal Procedure Code
DDALS	-	Deputy Director Nigerian Army Legal Service
DLS	-	Director of Legal Services
DPP	-	Director of Public Prosecution
GCM	-	General Court Martial

GOC	-	General Officer Commanding
IHL	-	Imprisonment with Hard Labour
J	-	Justice
JCA	-	Justice of the Court of Appeal
JSC	-	Justice of the Supreme Court
Lt	-	Lieutenant
Lt Col	-	Lieutenant Colonel
Maj	-	Major
MML	-	Manual of Military Law
MWO	-	Warrant Officer
NASMP	-	Nigerian Army School of Military Police
NATO	-	North Atlantic Treaty Organization
NBA	-	Nigerian Bar Association
NMF	-	Nigeria Military Force
QONR	-	Queens own Nigerian Regiment
RNA	-	Royal Nigerian Army
RP	-	Rules of Procedure
SCM	-	Special Court Martial

UK	-	United Kingdom
USA	-	United State of America
WAFF	-	West African Frontier Force

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ABSTRACT

One of the issues that has continued to generate controversy among the bar, the bench and international and local human right activists is whether the Military Justice system is or should be subservient to the rule of law. The legal implication of the military justice system derives from sections 1 (1), 1 (3), of the Constitution of the Federal Republic of Nigeria 1999, Cap C23 laws of the federation; Armed Forces Act, Cap C20 laws of the Federation 2004 and other subsidiary legislations. Nigerian Military Justice System is machinery put in place to ensure justice and discipline in the Armed Forces as well as enforcement of law. The military commanders be it at summary level or court martial play important role in the administration of military justice in any military jurisdiction. The present the entry point into the military criminal justice system, this is because the commanders at justice system and the military justice system are the commanders. One cannot divorce one from the other. This research examines critically the military justice system in Nigeria vis-à-vis it's conformity with the enabling laws as regards its application strictu sensu. To identify challenges militating against its awards and findings on appeals at High courts and court of Appeal respectively. This research observes that most trials conducted and its attendant awards did not conform to the enabling laws and the rule of law. In view of these, most of their awards and findings have been quashed by the appellate courts. Mostly for lack of observance of fair hearing, unwillingness to abide by the rule of law, inadequate knowledge of the law, and unwillingness to be guided by the Directorate and legal officers of legal services even down to battalion level. Consequently, this work recommends amongst other things that the commanders, ASA inclusive to always be mindful of the rule of law in dispensing justice and to always make use of the available legal officers by seeking legal guidance and advice from them when the need arises.

CHAPTER ONE
INTRODUCTION

1.1 GENERAL BACKGROUND OF THE STUDY

Over the ages, man has always lived together and interacted in one form or the other with one another. These interactions have become more complex and sophisticated with the evolution of modern societies and organizations. The competing demand for scarce resources and self-actualization which sometimes put man in confrontation with one another[1] hence, the necessity for the regime of law to curb man's existence, and ensure a peaceful society[2].

Law, as defined by Black's Law Dictionary is a rule of law conduct, procedure or custom, recognized by a community as binding or enforceable by authority[3]. Although, it is difficult to have a definition of law that is all encompassing and generally accepted, this definition has been adopted because it captures the essence of this research. There is no objective organization

[1] Montesquieu P. Sociology of Man, (Novato, Presido Press, (1995) P. 15

[2] Roscoe, Pound. The Law as a Social Engineering Tool (New York, Osmond press 1960) p. 72

[3] Black HC Blacks Law Dictionary Sixth Edition St Paul Minnesota. West Publishing Company (1979) P 864

or community that has no set or body of laws which regulate the conduct of the society and ensure the greatest good for the greatest number if strictly and impartially enforced. It also creates social stability and harmonious living.

The concept of justice is also closely related to the strict application of law. Justice has been defined by the Encarta Dictionary as Fairness or reasonableness especially in the way people are treated, decisions are made and Law enforced[4] Thus, justice encourages the maintenance and administration of fairness, the impartial adjustment of conflicting claims and assignment of rewards and punishments[5]. The notion of justice is embedded in the administration of criminal justice system. The criminal justice system is the procedure saddles with the efficient application and just adjudication of all violations of the law in an organization[6]. It is concerned with the judicious and procedural application of law without fear, favour or affection.

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[4] Encarta Dictionary, (2007) edition P. 147

[5]Section. 36(6) of the Constitution of the Federal Republic of Nigeria. Cap C. 23 Laws of the Federation of Nigeria (2004).

[6] Okey, Achike Groundwork of Military Law and Military Rule in Nigeria, Enugu. Fourth Dimension Publishers (1999), p. 55.

The rule of law on the other hand is the foundation for liberty and order[7]. It emphasizes the supremacy of due process. It respects all and allows us to organize our lives, plan our future and resolve disputes in a rational way; it also forbids arbitrariness. The rule of law ensures that the guilty should not go unpunished[8].

One of the tenets of the rule of law is that a man must not be punished without due trial. However, some people are of the opinion that the rule of law is not compatible with the military system[9]. Dressler, SP quoting Charles De Gaulle, stated that, "Those who of their own volition joined the military have mortgaged their liberty and the right to choose where to go and what to do".[10] However, while the military tenets demand total obedience to orders, authority and hierarchy, it is not true that the notion of justice fair play and the rule of law are alien to the military. The problem lies in its

[7] OPcit

[8] Decision of Supreme Court in the State v. Madunmagu (1993) 20 NWLR p. 130

[9] Chiefe, T.C 'A Critical Appraisal of Court Martial Procedures Under Military Rule'. A Seminar Paper Presented at the COAS Conference Annual Conference, Abuja (1997), P. 4

[10] Dressler, SP military law In diction (Indian napolis law press, 1993) P. 68.

application, by Military commanders at different levels, who administer justice according to their whims and caprices[11]. There are cases of flagrant disregard of the rule of law and the principles of fair hearing who have tended to paint the picture that the Nigerian Military was averse to the rule of law. For instance, in the case of A**nyankpele v. Nigerian Army**[12] The appellant, a brigadier General in the Nigeria Army was charged for Disobedience to Standing Order, contrary to section 57 (1) of the Armed forces Decree and Conduct Prejudicial to Good Order and service Discipline contrary to section 103 of the Armed Forces Decree. He was convicted by the court Martial. On appeal to the court of Appeal, the decision was quashed because the order contravened was neither published nor brought to the attention of the accused officer.

Also in **Karim v. Nigerian Army**[13] The appellant was a Lieutenant Colonel and military stores depot commander. Part of his duty was the control and supervision of all stock coming

[11] Verbal Dismissal of TP Amos Oogwu at 3 Division Nigerian Army (unreported) suit No. LIC/ABJ/116/2012.

[12] (2000) 13 NWLR (pat 684-226-227 paragraph C-G

[13] (2000) 4 N.W.L.R (pt 759) 717

into the depot by way of their delivering and issuance. He was arrainged for a General court Martial upon a convening order stealing and making of false documents. The Court of Appeal quashed the decision of the General court martial on appeal, on the ground that one of the members of the General court martial was junior to the appellant. It could be safety adduced that the rule of laws and its accompanying tenets can be applied in Nigeria military justice system.

1.2 STATEMENT OF THE RESEARCH PROBLEM

It was Aristotle who said that justice is the bedrock of any society or organization and that the rule of law is the wheel which ensures the smooth running of the society[14]. The goal of every community or organization is to ensure an orderly, disciplined and just society.

The search for justice is very important in the military, where discipline and total obedience is highly necessary. It is therefore not surprising that the President and commander-in-

[14] Archbolds, TA Philosophy of Ancient Greek Anhelm USA, Loco, press (1990) P. 95.

chief of the Armed forces of Nigeria adopted the rule of law as one of the cardinal, principles upon which the foundation of his administration rests[15], and the Nigeria Military is not excluded from the same.

Rule of law is essential tool military justice employed to reform to strengthen the capacity of the Nigerian Military. Therefore, improving the effectiveness of the Nigeria military justice system through rule of law is an essential prerequisite in sine qua non, as it were, to improving the discipline and operational effectiveness of the military, and consequently its ability to fulfill its constitutionally mandated mission, in protecting and defending the Federal Republic of Nigeria and its people, in a manner which is consonant with its obligations under Nigerian and International law, including respect for human rights and international humanitarian law[16].

[15] Kanu, Agabi. The cardinal and Derivative principles of Federal Government. A workshop paper presented by the former Minister of justice and Attorney General of Nigeria at a retreat for Ambassador designate in Abuja (2007) p. 6.

[16] Eugene, E Fidall Rule of Laws and Military Justice in Congo (2014) http:/.1blogspot.com/ogchtcpjoua/Uy. Sunday, March 2014)

The court martial system, the summary trial, Board of Inquiry and other related matters, regimental inquiry, criminal investigation, rules of evidence, the Armed Forces Act manual of military law pg 1958, Rules of procedure (A) 1972 and so on are all geared towards the enthronement of justice[17]. However, there were plethora of cases of Kangaroo justice in the military justice both in time past and of recent which ought to be seriously addressed[18].

1.3 AIMS AND OBJECTIVES OF THE STUDY

Military justice in a nation like Nigeria as obviously suffering from the hangover of military rule. Some persons and authorities still find it difficult to depart from arbitrary and authoritarian ways of the past with scant regard for the reality of the present democratic order. Sadly, this hangover is still prevalent, to a certain extent in the military justice system. However, this research seek to examine the following:

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[17] Izuchukwu, M.O. (capt); Reports of Activities of Directorate of Legal Services (NN) Naval Headquarters (NHQ); A paper presented at the Chief of Naval staff Annual conference (CONSAC), Sokoto, (2007), P.6.

[18] Opcit p. 3-4

- What is the rule of law and its role in the military justice system.
- Is the military justice system inimical to the rule of laws?
- Is it possible to apply the rule of law in the administration of the criminal justice system and other processes of redress in the Nigeria Military?
- How can the military justice system and other redress process be made to conform with the rule of law?
- What is the way forward?

1.4 SIGNIFICANCE/IMPORTANCE OF THE STUDY

Military law and military justice administration like every other facet of human endeavour is not static but fluid and continuously evolving. It is therefore necessary to also modify and fine tune operating systems to conveniently align and conform with emerging trend and developments. There has been increasing clamour for military justice administration to conform with constitutional provisions on fundamental human rights, fair hearing, rule of law as well as international norms

in these areas as codified in international instruments; a lot of which Nigeria has subscribed to as a signatory.

In the face of this reality, it is crystal clear that there is need for change. Such regeneration should begin with a tweak with the laws regulating military justice system mode of administration starting with the military commanders at all levels who actually administer the system.

As it relates to the rule of law in the military. Moreso, this will attempt to increase the level of knowledge of military personnel on their constitutional rights, considering the fact that these rights are not diminished by the mere fact that they are members of the profession of arm and are administered by both the civil and military laws.

The study is also aimed at enriching literature in this area with a view to educating and disabusing the minds of civilian populace that the criminal justice system in the military is inherently averse to rule of laws, but capable of ensuring fairness.

1.5 RESEARCH METHODOLOGY

This work is based on doctrinal method of research. Hence the research is conducted in libraries and internet. The statement of international legal principles depends on this method of research. References are made to few decisions in other jurisdictions, articles, journals, and so on as secondary source where necessary.

1.6. LITERATURE REVIEW

Quite a number of authors/writers have written to express their divergent views on the topic of study with different approaches. The first of these writers is Chiefe T.E.C, an erudite author who has contributed immensely to the development of military law in Nigeria. According to him in his book[19], it is pertinent to state that the accused is entitled to be defended by a legal practitioner of his choice, who may be either a civilian or service personnel. That rule 79, rules of procedure made applicable by virtue of section 181 of the

[19] Chiefe T.E.C Military Law in Nigeria Under Democratic Rule Diametrics Nigeria Limited, Abuja (2008) P. 126

Armed Force Act, enables any legal practitioner whether military or civilian to appear before a court martial.

That notwithstanding and with due respect to the author it is needful to say that the above provision is subject to legal requirement. In this case, the legal practitioner who would appear before the court martial must be duly called and qualified to practice in Nigerian courts as held in the case of **Awolowo v. Federal Minister of internal Affairs**[20]. The court in this case considered the provision of section 21(5) (c) of the Constitution of Nigeria 1960, which is in pari material with section 36(6) (c) 1999 CFRN. Udo Udoma J. delivering the judgment stated thus:

> *Having examined the provisions of section 21 (5) (c) very carefully, I am inclined to the view that the provision is subject to certain limitations. It is clear that any legal representative chosen would run the risk of being refused entry into Nigeria by the*

[20] (1962) L.L.R. 177.

immigration authority, and by the chief justice of the federation[21].

The above decision was upheld by the Supreme Court.

The author furthermore opines that the appearance of civilian legal practitioners in court martial has raised the standard of legal practice in the court martial, by challenging military lawyers to work very hard especially when they are prosecutors or judge advocates facing senior advocates of Nigeria at the defence. That it has also guaranteed fair hearing to the accused servicemen, by ensuring that rule of law is applied at the court martial. He argues that this will prompt the members of the court, judge advocate and the prosecutor to be conscious of the fact that anything in the contrary will be challenged by the civilian lawyer and could be subject matter of an appeal to the appellate court[22].

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[21] Aihce, D.O and Oluyede, P.A Cases and Materials on Constitutional Law in Nigeria. London Oxford University press. (1979) P:92.

[22] Chiefe, T.E.C Military law in Nigeria Under Democratic Rule Diametrics Nigeria Limited. Abuja (2008) P. 129

While the author is not wrong, it seems that the best way of ensuring that the accused person gets the best opportunity to defend themselves, they should be encouraged to engage, in addition to the civilian lawyers, the services of tested, competent and experienced retired or discharged military lawyers who are in private legal practice. The major advantage is they are well grounded in military law and military service knowledge, and can adequately lay solid foundation for likely issues that may be raised on appeal, if necessary.

Again, there has been controversy amongst different writers whether the administration of military laws by court martial should observe the tenets of justice and the rule of law. Ocran T. of the North Atlantic Treaty Organization (NATO) discountenanced the so called 'Tenets of Justice'. In his view he believed discipline, fidelity and trust to the extent that if these disappear there will be no army but a rabble[23]. Colonel Tallradfe of the United states army agrees that "an army

[23] Ocran, T. Politics of the sword ands the Rule of Law. Brusselas Mitteo Press (1997) P. 46

without discipline is in fact, more dangerous to the civil populace than itself[24].

Also, colonel Maglish of the Russia army is of the extreme views that soldiers are a description of men who must be ruled with severity[25] in the same vein, Winthrop, professor of military law, is of the opinion that;

> *Sometimes the commander's preoccupation and indeed main objective is to exercise strict disciplinary control over a motley of men who are equipped and are in control of most dangerous weapons and in so far as the disciplinary control is achieved, it is immaterial that the principles of law, justice and the rule of law are jettisoned[26].*

However, Ansell, S.T the judge advocate general of the United States army from 1997-1999 believed that the tenets of the rule of law need not be jettisoned. He encapsulates his position thus:

> *The military environment is not exactly congenial to justice. The militaristic mind is rather intolerant to those methods and process necessary for justice. Justice is not a thing which can be left to be nurtured by un-*

[24] Tallradge E. the Law and the Army New Jesse USA. Runnel press (1990) p. 48

[25] Maglish, A. Military Politics, Pennsylvania. Forth Publishers(1980) p. 38.

[26] Winthrop, A. the Military Commander and Military Law. New Jersey, USA. Macabe press (1986 p. 55)

> *nurtured man. Frequently, it must be achieved through pain and toil. It is a high object of government, and government is required for its establishment when resort is had to trial, justice cannot be achieved unless the methods of the trial are themselves just. The process used leading to the result itself are essentially involved in justice and if the procedure is wrong, so is likely to be the result*[27].

One cannot agree less with the above writers, in that any force bereft of discipline, no matter the abundance of impressive military hardware that adorns its armory cannot be reckoned with professionally. However, it is submitted that proper application of rule of law will further, undoubtedly enhance military professionalism.

Ansell, has adopted the appropriate position in that justice must be achieved by constantly applying the rules and procedures that shape the institutional order. This means that there must be a set procedural rules which are transparent, fair and fixed. The concept of the rule of law which is that no one is above the law is hereby adopted for it captures the essence of the study.

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[27] Ansel, S.TE the Arm of Justice. Rhode Island, USA Charlotte Press. (2000) Pa. 29

Additionally, in analyzing the decisions of appellate courts on court martial appeals and to unravel their rational for overturning majority of courts martial decisions, D.B Takai[28] is of the view that this is unpleasant and stems from a lack of understanding of the military justice system by the appellate judges.

As a response to these, an astute practitioner in a resound comment on a military law has made the following comment on the Nigeria justice system:

> *It is indeed unfortunate that the military justice system is being destroyed from within and ironically by those entrusted with its enforcement. If it is realized that court martial trials in this country are amenable to the supervisory and appellate jurisdiction of the regular courts up to the Supreme Court, the need to act appropriately and in accordance with law becomes imperative[29].*

The above comment aptly expresses the current situation of the Nigerian military justice system. This is because a detailed study of the trend of the decisions of the appellate

[28] Takai, D.B Decisions of Appellate Courts on Court Martial. Military Law Journal Abuja. 2 Apri2dl (2009) Volume 4 P. 166.

[29] Akin, Kejawa Diligent Prosecution. Lagos, 10 November (2003) P. 9

courts on court martial appeals will reveal that the often mortal injustice to court martial occasioned by their reversal are self-inflicted D.B Takai (supra further listed the reasons for reversal of courts martial cases on appeal as follows:

Lack of jurisdiction due to: improper issuance of convening order, improper composition of the court martial wrongly drafted charges president or members jumping into the arena by taking over the prosecution; lack of fair hearing, joint trials where there are no joint charges; failure to evaluate evidence; confirmation without affording accused the opportunity to petition within three months, confirmation by the same officer who convenes the court.

Obviously, the above reasons include but are not limited to those listed. In other words, they are not exhaustive. Another major reason why military cases are quashed at appellate courts, among others, is due to failure to observe procedure. On 6 May 2014 the National Industrial Court, Abuja Judicial Division, in a case between **Oogwu v.**

Nigerian[30] army (unreported) a dismissal award given by the defendant to the claimant was upturned for failure to adhere strictly to the provisions of section 59(a) of the Act[31].

The views from some other commentators are somewhat more succinct and reflect the thinking in some quarters that military justice is an "inferior" system of justice. For instance, J. W. Bishop[32] once referred to military courts as the "Kangaroo" proceedings in which a wretched convict is dragged before the panel of sadistic martinets, convicted on the basis of perjured evidence and his own confession, which has been extracted by torture, and sentenced to fifty or sixty years of a solitary confinement, chained to a wall of subterranean dungeon and fed on bread and water.

Even the United Nations on human rights sub-commission on the protection and promotion of human rights has on the past expressed the view that military justice has a tendency to reinforce the impunity of military personnel,

[30] Suit No. NIC /ABJ/116/2012 Delivered on 6/5/14.

[31] Armed forces Act cap A 20 Laws of the Federal of Nigerian 2004

[32] Bishop, J.W A case for Military, Judge Advocate General School, United states. 30 August (1973) P. 49

particularly high ranking officers responsible for human rights violation constituting serious crimes under the international law[33].

According to Festus Okoye, "The military had contended that special and military tribunals are part of our judicial and constitutional order. That the contention is misplaced as the types of tribunal envisaged and provided for by the constitution are completely different from the plethora of tribunals being set up by the Nigerian military.[34]

In the context of these trenchant criticisms it may not be out of place to state that globally, the military justice system had/is being pilloried. This is not farfetched from the fact that the system lack impartiality which is the greatest attribute that any adjudicating body must always lays lay claim.

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[33] United Nations Commission on Human Rights Sub-commissions on the Promotions and Protection of Human Rights on Administration of justice through Military justice system. Fifty-fourth session. 9 July (2002) P. 2.

[34] Okoye, F. Special Military Tribunals and the Administration of Justice in Nigeria- Human Right Monitors. Kaduna. 20 September (2006) P. 7

Meanwhile, Omachi, an industrious, upcoming writer in military law has done a thorough job in his book[35] though, erroneously, with due respect, stated that accused person may elect to be tried summarily or by court martial.

Rather, the true position is provided by the enabling Act, Section 117, which provides thus[36]:

> *Notwithstanding anything in the foregoing section of this Act, a commanding officer shall not proceed with the trial of an officer, a warrant officer, petty officer until he had afforded the officer, warrant officer or petty officer and opportunity of electing to be tried by a court martial and if the person so elect in writing the commanding officer shall take the prescribed steps with a view to the charge being tried by a court martial[37].*

While section 116[38] (c) provides that: Where the accused is below the rank of warrant officer, class one or chief petty officer, the brigade commander or his equivalent, may

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[35] Omachi AI Court Martial: Law and Practice in the Armed forces of Nigeria, Kaduna Faith Publishers, Abuja (2012) P. 41

[36] Armed forces Act cap A20 Laws of Federation of Nigeria 2004.

[38] Id

summarily deal with the case or award any of the following punishment that is…

With the combined effect of all the above provisions it clearly show that for an accused person to be afforded the opportunity to elect, he must fall within the rank of warrant officer and above and not open-ended. (Note that warrant officer class one is equivalent to master warrant officer) pursuant to section 117[39]. While section 116(b) show that any commanding officer below appointment of battalion commander or brigade commander or its equivalent cannot try warrant officer or warrant officer class one (master warrant officer) and above as the case may be, but can refer him to the next higher rank as provided by section 115[40], 116[41] and 117[42] respectively.

[39] Op cit p. 16

[40] Id

[41] Id

[42] Id

1.7 SCOPE OF THE STUDY

The study will exhaustively deal with military justice system in Nigeria. Starting from history, pretrial, post-trial and appeal.

1.8 ORGANIZATIONAL LAYOUT

The structure of this work is anchored on a five chapter format. Chapter one deals with General introduction which presents the subject matter of the research, its problem, objective, scope, methodology, literature review, significance/importance and organization layout.

Chapter two explains General introduction to military justice system. It contains Doctrine of compact, Concept of Rule of Law, Evolution of Military law, Preliminary Issues for consideration, Power of command, Jurisdiction of the Offence and Offender, Preliminary Objection Available to the Accused Person, Preliminary Procedures, Arrest, Custody, Constitutional Safe Guard for Fair Hearing, Unit Investigation, Commander Investigation, Board or Regimental Inquiry and Military Police Investigation.

Chapter three discusses introduction to Pretrial, Trial and Post Trial Procedure which embodies; Applicable Laws, Pretrial Process, Service of Charge or Charges within 24 Hours, Provision of Interpreter; Summary and Abstract of Evidence, Call of Defence witnesses/s, Summary Trial, Court Martial Trial. Post Trial Matters and Redress

Chapter Four deals with Introduction to Contentious Issues in Military Justice System which include; Initiation of services Process by Response to Legal Process by the Military. Appeals, Challenges and Issues.

Chapter Five deals with Conclusion, Findings /Observation.

CHAPTER TWO

MILITARY JUSTICE SYSTEM

2.1 INTRODUCTION

It has been argued by Aycock and Wurfel that just as criminal law seeks to restrict and regulate behaviour so that people can live together in peace and tranquility, military law has a similar and yet more positive purpose[43] they state that "military law as of necessity is to promote good order, high moral and discipline in the military, for the accomplishment of the military mission". It has also been emphasized that the principal purposes of the military law must be to serve the interests of the particular armed forces within which it applies and to strengthen the goals, aspirations, morals and ethical values of that military and by extension the nation to which that military belongs.

Military justice system on the other hand is the structure of punitive measures designed to foster order morale and

[43] Aycock, W. B. Wurfel, S. Military Law Under the Uniform Code of Military Justice. Connecticut: Green Wood Press (1972), P.2

discipline within the military. Professor George added that the military justice system encompasses all matters relating to the arrest and powers thereof, investigation of crimes, summary trial, court martial trials including appointment of members and judge advocate, calling of witnesses etc. post trial actions and extra regimental appeals to the court of appeal and supreme court.[44] According to Chiefe, the basic aim of military justice is to maintain discipline.[45] It is therefore submitted that discipline is maintained in the armed forces by the proper application of military law in the dispensation of military justice.

2.2 CONCEPT OF RULE OF LAW

The rule of law in our context means that anything done or action taken by government, government departments or other authorities or agencies of government and individuals must be done in accordance with the laws of the land. The supreme law being the Constitution of the Federal Republic of

[44] Akinseye, G., The military Lawyer: Volume 4. Abuja October, (2009) P.226

[45] Chiefe, T. E. C., Military Law in Nigeria Under Democratic Rule: Diametrics Nigeria Limited Abuja. 2008

Nigeria.[46] Anything done or action taken which is not according to law can be effectively challenged by any affected person, in a court of law.

Secondly, it connotes that the government's action should be conducted within the framework of recognized rules and principles which alone limits the power of civil authorities. This will thereby curtail the civil authorities recourse to unrestricted discretionary power with the attendant danger of abuses. But for this feature of rule of law, civil authorities will be at liberty to make laws to suit their personal whims and caprices, rather than for the peace, order and good government of the Federation of any part thereof. Under this principle of the rule of law the courts are sufficiently empowered to be effective match dog of the rights and liberties of citizen.[47]

Furthermore, the rule of law is equality before the law of all person including government functionaries or other

[46] Section 1(1) of the Constitution of the Federal Republic of Nigeria (1999) Cap C23 Laws of the Federal of Nigeria 2004

[47] Section 6(1) of the Constitution of the Federal Republic of Nigeria 1999

authorities or agencies of government. The Constitution,[48] "provides that judicial powers shall extend to all matters between persons or between government or authority and to any person in Nigeria and all actions and proceedings relating thereto for the determination of any question as to the civil rights and obligations of that person". A person who feels aggrieved by any action of government or of any of the arms of government, that is, the legislature, the executive and the judiciary, can seek redress in any court of competent jurisdiction. And because of the inbuilt independence of judicial officers and their adjudicatory functions, the state has no advantages over ordinary citizens. Put in another way the law is even-handed as between government and the ordinary citizen.

A classic example of this feature of the rule of law is the case of **Minere Amakiri v. R. M. Iwiowari**[49]. The plaintiff, a journalist caused to be published a lead story in the Nigerian Observer Newspaper which apparently offended the

[48] Section 6(6) (b) (1999) Cap C23 Law of the Federation of Nigeria 2004

[49] PJC/222/73 of 22 of March, (1973) (Unreported)

sensibilities of the Military Government of Rivers State. On the instruction of the defendant who was the Aide d camp to the military governor of the state the plaintiff was arrested and detained at the Government House where he was shaven and given twenty four lashes of the cane. In a suit filed, the plaintiff claimed against the defendant a total of ten thousand naira (10,000.00) damages for false imprisonment, assault and battery. The Court found for the plaintiff and held that the defendant was vicariously liable. In his concluding paragraph of the judgment, Allogoa, Acting Chief Judge (as he then was) remarked, "the Courts are the watchdog of these rights and are the sanctuary of the oppressed and will spare no pains in tracking down the arbitrary use of power where such cases are brought before the court".

So also was the case of Shugaba Abdulrahaman Darman Minister of Internal Affairs and others.[50] The effect of the decision in **Bashir Alade Shitta Bey v Federal Republic**

[50] (1982) 3 N.C.L.R 915

Service Commission[51] is that public servants in Nigeria no longer hold their appointment at the pleasure of the executive.

The principle of rule of law abhors 'sacred cows' and emphasizes the jurisdiction of the courts. Osita Eze, a Professor of Law, further captures the ideal of the rule of law when he stated:

> *"The rule of law presumes an ordered and rational human society. It is founded on the ideals of justice, freedom, liberty and human dignity, it rejects arbitrary, abusive or excessive use of power. It requires that all concerned, the ruler and the ruled, the powerful, conformist and dissenter alike, are subject to law which accords them equal protection".*[52]

The care postulation of this jurist is to be effect law is above every person including the leader. Additionally, the court, Per Obaseki JSC (As he then was) spoke eloquently of the doctrine of the rule of law in the following terms:

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[51] (1981)1 S. C. 26

[52] Osita, E., The Nigeria Legal System: Lagos, McMillian Press, (1990) P.15

> *I will be doing injustice to the rule of law if I grant this application and allow the eviction of the respondent to stand. The Nigerian Constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary power which Coke, colourfully spoke of a golden and straight method of law as opposed to the uncertain and crooked cord of discretion. More relevant to the case in hand, the rule of law means that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive...*[53]

As evident from the above, the theory of the rule of law is so inextricably linked to the supremacy of the Constitution[54] that there cannot be any meaningful discussion of one without a discussion of the other. Under the doctrine of rule of law, every action of government or any of its agencies, military and its justice system inclusive must be according to law, a fortiori the Constitution, it being of the apex of our laws.

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[53] Wade E. C. S., Administrative Law: Sweet and Maxwell 5th Edition PP.2-22

[54] Op Cit P.22

2.3 EVOLUTION OF MILITARY LAW IN NIGERIA

Evolution of military law in Nigeria would necessarily commence from the history of Nigerian Army. This is because Nigerian Army was the first of the three arms of the Armed Forces to be established. The history of Nigerian Army dates back to 1863 when Lt Glover of the Royal Navy selected 18 indigenes from the northern part of the country and organized them into a local force known as the Glover Hausa and they performed duties for the Lagos Colonial Government. In 1865, the Glover Hausas became a regular force with the name Hausa Constabulary and was later called Lagos Constabulary in 1901. At Jebba, in Northern Nigeria, Lord Frederick Lugard had formed in 1890 the West African Frontier Force (WAFF) and by 1901 it hard incorporated all preliminary units in all British dependences.[55]

The establishment of WAFF led to the merger of units to a regiment in each of the dependencies and the merger produced the Northern Nigeria Regiment and the Southern

[55] The Constitutional Root of Military Law and the Constituents of Due Process and Fair Hearing: Nigerian Military Law Journal Vol. 4 October, 2009

Nigeria Regiment. With the amalgamation of northern and southern Nigeria and 1914 by Lord Lugard, the northern and southern Nigeria Regiment were unified and called the Nigerian Regiment. Thus the northern Nigeria Regiment became the first and second battalions of the Nigerian Regiment while the southern Nigeria Regiment became the third and fourth battalions of the Nigeria Regiment.

The visit of Queen Elizabeth two of Great Britain to Nigeria in February, 1956 changed the name of the Nigerian Regiment to Queens Own Nigerian Regiment (QONR) also the same year with the rationalization of the WAFF it became the Nigeria Military Force (NMF). In 1960 when Nigeria became independent, the NMF became the Royal Nigerian Army (RNA) and subsequently the Nigerian Army when Nigeria became a Republic.[56]

It appears that the earliest legislation relating to military law was the West African Frontier Force (Nigerian Regiment) Ordinance of 1916 which constituted the WAFF. The

[56] Id P. 26

Ordinance made comprehensive provisions for the discipline, control and use of the Armed Forces.[57] Other legislation are the West African Frontier Force Ordinance, Cap 33 Law of Southern Nigeria and the West Africa Northern (Nigeria Regiment) proclamation Cap 18 Laws of Northern Nigeria. These were followed by the Royal Nigerian Army Act 1960 in section 208(1).

The Nigeria Army Act 1960 which commenced on first October, 1960 provided for the establishment, governance and discipline of the Nigerian Army. Part four deals with discipline, trial and punishment of military offences. Specifically, sections 30-72 deal with offences while sections 73-75 provide for punishments. It is worthy of note that section 128 empowers the president of Nigeria to make rules of procedure which shall apply to proceedings of Courts Martial and summary dealings with charges under part four of the Act.

Unfortunately, the rules of procedure have not been made and the Nigeria Army is still relying on the rule of

[57] Id

procedure 1972 of the British Army contained in the British Manual of Military Law 1972. It is gratifying however, that the Nigerian Army Courts Martial (Appeals) rules of 1981, which commenced on first July 1961, was made in exercise of the powers conferred by section 143 of the Act on the president of the court of Appeal, to make rules for regulating the procedure and the practice to be followed in the Court of Appeal for appeals from court martial. All the above laws and rules were for the discipline of members of the Nigerian Army.

At 1960, Nigerian Navy Act[58] was passed followed by the Nigerian Air Force Act 1963. These three military laws governed the separate components of Nigerian military until 1993 when the Armed Forces Decree No 105 1993 was promulgated. The Armed Forces Decree has since been renamed as the Armed Forces Act Cap A20, Laws of the Federation 2004 which was received into the 1999 constitution as an existing law pursuant to section 315 of the same constitution.

[58] AFA Id

The Armed Forces Act came into force on the 6th of July, 1994. It provides for the establishment of Armed Forces council with the President and Commander-in-Chief as the chairman. It also provides for the law governing military discipline and prescribes rights, duties and obligations of the military personnel and provides for assimilation of civil offences into the Act with specific reference to the administration of military justice system, the Act provides for summary trials, court martial, trial procedure and post-trial procedure etc. there is also provision for appeals form the decisions of court martial.

2.4 DOCTRINE OF COMPACT

The soldier is a part of the society and also a citizen. Being a soldier does not remove him from the society but puts on him a specially conjured status called 'compact'. He enjoys all the rights of a citizen except those he surrenders by virtue of being a soldier. Upon acquisition of military status, both civil and military law govern him. In support of this position, Takai submits that "the soldier by becoming a soldier does not

relinquish his identity or status as citizen with the right and obligations contained in the constitution. He remains subjected both to the civil and military laws, a situation described by some jurists as a compact".[59] This duality of status was aptly described in **Grant v Gould**[60] where it was stated that a soldier does agree and consent that he should be subject to military discipline and he cannot appeal to the civil courts to rescue him from his own compact.

The doctrine of compact was further explained by Justice Willes in **Dawkins v Lord Rockeby**[61] when he said:

> *But with respect to persons who enter into the military state who take this majesty's pay and who consent to act under his commission, although they do not cease to be citizens in respect of responsibility, yet they do by a compact which is intelligible and which requires only the statement of its to the consideration of any one of common sense,*

[59] Takai, D. B., Military Personal Armed Forces Decree 105 of 1993 (Amended) And Support for Democracy. Being a Paper Presented at NAVTRAC Quarterly Legal Awareness Forum Lagos, 15 April 2004 P.17

[60] (1972)2 Henry, Blackstone Rep 69

[61] (1866) 4 F&F 806 P.832

become subject to military rule and discipline.[62]

But inspite of the judicial pronouncement above, there were still arguments as to whether or not the soldier has surrendered all his rights, and if the soldier should be treated as a citizen without any right or liability to protect or enforce his civility. **McCardie J. in Heddos v Evans**[63] settled the notion when he said:

> *I conceive that the compact or burden of a man who enters the army whether voluntary or not is that the will submit to military law and not military illegality. He must accept the Army Act, rules and regulations and orders and all that they involve. These (which I may call army legislation) define his status, indicate his duties, express his obligation and announce his military rights. To the extent permitted by them his person and liberty may be attached and his property touched. This defines the extent to which a soldier's life, rights and liberty, burden and responsibilities are taken away or added. If he had lost all*

[62] Okey, A., Ground Work of Military Law and Military Rule in Nigeria. Enugu Fourth Dimension Publishers (1990) P.55

[63] (1919)35 T. L.R. 642 at p.643 90) P.55

rights it would have meant also that he cannot be responsible for violation of the civil rights and duties that are protected or waived by change of status.

It is clear from the above that a soldier by virtue of his dual status of being soldier and a citizen is subject to military law as a member of the Armed Forces and to the ordinary laws of the land as a citizen. He can therefore be tried for alleged offences under the Armed Forces Act as a soldier and also under the Criminal or Penal Code for Offences in Civil Courts as a citizen. Indeed, in the case of the State v Jerry Emezie and 3 ors.[64] Major S. S. Tomoye was arraigned in a civil court for stealing with five civilians.[65] Also, in the Police v Sani Mohammed[66] the accused who was a soldier was charged in a civil court with robbery. It is important however, to point out that the soldier can plead double jeopardy if after a trial in a

[64] (1970-71) I E. C. L. R. 198

[65] Achike, O. Op Cit P.31

[66] Suit No. E/50C/71 of 13 March (1972) Unreported

civil court, he is subjected to another trial for the same offence by the military authorities under the Act.[67]

In summary, this work shares the views of Achike that the legal position of a soldier is indeed enigmatic. One of the major implications of the enigma, which is expressed in the Doctrine of Compact, is that members of the Armed Forces do not belong to a legally privileged class. Every action they take, whether as individual or a body (such as court martial) which affects the right s of other citizens can be subject to judicial review. This really demands that trials, whether summary or court martial must be conducted strictly in accordance with the dictates of law, especially the human rights to fair trial. The human rights to fair trial entails by necessary implication, that every military trial must be conducted in manner that would guarantee its independence and its impartiality.

[67] Section 171(1) (a) of the Armed Forces Act, Cap A20, Laws of the Federation 2004

2.5 PRELIMINARY PROCEDURES

2.5.1 Arrest and custody

The preliminary criminal justice procedure in the Armed Forces starts with the allegation, which may lead to the arrest of the suspect. The subject of arrest is dealt with under sections 121[68] and 122 of the Act[69]. The salient features are as follows:

a. An officer can order the arrest of another officer of inferior rank. However, an officer can be arrested by any senior officer of any seniority if he is involved in quarrel or disorderly conduct. Provost officers, that is personnel of the Nigeria Army Corps of Military Police, have unfettered powers of arrest provided that in all cases an officer must give the order for arrest.[70]
b. A person arrested for an offence shall be released within twenty four hours, but the commanding officer has the power to determine whether he would be detained beyond

[68] Armed Forces Act Cap A20 Laws of Federation 2004

[69] Id Section 122

[70] Id Section 121

twenty four hours. Where the person remains under arrest for more than eight days, without a court martial assembled to try him, the commanding officer shall send a special report on the necessity for further delay to the Appropriate Superior Authority (ASA) every eight days until the case is brought for trial or the person is released from arrest. In any case, the period of arrest shall not exceed ninety days, unless where the person is on active service or in the Navy at sea, in which case, compliance with that is unreasonably impracticable.[71]

c. It is an offence to keep any person under arrest without taking proper steps to investigate the reported offences or to fail to make relevant entries in the service book meant for documenting the arrest.[72]

It may be argued that section 121 and 122 of the Armed Forces Act derogate from the fundamental human rights provision in section 35 of the 1999 Constitution of the Federal Republic of Nigeria. The relevant provision of section 35

[71] Id Section 122

[72] Id Section 84

explains that a person can be arrested and detained upon reasonable suspicion of him having committed a criminal offences or when it is reasonably necessary to prevent him from committing a criminal offence. It further states that such a person shall be brought before a court of competent jurisdiction within a reasonable time form the date of the arrest or detention. It also states that reasonable time is a period of one day when the court of competent jurisdiction is within the radius of 40 kilometres and in other cases, a period of two days or such long periods as may be considered by the court to be reasonable in the circumstances.

From the above provisions, it can be forcefully argued that section 121[73] and 122[74] of the Armed Forces Act are not consistent with section 35 of the constitution, and therefore need amendment.[75] This is because the sections elaborately provide for the mandatory actions to be taken where a service personnel will inevitably be detained beyond eight days. In fact

[73] Id

[74] Id

[75] Cap C23 Laws of Federation 2004

the specific provision for eight days delay report in the Armed Forces Act reinforces the guarantee that the right to personal liberty of service personnel shall not be infringed upon by the military authorities. Furthermore, the sections appear to confirm to section 35 of the constitution which allows for the detention of a suspect but he must be brought the counts within a reasonable time.

2.5.2 Investigation of Cases

Prior to taking disciplinary or judicial action against an alleged offender, it is necessary to carry out an investigation to unravel the facts and circumstances for the offences. A military commander has avenues of investigation which includes:

a. Unit Investigation

The commanding officer of a unit or a Regiment could utilize the Regimental Police Detachment or the military intelligence section to investigate minor cases in the unit to enable him take regimental action to resolve the matter.

Furthermore, in uncomplicated cases, the commanding officer may call witnesses directly to find out the gravity of the offence before embarking on further investigation.

b. Investigation by Commanding Officer

It is a quasi-judicial function exercised by commanders to try disciplinary cases within their command. It is provided for in section 123[76] "thus the allegation shall be reported in the form of a charge to the commanding officer of the accused and the commanding officer shall investigate the charge in the prescribed manner".

The commanding officer by reading the charge to the accused, who shall plead to it (guilty or not guilty). Witnesses shall be called to testify before the commanding officer in the presence of the accused person. The accused person shall be given the opportunity to question the witnesses. The accused person will be allowed to testify and call witnesses to testify on

[76] Id 123

his behalf.[77] After such investigation, the commanding officer may either dismiss the change, if there are no facts to support it, or enter a finding of guilty and award any punishment within his powers under section 115 and 116 of the Act.[78] He could also refer the case to a higher commander[79] or he may remit it for trial by court martial.

2.5.3 Board of Inquiry and Regimental Inquiry

These are constituted by commanders to investigate the circumstances surrounding certain occurrences to enable them take administrative action.[80] The Board specifies what facts that have to be inquired into. Consequently, the terms of reference for any inquiring should not specify an accused person. They are not meant to indict or to be a prelude to judicial action. It is simply fact finding. Thus, evidence obtained at a Board of inquiring cannot be used or tendered at

[77] Rule 8 Rules of Procedure (Army) (1972)

[78] AFA Section 115, 116

[79] Rule 39, Rules of Procedure (Army) (1972)

[80] AFA Section 172

a court martial or summary proceedings except in a case of perjury.[81]

2.5.4 Military Police Investigation

These are investigations carried out by the service Police who are experts in criminal investigation and law enforcement. They can usually involve when the cases are technical or complicated and require expert investigation. The investigation report exhibits and statements collated by the military police are useful for the prosecution of cases.

It is mandatory that in investigating any alleged offence, recourse should be had[82] in accordance with constitutional fair hearing as provided in section 36(2)-(12) and safeguard for section 29 of Evidence Act[83] which stated that if confession was or may have been obtained by oppression of the person who made it, or in consequence of anything said or done which was likely in the circumstance existing at the time, to

[81] Id Section 172

[82] Op Cit

[83] Cap E14, Laws of the Federation 2011

render unreliable any confession which might be made by him in such consequence, that the court shall not allow such evidence to be given unless the prosecution proves that it was not obtained under duress.

Similarly, section 143 of the Act[84] provides that rule of evidence shall be observed in criminal courts in Nigeria. These imply that noncompliance with the above provisions will jeopardize the prosecution of the offender and therefore undermine military justice.

2.6 PRELIMINARY ISSUES FOR CONSIDERATION

2.6.1 Powers of Command and Punishments in summary trial

Before the trial commences, the trying authority shall consider he has the jurisdiction to try an offender and award punishment. This jurisdictional power is referred to as power of command. For instance, in the Nigerian Army, power of command is that author given to a commander or any person

[84] Op Cit

having command of a unit or formation to run the unit administratively and operationally. Under the military justice system, the powers of command enable the commander to take appropriate disciplinary measures by way of summary trial and award of punishment against any accused personnel under command. In Armed Forces Act, the power to try summarily and award punishment depends on the level of command or appointment of commander and the rank of the accused facing trial which are provided for in sections 115 and 116 of the Act[85] as follows:

a. Company Commander or Equivalent

The power to summarily try begins with a company commander or equivalent, who can only exercise his powers of summary trial over personnel of rank of Capt. and below. At the trial of an officer form the rank of Captain to second Lieutenant, the company commander may either dismiss the case or award any of these punishments, confinement not exceeding seven days, award of extra duties not exceeding

[85] AFA Section 115, 116

seven days and admonition. While below the rank of sergeant, he may dismiss the case or award any of these punishments, imprisonment with hard labour (IHL) not exceeding seven days in the unit guard room, extra duties not exceeding seven days, conferment not exceeding seven days, stop pages not exceeding two hundred naira (200.00), reprimand and admonition.[86]

b. Battalion Commander or Equivalent

The commanding officer can only exercise summary jurisdiction are personal of the rank major and below. At the trial of an officer from the rank of major to Second Lieutenant, he can either dismiss the case or award any of the following punishment; fine not exceeding five hundred (₦500.00) and where offence has occasioned expenses, loss or damage, award stoppages not exceeding two thousand, five hundred naira (₦ 2500.00). as for the trial of a warrant officer and below, the commanding officer may dismiss the case or award any of the following punishments; dismissed regiment to the rank of a

[86] Id Sections 115 (a) (i), (ii), (iii), 116 (a) (i) – (iv)

corporal and below, imprisonment with hard Labour (IHL) up to twenty eight working days to the rank of corporal and below, reduction in rank not below one step from sergeant and below, for future of pay not exceeding seven days, stoppages not exceeding two thousand five hundred naira (₦2,500.00)[87]

c. Brigade Commander or Equivalent

The brigade commander can exercise his powers over personnel rank of lieutenant colonel and below. He can summarily try offences from the rank of lieutenant colonel to second lieutenant. He may either dismiss the case of award any of the following punishments; fine not exceeding one thousand naira (₦1,000.00), forfeiture of pay not exceeding thirty days and stoppages not exceeding three thousand naira (₦3,000.0). in the trial of warrant officer and below,, he may dismiss the case and award any of the following punishments; dismissed regiment to the rank of staff sergeant or below, Imprisonment with Hard Labour (IHL) up to twenty eight days, reduction in rank in rank of staff sergeant and below not more

[87] Id Sections 115 (b) (i), (ii), 116 (b) (i) – (ix)

than two steps, fine not exceeding two hundred naira (₦200.00) stoppages not exceeding two thousand five hundred naira (₦2500.00) forfeiture of pay not exceeding thirty days reprimand or service reprimand and admonition.[88]

d. General Officer Commanding or Equivalent

The General officer commanding can only exercise summary jurisdiction over officers of the rank of colonel and above, and soldiers of the rank of warrant officer class one (now master warrant officer) and above. At the trial of the officer of the rank of colonel and above, the G.O.C may either dismiss the case or award any of the following punishments; fine not exceeding two thousand naira (₦2,000.00) forfeiture of pay not exceeding sixty days, stoppages not exceeding five thousand naira (₦5,000.00), reprimand or severe reprimand and admonition. Where a warrant officer class one (MWO) and above is tried, the GOC may either dismiss the case or award any of the following punishment. Dismissed regiment to the rank of warrant officer and below (IHL) for up to twenty eight days in

[88] Id Sections 115 (c) (i)- (ii), 116 (c) (i) – (viii)

the unit guard room. Others include reduction in rank not more than two steps for warrant officer, fine not exceeding two hundred and fifty naira (₦250.00), stoppages not exceeding three thousand five hundred naira (₦3,500.00), forfeiture of pay not exceeding twenty eight days, reprimand or severe reprimand and admonition.[89]

In the lite of the above, it therefore submitted that sections 116 (b), (i) require amendment for the reason of ambiguity as it affect the rules of granting of charges.[90] This was also observed again by the judge in the case of Tpr Ooogwu Amos (Supra) that said provision is ambiguous.

[89] Id Sections 115 (d) (i)-(v), 116 (d) (i) – (viii)

[90] Rule 23 (1) Rule of Procedure Army (1972)

CHAPTER THREE

TRIAL AND POST TRIAL PROCEDURE

3.1 INTRODUCTION

Trial of offenders in the Nigeria military is designed to follow the due process and in conformity with the extant laws, especially the Constitution and the Armed Force Act. Painstaking efforts are usually made to ensure that every step or action taken in the process conform to law. Otherwise, the entire process could be overturned and invalidated when it is subject to appellate scrutiny. The aim of punishment of offenders in the military is to maintain discipline in the Armed Forces as a means of achieving military efficiency. Such discipline must be based on justice predicated on the rule of law as aptly explained by General William Childs Westmoreland, a one-time United State General as follows; “A court martial must not be mistaken for an instrument of

discipline. It is first of all an instrument of justice which in doing justice should promote discipline".[91]

This is an apt description of the present situation in the Nigerian Military. Justice is to promote discipline because it is a known fact that discipline cannot be achieved without justice. Any semblance of discipline without justice is a mere façade and an uneasy calm. We will now consider the components of trial and post-trial procedure.

3.2 TRIAL PROCEDURE

3.2.1 Charge Sheet

In court martial trial and summary trial, the charge sheet will be defective if it is not signed, or where it is signed by a person that is not authorized in law to do so. The commanding officer of the unit of the accused person in the right person to

[91] http://law.jrank.org/pp/3387/westmoreland-v-cbs(1984).html

sign a charge sheet concerning the accused after complying with Army Act (44) 1955 section 77(3)[92]

The subsection states that any charge not dealt with summarily shall after investigation be remanded for court martial. It is noteworthy that section 77(3) of the British Army Act (AA) 1955) is equivalent to section 124 of the Armed Forces Act.

Furthermore, the charge sheet must not only signed but it must also disclose an offence. In the case of **Lieutenant Colonel E. O. Anene v the State**[93] the Court of Appeal (Ibadan Division)q quashed the conviction of the appellant because the charge did not disclose any offence. Similarly, in the case of **Lieutenant Colonel A. D. Karim v the Nigeria Army**,[94] the court of Appeal held charge three (3) to be fundamentally defective and incurably bad because the words used in the charge were alien to the provision of section 90 of the Armed Forces Act under which the appellant was charged.

[92] Rule 14 (1) (b) Rule of Procedure Army (1972)

[93] CA/L 144/97 (unreported)

[94] (2002)4 H. W. L. R. (pt759) 717

The court further held that: “Words used in a charge must conform strictly with the words of the penal statute under which it is charged”. In other to be in line with the demands of the law as regards the drafting of charges, it is necessary to refer to the British Precedent as contained in paragraph 42, chapter 2 of the British Manual of Military Law 1972 (MML) it states as follows:

> *The particulars must support the statement of the offence, e.g. if an accused was charged under Army Act (AA) 1955, section 33(1) (b), with using threatening language the particulars must also show that threatening language was used; if they only show that insubordinate was used the charge will be bad. They must show every act or neglect which it is intended to prove. It is essential to allege in the particulars the date in which the offence was committed if the date is not certain, the offence should be alleged to have been committed on or about a date or between certain dates. The date is important not only to tell the accused of the case he has to answer, but also because it is a limitation of time within which trial by court martial can commerce.*

The above provision, no doubt explains how a charge should be drafted and particulars of offence which must be stated. Non conformity with that would render the charge bad in law.

3.2.2 Preparation of defence

After a valid charge has been framed, the next thing to be done is to serve the accused a copy of the convening order which will include the charge sheet, summary or abstract of evidence and a list of witnesses that the prosecution intend to call. This must be done not later than twenty four hours before commencement of the trial. It is mandatory under rule 25, Rules of Procedure Army 1972 as well as in those of the Navy[95] and Air Force,[96] to enable the accused adequately prepare his defence. It is also pertinent to state that the accused person is entitled to be defended by a legal practitioner of his choice who may either be a civilian or

[95] Rule of Procedure Royal Navy BR11 (1972)

[96] Rule of Procedure Royal Air Force (1972)

service personnel[97] which are in conformity with the constitution.

If however, the accused notwithstanding the non-availability of his counsel of choice, he undertakes his own defence, his right to a counsel of his own choice, could not be said to be infringed as per **Shemfe v Commissioner of Police**.[98]

Where an accused accepts a counsel assigned to him statutorily in a capital case, without letting the court know that he has in fact retained the service of his own counsel, he cannot later complain that his right to a counsel of his choice has been violated. This was the decision in R v E[99]

Perhaps, it is necessary to stress that although the law in **Shemfe's case** precludes a military personnel who undertakes his own defences from claiming that his right to counsel of his choice has been infringed, the judge advocate a duty to explain

[97] Rule 79. Rule of Procedure Army (1972

[98] (1962) N. N. L. R. 87

[99] (1963)1 ALL N. L. R. 87

to the accused his right to counsel, and that he need to defend himself by himself unless he so choose. Coercion in any form must not be brought to bear on the accused inspite of the exigency to make him defend himself. In the same vein, it is submitted that by virtue of the **Ezea's** case, an accused serviceman who has engaged a counsel of his choice cannot be compelled by court martial, to have the services of a counsel assigned to him by the court martial where the counsel of his choice is within reach and is available to defend him.

Also, in accordance with the traditions, customs and ethnics of the military, in all court martial trials, an accused servicemen is entitled to a counsel from the convening authority through the court martial, where he cannot afford a counsel of his own choice. This is unlike the civil courts where it is only a person accused of a capital offence that is entitled to a counsel from the legal Aid through the state.

In addition to the foregoing, the following points should also be strictly observed by commanders in other to ensure fair hearing:

a. Before the trial proper, the accused is given a copy of the charge sheet and convening order at least twenty four hours in the case of court martial.
b. Before the trial the accused is asked if he is willing to dispense with the attendance of witnesses where evidence is contained in the summary or abstract of evidence, and if he is willing, he signifies in writing. [100]
c. The trying authority does not try a case he is likely to be a witness or where the alleged crime is committed in his presence, and this is to avoid allegation of bias.
d. The trying authority also ensures that he is statutorily empowered to try the accused person summarily and equally ensure that he does not exceed his powers in awarding punishment.[101]
e. The trying authority does not award more than one punishment for one offence [102]

[100] Rule 9 Rule of Procedure Army (1972)

[101] AFA Sections 115, 116 and 124 (6) (9)

[102] Section 115(3), 116(3) of AFA P.16

3.3 SUMMARY TRIAL

Summary trials are provided for in Sections 115(1) and 116(1) of the Armed Forces Act. About ninety-eight percent of all service offences are dealt with summarily. Summary trials are considered necessary because they are quicker and easier to administer an important factor when the offence takes pace in a field of action. For the purpose of this work, it may be necessary to characterize summary trials. First form a utilitarian point of view, summary trials provide a ready vehicle for the enforcement of service discipline, which is one of the main pillars of successful armed forces.

Second, it also provides commanders with a method of dealing simply and expeditiously with less serious disciplinary infractions, whether they are committed within the country or during foreign military operations. Third, it gives the Armed Forces an avenue for dealing with minor disciplinary offences which may not readily fit into or be comfortable with a

complex adversarial process.[103] Despite its important utilitarian purposes in the Armed Force and the relative formality of proceedings before a summary trial, the preponderance of informed legal opinion on the subject is that summary trials cannot be classified as 'courts'. Neither can the adjudicating commanding officer be classified as 'judicial officer'. Rather it would appear that the more appropriate character of a summary trial is an administrative action by executive officer rather than a judicial action by a judge.[104]

Accepted that the summary trial cannot be classified as judicial process, nevertheless, it is still subject to judicial review in the like manner in which all other actions of the executive arm of government are subject to review by appropriate judicial authorities. (in the case of Nigeria, the appropriate judicial authority for review of summary trials is usual the National Industrial Court).[105] This is the case of **Corporal Shehu Maigari and 28 others v Nigerian Arm**y

[103] Adaka, F. C. Military Justice System. Military Law Journal Vol. 4, October, (2009). Abuja. P. 215

[104] Adaka, Op Cit

[105] Suit No FHC/KD/C.S/68/98(unreported) suit No NIL/ABJ/116?2012 (Unreported)

where the soldiers appealed against their dismissal from service by their commanding officer, at a summary trial on a charge of being married to foreign women, the Federal High Court quashed the dismissal of the soldiers. In that case the court held that the girls were more girl friends as there was no proof of marriage. Similarly, **Tpr Oogwu Amos v Nigerian Army** and Another Justice B. A. Adejumo in his judgment quashed the summary of dismissal award to the claimant/plaintiff for failure to comply with section 59 of the Armed Forces Act. He relied on the supreme court case of **Thompson org. v N. I. P. S. S.,** per Kalgo JSC when he stated that specific provision overrides general provision of the Statute. On the aspect of judicial review of summary trials, when such trials are not conducted according to laid down rules, their decisions can be contested through redress to the appropriate superior authority (ASA) within the Armed Forces,[106] if a conduct of summary trials is found to have been faulty the findings and sentence may be quashed by the appropriate superior authority (ASA). In the case of Nigeria,

[106] AFA 147

the Armed Forces Act[107] empowers ASA to quash the finding of summary trial where it is found that it is expedient to do so by reason of a mistake in law or many other irregularity occasioning substantial injustice to the accused or where the punishment award is invalid or too severe[108]

3.3.1 Review of Summary Findings/Award

The AFA prescribes for a review of summary findings/awards by the appropriate superior authority who may be either the commanding officer of the rank of brigadier general or above or officer of corresponding rank under whose command the accused is serving. This revision may be sequel to a petition submitted by the accused, or at any time if facts material to the case arise which were not available during the trial. A petition by a person sentenced summarily must be submitted not more than one month after the finding and award was made. [109]

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[107] Id

[108] Id

[109] Id

3.4 COURT MARTIAL TRIAL

And court martial is a military court that is convened by a commander to try personnel within his command who are alleged to have committed offences. A court martial is a prejudicial body and thus, all its affairs, from the convening of the court, the jurisdiction of the court, arraignment and calling of witnesses, decisions, findings and awards must conform to law. The understanding of these stage was paramount in this study because the greater percentage of miscarriage of justice and disregard for rule of law takes place during these stages of trial. The importance of this was stressed in the case of **Maclaughry v Denning**[110] where United State Supreme court ruled that: "A court martial is a creature of statute and as a tribunal, it must be convened and constituted in entire conformity with the provision of the statutes or else, it is without jurisdiction" the stages are considered subsequently.

[110] 186 US 49 (1902)

3.4.1 Pre-Trial Procedure

Once a Commanding Officer (CO) has come to the conclusion that an offence has been committed, he shall refer it to appropriate superior authority (ASA) as priivided by the Act[111] with a view to seeking permission for trial. The ASA upon receiving the charge may order an independent investigation or rely on Commanding Officer investigation report. If the appropriate superior authority is not satisfied, he could dismiss the charge or refer back to the commanding officer for dismissal.[112] However, once the ASA decides on a trial by court martial, he takes immediate step to set in motion the machinery for trial starting with the convening of the court martial or direct the commanding officer to convene same.

There are two types of court martial, General Court Martial (GCM) and Special Court Martial (SCM). A GCM comprises a minimum of the president and root had there for member, judge advocate, a waiting member and lesson

[111] AFA Section 127 (1)

[112] Id

officer[113] A special court martial on the other hand comprises the president and not less than two members, judge, advocate, waiting member and lesson officer.[114]

Another area of difference is in the power to award punishment. While the GCM has power to award up to the maximum punishment by law which includes death and life imprisonment, except that, where the GCM is less than seven members it shall not impose a sentence of death,[115] a SCM can only award punishment not exceeding maximum of one year imprisonment.[116]

The strict adherence to the requirements of seeking approval from ASA before convening a court the composition of the court and compliance with the scale of punishment are all designed to ensure that no individual or group of individuals wield enormous power which could be susceptible to abuse. The disregard of this punishments may lead to quashing of the

[113] Id Section 129 (a)

[114] Id Section 129 (b)

[115] Id Section 130 (1)

[116] Id Section 130(3)

decisions of GCm on appeal. Although the Military Authority to ensure that these requirements are adhered to, there is still much to be done to sensitize the commanding officers on the sanctity of the provisions. This will help in reducing the spate of miscarriages of justice occasional by misapplication of these provisions and hence reduce the rate of loss of military cases on appeal. Most of these cases shall be dealt with extensively on the succeeding chapter.

3.4.2 Convening of Court Martial

A convening of a court marital[117] is fundamental to the exercise of jurisdiction. According to Kejawa A, former Deputy Director Nigerian Army Legal Service (DDALS), the court martial comes into existence only upon the other of a commander authorized by law to convene a court martial. Hence, it was decided in a celebrated case thus: [118]

> *Because the manner in which a court martial is convened determines whether the court martial has jurisdiction, the*

[117] Id Section 131 (1) (2)

[118] Anushiem, C. N., Application of Rule of Law in the Nigeria Navy, Jaji (2008) P.92

supreme court have developed the general rule that court martials must be convened strictly in accordance with statute. If the commander has not properly constituted the court or referred changes to it, the court has not power to hear and determine a case. Under such a circumstance, any conviction would be a nullity. Unless the convening authority has properly detailed all essential personnel of the court its proceedings will be void and cannot be retrospectively validated.

3.4.3 Membership

According to the Act[119] the president and members of the court martial must be at least of the same rank and seniority of the accused. The law does not permit a junior to sit in the trial of this superior.[120] In the appellant a major in Nigerian Army appealed to the court appeal on the ground that two officers of the rank of captains, being below his rank were members of the court martial that tried him contrary to section 133(3) (b) of the Act. On this ground, the court of Appeal quashed the decision of the court martial.

[119] Section 133 (3)

[120] Section 133 (3) (b)

Thus, the Nigerian court martial system which is akin to jury system in USA or UK allows for a panel comprising one's peers or his senior try him. This accords with acknowledged military tradition which forbids the appointment of a junior officer to try his superior.

3.4.3 Assembly and Swearing-in

The statutory appointment of the president, members, judge Advocate and other officers of court martial after diligently ascertaining that they are not disqualified by any law sets the stage for the assembly of the court. A court martial is assembled when the court is fully formed and the convening order is read in court. This is followed by the swearing-in of officers of the court. The accused must then be given the opportunity to make an objection if he has any against any member of the court he thinks will not be fair to him during trial.[121]

[121] AFA Section 137(2)

A trial could be nullified if an accused is not afforded the opportunity to make an objection. In the past some court martial trials have either denied the accused this right or unreasonably overruled his objection detrimental consequences at the court of Appeal or Supreme Court, see **Lieutenant Colonel A. D. Karim** (Supra). The military courts must therefore not only give the accused person the right to object, such objections must also be dispassionately considered on merit with a view to disqualifying a member where whole fairness would be questionable.

When the commanding officer or the direct superior officer of an accused is sitting in his trial, the law presumes that there is likelihood of bias. This is because the accused commanding officer or superior officer would be both the accuser and the judge at the same time. There is therefore, the need to delineate the roles of the commanding officer who reports on the case and member of the court martial who is a judge.

3.4.4 Arraignment

The likelihood of misapplication of rule of law is very high in the area of arraignment. Any misreading, misunderstanding or misapplication of relevant laws in this regard is therefore likely to have far reaching consequences. An arraignment is the reading of a charge to the accused in the language he understands and consequently obtaining a voluntary plea from him as required by law.[122] Any forced, coerced or cajoled plea is therefore prohibited.

Very often, due to ignorance, over zealousness or vested interest, the accused is made to plead quality to a charge under circumstance that negate this principle. This is likely to happen during investigation by the provost or the intelligence.

These agents of the criminal justice system more often think that their job is done when the suspect 'confesses' to crime. To them any, method must be used to extract the

[122] Section 36(a) of the Constitution

'confession'. Contrary to the Evidence Act[123] and the Constitution[124]. This is corroborated in the case of **State v Sgt. Sylvester Kassam** and others[125] where the court stated, certainly, beating or flogging of person with a view to forcing him to make a confessional statement is unlawful.

This mentality is one of the problems against the noble tenets of the rule of law. The provost and intelligent department need a lot of retraining in this area. One way of guarding against this is for the military command to direct their investigation before being acted upon. This will be skin to what is obtainable in civil world where police reports are forwarded to the office of the Director of Public Prosecution (DPP) for clearance before trial.

3.4.5 Trial

A trial refers to calling of witnesses, examination, cross examination and re-examination of witnesses by all the parties

[123] Section 29 (2) (a) Evidence Act Cap E14 LFN 2004

[124] Section 36 (11) of the constitution

[125] (1987)2 Q.L.R.N 243 at 259

with a view to eliciting facts of the matter from them. The witnesses may also produce hard evidence like weapons, documents and other physical objects and substances. This is perhaps, the kernel and the most exciting part of criminal justice procedure. A lot of care need to be taken to check the excesses of members of the court and parties to the matter in other to guarantee the accused his fair day in court.

As the court decided in the case of **Lieutenant Colonel E. O. Anene v Nigerian Army (Supra):**

> *where the appellant argued that the president of the court martial subjected the appellant to serious examinations on matter that were not relevant facts, the court of appeal held that the appellants right to fair hearing was breached. Similarly in* ***Lieutenant Colonel A. D. Karim v Nigerian Army (supra)*** *the court of Appeal held thus: Though section 232 of the Evidence Act gives a court and a court martial liberty to discover or to obtain proof of relevant fact by asking questions, however their liberty should not be converted into license for the court to appropriate a case and constitute itself into a prosecuting agency. The appellant's right to fair hearing was also holt to have been breached because the court martial took over the job of a prosecution by examing almost all*

the witnesses in like manner that gave the inevitable impression that trial was an inquiring tailored in favour of the defendant.

3.4.6 Decisions

The Act[126] makes adequate provision for how decision of courts martial are to be reached. Section 140(1) of the Act provides that every question to be determined by the court martial shall be by a majority of the votes of the members of the court martial and in the case of equality of votes on the finding, sub section 2 states that the court shall acquit the accused subsection 3 is emphatic on the fact that a finding of quite where the only punishment which the court can award is death shall not have effect unless it is reached with the concurrence of all the members. It further provides what where in any other case there was no concurrence in the finding of a majority of the members, the court may awarded any less punishment provided by the Act.

Subsection 4 on the other hand states that where the accuses is found guilty and the court has power to sentence

[126] Section 140 of Armed Forces Act

him either to death or to some less punishment, sentence of death shall not be passes without the concurrence of all the members. In the case of equality of the votes on the sentence or on any question arising after the commencement of trial, other than the finding, subsection 5 provides that the president of the court shall have a second casting of vote.

It is clear from section 140, that firstly, for an accused to be found of any offence under this Act, majority of the members must vote in favour finding him guilty. Secondly, where the offence carries a death penalty, all the members must vote in favour of a finding of guilty. Thirdly, the president cannot have a second vote where there is an equality of vote. In that circumstance, court shall discharge and acquit the accused, and such acquittal requires no confirmation.[127] This is the only logical, reasonable and fair decision since an equal number of the members of the court on individual basis number of the members of the court on individual basis, are in favour of his acquittal and conviction respectively.

[127] See foot note 2 to section 96 of British Army Act which is Similar to Section 140 of Armed Forces Act.

3.4.7 Findings and Awards

Finding and sentence is provided for by the Act.[128] Subsection 1 provides that the findings of the court in each change shall be announced in the open court and if the finding is quality. It shall be announced as being subject to confirmation.[129]

At the end of the prosecution and defence cases, both parties address the court. Thereafter, the judges advocate sums up and advises the court on issues of law before the court retires to consider her findings. The finding s entail distinguishing and analyzing the issues, taking a position and pronouncing on the guilt or otherwise of the accused subsequent upon the guilty verdict, the court must punishment. It must be noted that these process are strictly guided by relevant laws which spells out the extent of the power of the court.

[128] Id Section 141 of the Armed Forces Act

[129] Id (1), (2)

3.5 POST TRIAL MATTERS

3.5.1 Review and Revision of Court martial Proceeding

The Act provides some safety valves for an accused. The Act[130] provides that an accused is encouraged within ninety days after days after being sentence by a court martial and before the sentence is confirmed to submit to the confirming authority any written matter which may reasonably tend to affect the confirming authority's decision whether to disapprove a finding of guilt or to approve a sentence. This process does not exist in regular justice system and further reinforces the necessity to exhaust all administrative remedy and appellant chain within the military justice system before seeking other remedies. Matters which may be submitted under this provision include:

a. Allegation of errors affecting the legality of the trial;
b. Portions or summaries of the records or copies of documentary evidence offered or introduced at the trial and

[130] Id 149 (1)

c. Matters in mitigations which were not available for consideration at the trial.[131]

Review of convictions by court martial evolved over time. Under current practice before the confirming authority takes action on a record of trial by a court marital, the confirming authority shall obtain a legal review from the case form Directorate of Legal Services of the Armed Forces, so however that no person who had acted as a member, judge advocate, trial counsel, defence council or investigating officer in the case may later review the same case.[132]

3.5.2 Confirmation of the Trial

This is covered by sections 141 and 148 (3) of the Act which imply that:

a. The accused is not yet a convict until his sentence is confirmed by authority which is the army council in the

[131] Id 149 (2) (a)-(c) of the Act

[132] Id 149 (3) of the Act

case of officers and the service chiefs in the case of soldiers.

b. The accused cannot initiate appeal process at this stage until his sentence is confirmed. This is because the findings and sentence is inchoate and the accused could still get a reprieve during the redress or review process
c. This equally implies that the status of the accused must not be altered until the confirmation of the finding and award by the confirming authority.

Inspite of the above provisions, however, there were pockets of violation during military dispensation where findings and awards of the court martial were sometimes confirmed on the same day judgment was delivered. This was evident in the case of **lieutenant colonel A. Akinwale v The Nigerian Army**[133] where the appellant upon conviction on the 16th August, 1996 wrote a petition against his conviction on 16th of August, 1996, but the confirming authority confirmed and promulgated the findings and sentences of the court

[133] (2001)16 N. W. L. R. (Pt. 738) 122 Para 9-11

martial on the same 16th August, 1996. The court of Appeal expressed shock and stated that the procedure adopted by the confirming authority: "made mockery of the independence and the impartiality provided and guaranteed by the constitution of this country".[134]

Similarly in the case of **Colonel Clement Gami v The Nigerian Army**[135] where findings and sentences where confirmed just four days after his conviction and the sentence, Oguntade J. C. A. as he then was, in his lead judgment expressed his displeasure thus:

> *I am however shocked or greatly disturbed by the fact that the confirmation of the decision of the GCM was done within four days after the decision was given. The appellant was in the process prevented from making representation to the confirming authority as to why the decision if the GCM should not be confirmed. Confirming authority proceeding to confirm the decision of the GCM without, waiting for the representation of the appellant should appear to have believed that nothing the*

[134] Section 36 of the Constitution

[135] Appeal No C.A/127/98 (unreported) February (2001)

appellant said could have persuaded it to change its mind. The confirming authority had thus exposed itself to justifiable accusation of bias against the appellant and unfairness in its approach. I think the approach was wrong and ought not be repeated. If I had to decide this appeal on the propriety or otherwise of the decision of the confirming authority, will set aside the confirmation and proceed to allow the appeal.

In view of the aforementioned provisions of law one cannot agree less with the Court of Appeal that the confirming authority shall wait for three months after the findings and sentence of the court martial.

3.5.3 Powers of Confirming Authorities

On review the confirming authority may direct a revision of the finding of guilt in any case where it appears to him that the finding was against the weight of evidence; or that some questions of law determined at the trial and relevant to the fining was wrongly determined. In all other cases, the

confirming authority shall deal with the finding or sentence of a court marital:[136]

a. By withholding information of the opinion that the finding is unreasonable or cannot be supported, having regard to the evidence or the fact that it involved a wrong decision on a question of law, or that on any other ground there was a miscarriage of justice or
b. Confirming the finding or sentence; or
c. By referring the finding or sentence or both for confirmation to a higher confirming authority.

In confirming a sentence, the confirming authority may remit in whole or in part, any punishment awarded by a court martial, or commute a punishment so awarded for such other and lesser prescribed punishments. Note that the confirmation of a finding or sentence shall not be deemed to be completed until the finding or sentence has been promulgated. Therefore, the confirming authority may not change a finding of not

[136] Section 151 of the Act

guilty but reverse a finding of guilty and reduce, mitigate, or disapprove a sentence.[137]

Major themes of reform of military law involves reforming of military law to civilian concepts of justice including the replacement of military officers lacking legal training with trained lawyers who could ensure the fairness and integrity of the judicial process.

[137] Id

CHAPTER FOUR

CONTENTIOUS ISSUES IN NIGERIAN MILITARY JUSTICE SYSTEM

4.1 INTRODUCTION

The legal justice system, is characterized by a legion of contentious issues which shall be discussed in the following paragraphs.

4.2 INITIATION OF LEGAL PROCESS BY SERVICEMEN

Some members of the Nigerian Armed Forces, especially the junior ones, up till recently erroneously think that they cannot sue to enforce their rights regarding contract, land, commercial transaction, among others. This is obviously incorrect, except for the limitation in relation to suits against the military authorities, as provided for in sections 178 and 179 of the Armed Forces Act.[138] A soldier who feels wronged on any matter by a person subject to military law can seek redress for such a wrong in accordance with the

[138] AFA Section 178 and 179

procedures set out by the Armed Forces Act. Section 178 that deals with complaints by officers or authority and on application to his commanding Officer does not obtain the redress to which he thinks he is entitled, he may make a complaint with respect to that matter to the Forces Council[139]. It also states that the officer shall first exhaust the administrative remedies available to him under the section before embarking on any other action[140].

In respect of a soldier, section 179 provides that he may make a complaint with respect to that matter to his Commanding Officer[141]. And if he is not satisfied with the dress, he may make a complaint to the next officer under whom he, the complaint, is for the time being serving, being an officer not below the rank of Brigadier General or corresponding rank. In other words, he is to complaint to the next higher authority to his Commanding Officer[146]. Like section 178, the

[139] Id Section 178 (1), 179

[140] Id Section 178 (1)

[141] Id 179 (3)

section also states that the soldier shall exhaust the administrative remedies before embarking on any other action[142].

The import of sections 178 and 179 therefore is that a service personnel is bound to exhaust all administrative remedies before he can proceed to the civil courts to seek remedy against a fellow service personnel or the military authority. If he refuses to do so, he can be disciplined for violating the channels for redress and communication which are matters of common service knowledge. Even in the United States of America, the Federal Courts have recognized the need to allow the military justice system and its agencies to conclude matters before the courts can intervene. It is held that it promotes efficiency and discourages servicemen from neglecting the institution created by the law. Thus, in **Orloff v. Wiloughby**[143] the US Supreme Court stated the position as follows:

> *We know that from to bottom of the Army the complaint is often made, and sometimes with*

[142] Id 179 (1)

[143] 345 U.S 83 (1953) at p.93

> *justification, that there is discrimination, favouritism or other objectionable handing of men. But judges are not given the task of turning the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline form that of a civilian. Orderly government required that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere judicial matters.*

It is submitted that this position conforms to sections 178 and 179 of the Armed Forces Act and would be of strong persuasive authority to the Nigerian courts in refusing to entertain suits servicemen who have not exhausted the prescribed administrative remedies available to them in seeking redress.

4.3 RESPONSE TO LEGAL PROCESS BY THE MILITARY

Each arm of the armed forces can be sued or served civil court process and is bound to comply with the process. The same is applicable to members of the armed forces as they

can be sued or be served legal process in their personal capacities. This assertion can be supported by the fact that there is no provision in the Armed Forces Act which restricts the right of citizens regarding suits or service of legal processes against the military and its personnel. It is also submitted that even as section 45 of the Constitution of Federal Republic of Nigeria 1999 which restricts the exercise of fundamental human rights by individuals, in the interest of defence and public safety, cannot be invoked by the military or its personnel in respect of suits or service of court processes on them.

Section 45 specifically provides that nothing in section 37, 38, 39 40, and 41 of the Constitution shall invalidate any law that is reasonably justified in a democratic society in the interest of defence public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons. Section 37 deals with right to private and family life, section 38 to freedom of thought, conscience and religion, section 39-right to freedom of

expression and the press, section 40 right to peaceful assembly and association while section 41 deals with right to freedom of movement.

4.4 REDRESS OF COMPLAINTS BY SERVICEMEN

The AFA provides a method for military members to file a complaint if they are "wronged" by their commanding officer. This is one of the most powerful, yet under-used tools in the military justice system, for members to assert their rights. Sections 178 and 179 and Part XV of the AFA[144] particularly sections 147 - 149 constitute some of the most powerful rights under section 178 of the AFA but are some of the rights least known and least used by military personnel. Under section 178 of the AFA, "any member of the armed forces who believes himself (or herself) wronged in any matter by any superior officer or authority may request redress. If such redress is refused, a complaint may be made and a superior officer must "examine into the complaint". Similarly,

[144] Section 178 and 179 of AFA

section 179 of the AFA gives every soldier, rating or aircraftmen of the Armed Forces the right to complaint that he or she was wronged by his or her commanding officer or other service personnel. Also section 147 and 149[145] deal with review of summary findings and awards, and petitions against findings or sentences of courts-martial respectively. Matters appropriate to address under sections 178 and 179 include discretionary acts or omissions by a commander or superior officer that adversely affect the member personally and are:

a. In violation of law or regulation
b. Beyond the legitimate authority of that commander
c. Arbitrary, capricious, or an abuse of discretion, or
d. Clearly unfair (eg., selective application of standard) treatment.

If an officer, soldier, rating or aircraft thinks wronged, the member, within 90 days, submits his or her complaint in writing, along with supporting evidence, to the commanding officer dealing the wrong alleged to have been

[145] Id Section 147-149

committed. There is no specific written format for a complaint, but it should be in normal military letter format, and should clearly state that it is a complaint under the provisions of the AFA. In either way, if the personnel on application to the commanding officer does not obtain the redress to which he thinks he is entitled or for any other reason, he may make a complaint in respect of that matter to the Forces Council (in the case of a commissioned officer), or to the Army, Navy or Air Force Officer under whom the complainant is serving, being an officer not below the rank of Brigadier General or correspondent rank.

The commanding officer or Force Council on receipt of the complaint shall investigate the matter and grant any redress which appears to him to be necessary. If the complainant so requires, the Forces Council shall make its report on the complaint in order to seek the directions of the President C-in-C on the matter. The commander receiving the complaint must promptly notify the complainant in writing whether the demand for redress is granted or denied. The reply must state

the basis for denying the requested relief. Sections 178(5) and 179(6) protects service personnel against any penalty consequent upon making complaints under this sections so long as such complaints are in conformity with military ethics and tradition. For example, this provision will not exonerate service personnel of the offence of False Accusation, if in the course of making his complain, he makes a false accusation against another service personnel[146]

It is worth nothing that sections 178(3) and 179(4) make it mandatory for an officer, soldier rating or aircraftman who feels he has been wronged in any matter to first exhaust all the administrative remedies available to him under this section of the Act before embarking on any other action. It is submitted that "any matter" includes courts-martial and other disciplinary processes. This is the crux of this chapter.

If the commander refuses to grant the requested relief, the member may submit the complaint, along with the commander's response, to any superior commissioned officer,

[146] Id Section 94(b)

who is mandated to forward the complaint to the officer exercising General Court-Martial Convening Authority (Brigadier General and above) over the commander being complaint about. The officer may attach additional pertinent documentary evidence and comment on availability of witnesses or evidence, but may not comment on the merits of the complaint.

4.5 APPEALS, ISSUES AND CHALLENGES

At this juncture, this study shall be analyze the decisions of appellate courts on court martial appeals and to unravel their rational for overturning a majority of courts martial decisions. Some commentators are of the view that this is unpleasant and stems from a lack of understanding of the military justice system by the appellate judges as was in the case of **Major Iyela v Nigerian Army**, and **Anyankpele v Nigerian Army**. They opine that the system deserves some sympathetic treatment given the fact that the system deserves some sympathetic treatment given the fact that the military is a specialized society trained for

war. It has also been argued that such a system does not have the time or the luxury for the fitness in legal semantics and procedures. Although we sympathize with such views, we are of the opinion that this as a challenge to collectively look inward and see how our system is faring in the global quest for enforcement of human rights and rule of law. Our quest may well reveal that we need to fine tune our system in order the capacity of those whose roles in one way or another impact on the military justice system. We will therefore in any comments elucidate the pitfalls of court martial decisions before the appellate courts, the factors responsible for this state of affairs and recommend possible penances for better output[147].

4.5.1 The Reasons for Reversal

An astute practitioner and commentator on Military Law has made the following comment on the Nigerian military justice system.

[147] OpcitTakai, D.B

> *It is indeed unfortunate that the military justice system is being destroyed from within and ironically by those entrusted with its enforcement. If it is realized that court martial trials in this country are amenable to the supervisory and appellate jurisdiction of the regular courts up to the Supreme Court, the need to act appropriately and in accordance with the law becomes imperative*[148]

The above comments aptly express the current situation of the Nigerian military justice system. This is because a detailed study of the trend of decisions of the appellate courts on court martial appeals will reveal that the often mortal injuries to court martial decisions occasioned by their reversal are self-inflicted. The reasons for reversal include but are not limited to the following:

1. Lack of jurisdiction due to -

    a. Improper issuance of convening orders

    b. Improper composition of the courts martial

    c. Wrongly drafted charges

[148] OpcitAkin, K.

2. President or members jumping into the arena by taking over the prosecution.

3. Courts martial not giving reasons for their findings

4. Denial of fair hearing through-

a. Joint trials where there are no joint charges.

b. Failure to evaluate evidence dispassionately

c. Confirmation without affording the accused the opportunity to petition within three months.

d. Confirmation by the same officer who convenes the court, as is was in the court of Lieutenant Colonel Akinwale (Supra)

The appellate courts from their pronouncements and decisions have provided us with sufficient signposts and lighthouses to guide us in navigating the tricky channels towards the ultimate destination of providing military justice in the true sense of that phrase.

4.5.1.1 Judicial Pronouncements on Courts Martial Decisions

The appellate courts have always unequivocally expressed the rationale behind their reversal of courts martial decisions. Some germane pronouncements in this regard are as follows:

4.5.1.2 Fair Hearing

Most appeals to the appellate courts involved the issue of fair hearing. It is the ground on which most decisions are over tuned. This was the case in **Nigerian Army v Col Umar Mohammed**[149] where the Supreme Court held, per Belgore JSC that: "It is true court-martial is a military court, it is however always bound by rules of evidence and manifestation of fair trials. The respondent was virtually not allowed a fair trial. I find no reason to disturb the judgment of the Court of Appeal"

[149] (2002) F.W.L.R. part 29 1554.

Also in the case of **Anyankpele v. Nigerian Army**[150], the Court of Appeal held that a trial where the accusers are the prosecutors and the judge at the same time can never guarantee fair hearing. It also held that the duty of a tribunal or any adjudicating body is to limit itself to the evidence before it and not to go fishing for evidence.[151]

4.5.1.3 Procedural Errors

Procedural errors in some instances form the basis for reversal. In some case, joint trial of accused persons who were charged separately was the Achilles heels of the court martial trial. This was in the case of **Yakassai v. Nigerian Air force**[152] where the Court of Appeal set aside the trial of the appellant. It held that where an accused is charged separately he cannot be tried jointly with another in the absence of joint charge. Oguntade JCA cited and adopted the earlier case of

[150] (2002) 13 NWLR part 684 226.

[151] See also Oladele v. Nigerian Army (20o4) 6 NWLR (pt 868) 166, Ex Lieutenant Colonel Akinwale v. Nigerian Army 12 NWLR part 738 109.

[152] (2002) 15 N.W.L.R (part 790) 294 at page 313

Togunloju v Nigerian Airforce, where the Court of Appeal had held that:

> *When it is intended to try more than one accused person jointly, there must be a joint charge. It is imperishable to try jointly persons separately charged... to have tried persons separately charged jointly was bound to create complications which could not be over-come without doing a grave injustice to the person being jointly tried. It was a mistrial which ought to be pronounced a nullity and set aside. The error completely vitiated the trial*[153].

4.5.1.4 Jurisdiction

On the appellate court's attitude to a court martial sitting jurisdiction, see the case of **Karim v. Nigerian Army (supra)**. In that case, the appellant, a Lieutenant Colonel was tried by a General Court Martial, which had one Lieutenant colonel Igwe as a member. Appellant contended that whereas he was promoted on 2 January 1996 to the rank of Lieutenant Colonel, Igwe was promoted to the rank on 7 March 1996 and therefore

[153] See also Karim v. The Nigerian Army (2002) 4 N.W.L.R (part 758) 717 at page 734, squadron Leader Onyeukwu v. The State (2002) 12 N.W.L.R (part 681) 256 at 258.

disqualified to sit as a member of the General Court Martial in violation of section 133(3) of the Armed Forces Act. Declaring the General Court Martial as incompetent to try the appellant and the trial a nullity the Court of Appeal declared per Galadima JCA:

> *It is the trite law that where the words used in a provision of an act are clear and not ambiguous the words must be given their plain, clear and ordinary grammatical meaning. Applying this rule of interpretation it would be seen that the appointment of Colonel CM Igwe was in violation of section 133(3) of the AFD (as amended). Consequently the trial of the appellant must be declared a nullity for locking jurisdiction.*

There are a myriad of appellate decisions on the same issue[154]

[154] See the cases of AKono v. The Nigerian Army (2000) A14 N.W.L.R. (part 68) 318, Lieutenant Colonel EO Enene

v. The State (CA/1/14497 Junreported. Ex-Major NU Okoro v. Nigerian Army Council (2000) 3 N.W.L.R

(part 647)77, Majekodunmi v. The Nigerian Army and Another (2002) 16, N.W.L.R (Part 794) 451

4.5.1.5 Improperly Drafted Charges

Non- compliance with basic rules of drafting charges has been bane of some court martial decisions before the appellate court which the appellant was tried was vague, ambiguous and above all, inconsistent with the words used in section 90(a) -(d) of the Decree. The court stated. The words "orders" or liaise to cover up" are words quite alien to or not used in section 90 or any of the subsections. Consequently, Charge three as preferred is fundamentally defective and incurably bad by reason that it dose that it does not disclose any offence created within the ambit of section 90 of the Decree.

In **Lieutenant Colonel Anene v The State (supra)** the Ibadan Division of the Court of Appeal ruled that the charges preferred against the appellate disclosed no offence and consequently declared the trial a nullity.

4.5.1.6 Conviction Based on Insufficient or Irrelevant Evidence

Court martial decisions based on insufficient or irrelevant evidence have also not been spared on appeal. In **Yekini v. Nigerian Army (Supra)** at 144 the Court of Appeal held, per Aderemi, JCA that:

> *It is the cardinal duty of a trial court to perceive and evaluate the evidence placed before it before arriving at a conclusion. A dereliction of this fundamental duty is fatal to whatever conclusion the trial court may reach. I have examined the whole of the evidence placed before the military court martial, it is devoid of value. The conviction appears to be founded on suspicious or a state of conjecture. I need to add that mere circumstances of suspicious are never sufficient to justify* a *conviction. Indeed, suspicion, no matter strong, can never take the place of legal proof.*

4.5.1.7 Failure to Give Reasons for Finding

Although there are conflicting appellate court pronouncement on this issue[155], there are subsisting judicial authorities requiring courts martial to evaluate evidence and give reasons for their findings. In **Ayankepele v. Nigerian Army (Supra)** the Court of Appeal observed that:

> *The judgment of any court or tribunal must be based... in criminal matters, on the evidence adduced in court and the findings of the Judge which are based on the issues raised... no court or tribunal can negotiate a non-compliance with the above requirements. In the instant case, no reasons were given as to how the conviction of the appellant was arrived at. The court just simply pronounced him guilty on the two charges.*

Also in **Oladele v. Nigerian Army**[156] the Court of Appeal declared the trial a nullity on the ground that the

[155] See the cases of Gbasouzour v. Nigerian Army (2000) 2 C.L.R 230, Magaji v. Nigerian Army (2004) 16 N.W.LE

[156] (part 899) 222, Lieutenant Colonel Ajia v. The Nigerian Army (unreported) (2004) 6 N.W.L.R (part 868) 166 at 183.

court martial failed to give reasons for their findings. The Court, per Aderemi, JCA held that:

> *The members of the Armed Forces are not excluded from the application of the provision of fundamental Rights like the right to life, right to personal liberty, right to fair hearing, right to freedom from discrimination etc. I have looked carefully at the records of proceedings, no where was it shown that he court martial evaluated the evidence led before it nor had a dispassionate consideration of the issues in controversy. The judgment is bare.*

4.5.1.8 Failure to Conform to Post-Trial Procedure

There are post-trial procedures required by law. Compliance with the procedures is as important as the trial proper. Such post -trial action includes petition to the confirming authority, legal review by the Directorate of Legal Services and Confirmation. The importance of these post-trial processes is underscored by the provisions of Section 148(3) (b) of the Armed Forces Act which provides that neither the finding nor sentence of a court martial shall have any effect until it is confirmed. It is therefore not surprising that the results of court martial trials where these post-trial procedures were not

conformed with were axed on appeal[157]. The comments in Oguntade, JCA in **Garni v Nigerian Army**[158] (cited with approval in **Ex-Lieutenant Colonel Akinwale v. Nigerian Army (supra)** are very germane in this respect. His lordship was of the opinion that:

> *The confirming authority by proceeding to confirm the decision of the General Court Martial without waiting for the representation of the appellant said could have persuaded him to change its mind....I think the approach was wrong and not to be repeated...this shoddy proceedings in my respectful view, makes a mockery of the independence and impartiality provided and guaranteed by the Constitution of this country.*

Having identified the minefields that constitute mortal and predatory peril to court martial decisions before appellate courts, it is necessary to examine the issues and challenges.

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[157] See EX-Lieutenant Colonel Akinwale v. Nigerian Army 12 N.W.L.R (part 738) 109, Majekodunmi v. The Nigerian Army and Another (2002). 16 N.W.L.R. (pt 794), 451, Yekini v The Nigerian Army (2002) 2 N.W.L.R (part 777) 127.

[158] Suit No. CA/L/276/98 (Unreported)

4.6 ISSUES AND CHALLENGES

4.6.1 Justice and Technicality

It must be emphasized at this juncture that in a court martial, justice must not be sacrificed on the altar of technicalities. This is the position of the Supreme Court which has unequivocally held that "Courts and tribunals are enjoined to decide matters on the merits and should be wary of sacrificing justice on account of technicality," per Dahiru Musdapher JSC delivering the lead judgment in Charles Okike v. The Legal Practitioners Disciplinary Committee[159].

In this case the Respondent based its decision on the unchallenged and admitted evidence that the Appellant, a legal practitioner, with intent to steal, deprived his client a judgment creditor, the proceeds of judgment. The Appellant not only admitted it to the petitioner but also paid in pat and promised to sell some of his properties to pay the balance. The appellant

[159] (2005) 10,M.J.S.Catp. 40.

had complained that no formal changes were forwarded by the Nigerian Bar Association (NBA) to the Respondents against the Appellant and that a formal report of the prima facie case sent to the Respondents did not constitute a formal charge.

The Supreme Court further held at page 39 that:

> *The precise nature of the allegations against the Appellant were communicated to the Appellant he was well aware of all the complaints against him. Where the allegation contained in the petition before the discipline tribunal, as opposed to criminal tribunal, contains all the essential elements and enough information it is not necessary to make reference to particular breaches of the rules as a criminal trial.*

The point to note is that in courts martial as in civil courts and tribunals, justice must not be sacrificed on the altar of technicalities. This is not to say that the court martial can breach the rules of fair hearing on the rules of evidence which it is bound to follow. It is submitted that the appellate courts will not hesitate in allowing an appeal based on such breach, as has been demonstrated through court martial cases which went on appeal.

Speaking also on the issue Justice C.A Oputa, a retired Justice of the Supreme Court asserted that: "The instrument which society created to implement justice is the law and the legal system. These are means to an end and the end should always be justice-not technical justice but substantial justice"[160].

He further argued that substantial justice inspires confidence in the people that the judiciary dispenses justice that is fair, just and even-handed. One cannot agree more with Justice Oputa. It therefore appears to me that since the court martial is a court of competent Jurisdiction recognized by section 6(5) (j) of the Constitution of the Federal Republic of Nigeria 1999, it should at all times pursue substantial justice and not technical justice.

In his own contribution, Fatai-Williams, CJN in the case of **Senator Abraham Adesanya v. President of Nigeria**[161]

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[160] Oputa, C.A "The 40th Anniversary of the Nigerian Law School Commemorative Publication", in the Nigerian Law School, Abuja. Four Decades of Services to The Legal Profession (2003), p. 97

[161] (1981) 2 N.C.LR. 358 at 373

stated as follows: "if we are to keep our democracy, there must be one commandment, thou shall not ration justice." It is our view that rationing justice amounts to allowing legal technicality to overshadow justice, which will inevitably swing the pendulum of the law away from substantial justice. This seems to be the position of Lord Ellenborough, CJ where he stated as follows:

It is of the greatest importance that the administration of justice should not only be free from spot or blame, but that it should be so far as human infirmity could allow it to become, be free from all suspicion[162]. It is submitted that the implication of Ellenborough's statement is that the administration of justice in a democracy should be free from all extraneous imports including legal technicalities, which would prevent the judiciary from meeting out substantial justice. This being the case, it is important that the administration of military justice

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[162] Afe Babalola, "Meeting the Needs of the Legal Profession: A View from the Bar," In the Nigerian Law School, Four Decades of Service to the Legal Profession (2003), p.101.

under a democratic rule should not only be free from spot, blame or suspicion but also free from legal technicalities that would deny servicemen or the military itself substantial justice.

4.7 CHALLENGES

4.7.1 Inadequate Knowledge of Military Law and Service Knowledge

The AFA is the principal enactment which regulates the mode of enforcing discipline in the Nigerian Military. The Act provides for two types of trials, viz summary trial and, court martial trials. Unfortunately, courts martial are still being regarded in some quarters as kangaroo court ostensibly due to ignorance. One of the most scathing criticism of the court martial system was made by Bishop Jnr when he said: "A court martial is a kangaroo proceeding in which wretched conscript is dragged before the panel of sadistic martinets convicted on the basis of perjured evidence on his own

confession which has been extracted by torture and sentenced to years of military confinement[163].

Nothing can be further from the truth than this assertion. Achike, unlike Bishop Jnr admitted his ignorance of the Court Martial system when he said: "The administration of military law or justice is an exercise not easily understood by civilians. Many civilians including the writer take the view that the nature of military justice must be of poor quality in comparison with civilian administration of justice[164].

The above sentiment expressed by Achike though predicated on inadequate knowledge is not abating but is rather gaining the sympathy of many stakeholders. Many court martial decisions have been overturned in the recent past for various reasons which many observers and critics opined were not based on merit. The effects of these overturned court martial decisions include the following:

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[163] Op cit Bishop Jnr.

[164] See Professor Okey, Acike; Ground work of Military Law Rule in Nigeria (Enugu: Fourth Dimension Publishers, (1978).

a. It whittled military and command authority.
b. Wastage of resources and man hours expended on the trials.
c. Erosion of morale and productivity, negative effect on discipline and professionalism when obvious offenders go free and unpunished for technical reasons.

4.7.2 Attitude of Appellate courts to Court Martial

With due sense of responsibility and absolute respect to the honourable Justices on the appellate bench, it is observed that they do not take the peculiarity of the military profession into cognizance before arriving at their decisions. This is because their subjecting of court martial decisions to the rigid constitutional tests like civil courts will not augur well for military discipline, professionalism and efficiency. The Court of Appeals decision in the case of **Major lyela v. Nigerian Army (supra)** is a pointer in this regard. One of the ratios in that decision is to the effect that an officer or any service personnel could arm himself without lawful authorization

simply because he is in military service. The Supreme Court went ahead to uphold the Court of Appeal decision in this case without pronouncing on this all important ratio having declared it moot in the light of other issues already determined. The effect of this decision on weapon accountability and national security is simply ominous.

The appellate courts recognize the legitimacy of courts martial as deriving from the CFRN but have however been inconsistent in their decisions on appeals from the Courts Martial. For example, the Court of Appeal held in the case of **Anyakpele v. Nigerian Army (supra)** that a Court Martial by not giving reasons for its decision derogated from the law and was in breach of the right of the accused to fair hearing. In a later case of **Ajia v. Nigerian Army**[165], the same Court of Appeal held that a Court Martial being a jury trial is not required to give reasons for its findings.

The appellate courts appear not to be well seised of the peculiarity of the relationship between a military superior

[165] (2000) 13 N.W.L.R (pt 684) 226-227

and his sub-ordinate. A superior has to be morally upstanding in order to earn the confidence and the "right" to command his subordinate and guarantee their unquestioned followership. Thus an Officer who borrows money from his subordinate would not be morally strong enough to call that subordinate to order if he misbehaves thus losing the moral authority to command such a subordinate. The lack of awareness of this peculiarity probably

hoodwinked the Justices of the Appeals in the case of Asake[166] v. Nigerian Army into holding that an Army Captain who borrowed money from his subordinate has not committed the military offence known as Conduct to the Prejudice Service Discipline.

4.8 CONCLUSION

The AFA was originally a military decree which did not take into recognizance the dictates of constitutional democracy

[166] Unreported

and due process. Although the Act has been received into the Constitution of Federal Republic Nigeria as an existing law under Section 315, it is still necessary to review it to bring its provision in tandem with rule of law, due process and constitutionalism.

CHAPTER FIVE

CONCLUSION

5.1 FINDINGS AND OBSERVATIONS

From the preceeding study, it was clear that observance of rule of law has an important role to play in administration of justice in military justice system. Consequently, this study observed the attitude, mentality and training of the military commanders are fashioned as it were, at not total observance of the rule of law. This was the legacy of the era of military regime, where trials were conducted and punishments awarded according to the whims and caprices of the commander of the accused person. Unfortunately, this attitude, mentality and training, have not, misapply law in

administering justice. The cases in hand are of **Tpr Oogwu Amos v Nigerian Army (Supra)**, **Zuru v Chief of Naval Staff.**[167]

The research also revealed that the foregoing discovery on misapplication of law in the military justice system has been the instrument for non-observance of rule of law violation of right to fair hearing of the accused with some level of impunity. This violation is a phenomenon in the system. It includes disregard of the provisions of the Constitution, the Armed Forces Act and other subsidiary military legal instruments.

Doctrine of compact entails that a soldier has dual citizenship that is a soldier and citizen. Irrespective of these dual status, a soldier is still being treated as though he has single status that is a soldier and nothing more as was observed in **Grant v Gould (Supra)** amongst other recent cases. A soldier is being treated as though he has no right or liability to protect or civility to enforce.

[167] (2004) ALL F.W.L.R Pt. 237-522

Again the practice by commanders pursuant to section 122 (1), (2), (3) (a-b) of AFA empowered him to detain an accused person for more than 24 hours, and write an eight days report to the ASA to justify further delay is absurd and inconstitient with our laws.

The study equally discovered that the provision of section 116 (b) (i) is ambiguous and is incapable of giving any direct meaning or interpretation, contrary to the rules guiding drafting of charges the whole of provisions of 115 (2) (3) (a-b) and 116 (2) (3) (a-b) equally contain in their sections award of punishments and sometimes in addition to fine are equally ambiguous and without proper meaning and interpretation.

In chapter three, it was equally observed that there had been defects in preferring of charges and failure to sign them has rendered several of the military cases a nullity at the appellate courts as well as failure to sign them.

In this chapter, it was observed also that the accused persons do not have legal representation during summary trial

as compared to court martial which violates his right to be represented as provided for in section 36(b) (c) of the Constitution.

This chapter also observed that it is difficult if not impossible for the system to reabsorb or reinstate personnel who got judgment against the army in civil court due to wrong dismissal or discharge rather, at best, they would reinstate and discharge them from service.

Finally, this chapter observes that the confirmation of findings and award pursuant to section 152 of the AFA is left in hands of service chiefs or councils where applicable instead of well-trained legal practitioners.

It was also observed that the Act provides that servicemen should exhaust the internal remedies before embarking on outside remedies that the most time the complaints are not given adequate and necessary attention as this leaves the aggrieved with no further option but to embark on quest for relief outside the system.

Furthermore, the decision in the case of **Major Iyela v the Nigeria Army (Supra)** among other similar cases aptly displayed the urgent need for the court to apply extra care when reaching judgment in the cases affecting the military.

It was equally observed that majority of the cases affecting military was quashed at appellate courts due to failure to observe among others, fair hearing, procedures, jurisdiction, improperly drafted charges, conviction based on insufficient or irrelevant evidence, failure to give reason for findings and failure to conform to the post trial procedure. This is in-exhaustive. However, we shall consider suggestion and recommendation.

5.2 SUGGESTIONS AND RECOMMENDATIONS

In view of the foregoing observations, the following suggestions are made:

1. It is important commanders study and be conversant with the applicable laws. They need also to liaise with the services legal officers at their disposal in all the Divisions

down to battalion levels for legal advice before embarking on any trial or legal-related matters.

2. There is equally the need for the most of the commanders who are still leveraging on the hangover of military regime to embrace reality of the fact that we are in democratic rule and therefore should abide by the rule of law.
3. There is no gain saying the fact that a soldier being a citizen, has some restrictions on his fundamental human rights in the interest of the defence of the nation pursuant to section 34 (2) of the Constitution. However, a soldier need not be subjected to military illegality but to military law *simplicita*.
4. The further detention of an accused person and eight days report need be abolished because it is contrary to sections 1(3), 34 and 35 of the Constitution.
5. The provisions of section, 116(6) (1), 116 (2), (3) (a-b), 115 (2), (3), (a-b) are ambiguous and incapable of giving any meaningful interpretation. It is suggested that it should be either redrafted or expunged from the Act for reason of

ambiguity. As these would lead to defect in preferring of charges.

6. There is need for an accused person to be equally represented by a counsel of his own choice during summary trial.
7. The system also has to endeavor to reabsorb and reinstate those personnel who got judgment in the civil court against the military rather than reinstate and discharge them from the service.
8. The confirmation and findings of awards need not be left in the hands of Service Chiefs or Forces Council as the case may be. Rather, there is need for lawyers in the legal services to carry out for efficient and unbiased confirmation. For this will equally allow them to bring legal minds to bear on the issues according to merit rather than sentiments.
9. Complaint or redress by the servicemen are need be given adequate and desired attention and grievances also need be equally treated according to merit.

10. The Appellate Courts need to be mindful of the fact that the military profession is a specialized organization and should therefore avoid bias or ready mindset in handling their cases for the interest of defence. They should endeavor to be dispassionate when delivering judgments that affect the military.
11. The commanders are advised to be fair and observe all the tenets of rule of law in dispensing justice.
12. There is need for the military commanders to strictly apply the rule of law in all trials.

5.3 CONCLUDING REMARKS

A fair system is only maintainable under military justice where those entrusted with adjudication adorn the garment of fairness by working in line with constitutional provisions are regards fair hearing. Granted that the Act as it presently is, in the light of globalization, technological advancement and democratization needs some amendments. It is our humble opinion that the challenges of the Act are not so much with the Act itself as it is with those empowered to administer it. In

William Shakespeare's Julius Caesar, Cassius believes that: Men sometimes are master of their fates: The fault … is not in our stars, but in ourselves…

There is no doubting the fact that the exigencies of the military require a system with adequate machinery for expeditious disposal of cases, so as to enable the serviceman return to his duty post. This factor cannot and ought not to be an excuse to either short-circuit or ignore those basic principles of fair hearing as enshrined in the Constitution and other enabling laws. Neither should any provision of the Act be abridged in any way save as provided by law. Courts-martial should always confine themselves within the rule of law. The 1999 Constitution which brought into existence the AFA is founded on the rule of law. Rule of law simply means that things should be done in accordance with the law. The Constitution guarantees fair hearing and fair treatment of an

accused person.[168] It is therefore, the duty of various commanders and court-martial to ensure fairness.[169]

Additionally, the concept of the rule of law postulates that no man is above the law of the land. This presupposes that all actions of the government and the citizens should be based on the provisions of the law. The rule of law is governed by 2 principles; no man should be judge in his own case' and 'the accused must be heard' as was decided by the Court in **Anyankpele v Nigerian Army (Supra)**, and also provided for in Sections 36(1), (5).

The concept of redress on the other hand covers the processes involved in quest for justice and the settlement of perceived wrongs. It involves the constitutional safeguards for fair hearing and the process of redress. The safeguards entail the rights as enshrined in the Constitution while the process of redress covers appeals and request to state complain.

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[168] Section 143 AFA CAP A20 LFN (2000), Section 36 of 1999 Constitution

[169] Section 36 (4) 1999 Constitution

Finally, the commanders are therefore adviced to adhere strictly to the rule of law in order to ensure a proper administration and dispensation of justice in the Nigerian military justice system.

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