

**CRITICAL APPRAISAL OF COURT MARTIAL CASES  
AT APPELLATE COURTS IN NIGERIA  
1990- 2014**

**By**

**Emmanuel Onyekachi UGWU**

**FACULTY OF LAW,  
AHMADU BELLO UNIVERSITY,  
ZARIA, NIGERIA**

**MARCH 2016**



**CRITICAL APPRAISAL OF COURT MARTIAL CASES  
AT APPELLATE COURTS IN NIGERIA  
1990-2014**

**By**

**Emmanuel Onyekachi UGWU  
LLM/LAW/64498/2013-2014**

**A DISSERTATION SUBMITTED TO THE SCHOOL OF POST  
GRADUATE STUDIES, AHMADU BELLO UNIVERSITY,  
ZARIA IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS  
DEGREE- LL.M**

**FACULTY OF LAW,  
AHMADU BELLO UNIVERSITY,  
ZARIA, NIGERIA**

**MARCH 2016**

## **DECLARATION**

I solemnly declare that this dissertation is the product of my personal endeavour and to the best of my knowledge, it has not been presented anywhere before. All ideas from previous writers have been duly acknowledged. I remain solely responsible for my views expressed and errors therein.

Emmanuel Onyekachi UGWU  
LLM/LAW/64498/2013-2014  
22 March 2016.

**CERTIFICATION**

This dissertation titled “CRITICAL APPRAISAL OF COURT MARTIAL CASES AT APPELLATE COURTS IN NIGERIA 1990 - 2014” by Emmanuel Onyekachi UGWU meets the regulation governing the award of the degree of Master of Laws (LL.M) of the Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

**Dr A.I. Bappah**

Chairman Supervisory Committee

.....

Signature

.....

Date

**Dr I. Shehu**

Member Supervisory Committee

.....

Signature

..... ..

Date

**Dr K.M. Danladi**

Head of Department  
Public Law

.....

Signature

.....

Date

**Prof K. Bala**

Dean School of Post Graduate Studies

.....

Signature

.....

Date

## **DEDICATION**

This dissertation is dedicated to my wife, Ngozi  
for effectively holding the home front in many  
periods of my absence.

## **ACKNOWLEDGEMENT**

I remain grateful to all those who contributed in one way or the other in making this dissertation a dream come through. First on the list is God Almighty, the Master of the universe, the King of kings and the giver of knowledge. I thank him for my being, for his grace which has always been enough for me. I thank the Dean Faculty of Law, Ahmadu Bello University, Zaria, Prof Y.Y. Bambale, for being a true leader that encouraged us to work very hard in order to graduate within the scheduled time. His simplicity and encouragement were exemplary. I am very grateful to my supervisors, Dr A.I. Bappah and Dr I.U. Shehu who worked faster than I anticipated. They defied the old belief that one has to spend a decade to obtain a Master of Laws Degree. My gratitude also goes to my lecturers, Prof B.Y. Ibrahim, Dr I.F. Akande (Mrs), Barr M. Audi and Prof Y. Aboki. I appreciate my parents, Mr and Mrs Ugwu Obuniyi of blessed memory.

I thank the Nigerian Army which has provided a platform for me to improve myself for several years. My family has remained a strong pillar for me. I thank my wife, Ngozi, my children, Nnenna, Ebube, Onyekachi Jnr and Obianuju who have made it possible for me to continue to study by enduring my absence. I am also grateful to my officers and soldiers and all the senior officers who encouraged me while this work was going on. I equally thank my classmates and all staff of Faculty of Law Ahmadu Bello University Zaria, for their diligent service. May God reward you all.

## **LIST OF ABBREVIATIONS**

AFA – Armed Forces Act CAP A20 Laws of the Federation of Nigeria 2004.

AFD – Armed Forces Decree 105 of 1993.

CAP- Chapter.

DHQ ADMIN –Defence Headquarters Administration.

ECOMOG – ECOWAS Monitoring Group.

GAF – Ghana Armed Forces.

GCM – General Court Martial.

JCA – Justice of the Court of Appeal.

JSC – Justice of the Supreme Court.

LCPL – Lance Corporal.

MWO – Master Warrant Officer.

NNS - Nigerian Naval Ship.



## TABLE OF CASES

	Pages
Abiodun Odediran v The State (2006) 18 NWLR Pt. 1012 .....	60
Adelu v State (2014) 13 NWLR Pt. 1425, 465 .....	61
Addah v Ubandawaki (2015) 7 NWLR Pt. 1458, 325 .....	38
Agbo v State (2006) 6 NWLR Pt. 977, 545 .....	62
Akinwale v Nigerian Army (2001) 16 NWLR Pt. 738, 109 .....	93,101
Akpan v State (1992) 2 NWLR Pt. 296, 64 .....	53
Aliyu v FRN (2014) 5 NWLR Pt. 1399, 101 .....	13
Anyankpele v Nigerian Army (2000) 13 NWLR Pt. 684, 209 .....	<b>44</b> , 45,46,47,79,80,90
Asake v Nigerian Army Council (2007) 1 NWLR Pt. 1015.p.408 .....	8, <b>53</b> , 81, 86, 99
Capt Akande v Nigerian Army (2001) NWLR Pt. 714, 1 .....	34
Charles Okike v Legal Practitioners Disciplinary Committee (2005) MJSC 1, 23 .....	34
Ciroma v Ali (1999) 2 NWLR Pt. 590, 317 .....	<b>79</b> , 80
Col Clement Gami v Nigerian Army (Unreported) Appeal No CA/276/98 Judgment delivered in February 2001 .....	36
Col David Gabriel Akono v Nigerian Army (2000) 14 NWLR Pt. 687, 318 .....	<b>17</b> , 48, 57
Cpl Isah Ahmed v Nigerian Army (2011) 1 NWLR Pt. 1227, 85 .....	34
Cpl Segun Oladele & 22 Others v Nigerian Army (2004) 6 NWLR Pt. 868, 166 ...	<b>62</b> , 63, 64, 90
Dodo v Nigerian Army (2007) 43 WRN 123 .....	<b>84</b> , 94
Egbeto v Wanogho (2005) MJSC 67 .....	60
Hamzat v Sanni (2015) 5 NWLR Pt. 1453, 101 .....	12

Igabele v State (2006) 6 NWLR Pt.574,354 .....	62
Idowu v State (1998) 11 NWLR Pt. 574, 354 .....	62
Lt Cdr Ben Ofuani v The Nigerian Navy and Nigerian Navy Board (2007) 8 NWLR Pt. 1037, 470 .....	64
Lt Cdr Anthony Bakoshi & 3 Ors v Chief of Naval Staff (2004) 15 NWLR Pt. 896, 268 .....	<b>14</b> , 26, 28, 90
Lt Col Dayo Karim v Nigerian Army (2002) 4 NWLR Pt. 758, 716 .....	<b>18</b> , 41, 42, 76
Lt Col Gbolawole Femi Majekodunmi v Nigerian Army and the Attorney General of the Federation (2002) 16 NWLR Pt. 794, 451 .....	<b>67</b> , 68
Lt Cdr Obisi v Chief of Naval Staff (2004) 8 MJSC 137 .....	<b>35</b> , 85, 86, 87, 94
Lt Col Iberi (Rtd) v Attorney General of the Federation (2004) 5 NWLR Pt.1401, 610 .....	<b>18</b> , 64, 89
Lt Col Komonibo v Nigerian Army (2002) 6 NWLR Pt. 762, 94 .....	<b>50</b> , 51, 80, 90
Lt Yahaya Yakubu v Chief of Naval Staff & ors (2004) 1 NWLR Pt. 853, 94 ...	<b>14</b> , 43, 70, 78, 90
Maj Bello Magaji v Nigerian Army (2004) 16 NWLR Pt. 899, 222 .....	34
Maj Jacob Iyela v Nigerian Army (2008) 18 NWLR Pt. 1118, 113 .....	<b>14</b> , 24,86, 90
Maj Suleiman Yekini v Nigerian Army (2002) 11 NWLR Pt. 777, 127 .....	<b>52</b> , 67
Maj IO Amachree v Nigerian Army (2003) 7 NWLR Pt. 807, 256 .....	55
Mohammed v Nigerian Army (1998) 7 NWLR Pt. 557, 232 .....	15, 40
Nigerian Air Force v Ex Wing Comd LD James (2002) 18 NWLR Pt. 798, 295 .....	34
Nigerian Air Force v Obiosa (2003) 4 NWLR Pt. 810, 233 .....	34
Nigerian Air Force v Wg Comd Shekete (2003) 2 MJSC 63 .....	34

Nigerian Army v Aminun Kano (2010) 1 MJSC Pt. 1, 151 .....	<b>13, 21</b>
Nigerian Army v Col Umar Mohammed (2002) 15 NWLR Pt. 789, 42 .....	<b>39, 90</b>
Nigerian Army v Dodo (Unreported) SC. 290/2009 .....	<b>87, 94</b>
Nigerian Army v Lt Col AO Peters (Unreported) .....	<b>58,92</b>
Nigerian Army v Warrant Officer Banni Yakubu (2013) 8 NWLR Pt. 1355, 1 .....	<b>83</b>
Nigerian Navy v Lt Cdr SA Ibe Lambert (2007) 11 MJSC .....	<b>71</b>
Nobert Okoro v Nigerian Army Council (2003) 3 NWLR Pt. 647, 77 .....	<b>65, 96</b>
Omoniyi v Alabi (2015) 6 NWLR Pt. 1456, 572 .....	<b>31</b>
Onuoha v State (1998) 5 NWLR Pt. 548, 118 .....	<b>62</b>
Ononuju v State (2014) 8 NWLR Pt. 1409, 345 .....	<b>72</b>
Orugbo v Una (2002) 12 MJSC 14 .....	<b>33</b>
Rear Admiral Agbiti v Nigerian Navy (2011) 4 NWLR Pt. 1236, 175 .....	<b>15, 20, 32, 34, 37</b>
State v Sqd Ldr OT Onyeukwu (2004) 14 NWLR, Pt. 89 340 .....	<b>72, 90</b>
The Federal Republic of Nigeria v George Osahon (2006) 5 NWLR Pt. 973, 361 .....	<b>94</b>
The State v Sqd Ldr Olatunji (2003) 14 NWLR Pt. 839, 218 .....	<b>34</b>
Umanah v Attah (2006) 17 NWLR Pt. 1009, 503 .....	<b>13</b>
WO Aloysius Idakwo v Nigerian Army (2004) 2 NWLR Pt. 857, 249 .....	<b>65, 81</b>
Yakasai v Nigerain Air Force (2002) 15 NWLR Pt. 790. 294 .....	<b>76</b>
Zakari v Nigerian Army (2012) 5 NWLR Pt. 1294, 92 .....	<b>54</b>

**TABLE OF STATUTES**

	Pages
Armed Forces Act CAP A20, Laws of the Federation of Nigeria 2004 .....	1, 2, 6, 14, 22, 34, 35, 50, 79, 93, 100
Armed Forces Decree 105 of 1993 .....	47, 51, 72
Constitution of the Federal Republic of Nigeria 1999 .....	1, 6
Economic and Financial Crimes Establishment Act 2004 .....	96
Evidence Act, CAP E4 2011 .....	49
Firearms Act 1958 .....	74
Legal Practitioners Act CAP L11, Laws of the Federation of Nigeria 2004 .....	96
Nigerian Army Act 1960 .....	96
Public Officers Protection Act CAP P41 Laws of the Federation of Nigeria 2004 .....	84
Rules of Procedure (Army) 1972 .....	27, 50

x  
**TABLE OF CONTENTS**

	Pages
Title Page -----	i
Declaration -----	ii
Certification -----	iii
Dedication -----	iv
Acknowledgement -----	v
List of Abbreviations -----	vi
Table of Cases -----	vii-ix
Table of Statutes -----	x
Table of Contents -----	xi-xiii
Abstract -----	xiv-xv

**CHAPTER ONE**

Background to the Study -----	1-3
Statement of Research Problem -----	3
Aim and Objectives -----	3
Justification -----	4
Scope and Limitation of the Study -----	5
Research Methodology -----	5
Literature Review -----	5-10
Organisational Layout -----	10-11

## CHAPTER TWO

Analysis of Court Martial Cases Upturned on Appeal on Grounds of Jurisdiction-----	12
Introduction -----	12-14
Wrong Constitution of Court Martial Based on Seniority of Members -----	14-22
Retrial of Condoned Offence -----	21-24
Court Martial Acting While <i>Functus Officio</i> -----	24-26
Unsigned Convening Order -----	26-27
Unsworn Members of Court Martial -----	27-30

## CHAPTER THREE

Analysis of Court Martial Cases Upturned on Grounds of Fair Hearing -----	31
Introduction -----	31-34
Issue of Bias Raised and Overruled-----	34-38
Descent into the Arena by President and Members of Court Martial -----	38-44
Same Person Convening and Confirming Court Martial Judgment -----	44-47
Judgment Based on Single Unsworn Witness -----	47-49
Substitution of Charges During Confirmation -----	49-51
Confirming of Sentence Same Day of Judgment without Legal Review -----	51-52
Non-Invitation of Vital Witness by the Prosecution -----	52-59

## CHAPTER FOUR

Analysis of Court Martial Cases Upturned on Appeal on Grounds of Lack of Diligent	
---	--

Prosecution and Other Reasons -----	60
Introduction -----	60-61
Lack of Proof beyond Reasonable Doubts -----	62-72
Reliance on Evidence of Co-Accused -----	72-74
Main Document not Tendered in Evidence -----	74-75
Joint Trial of Separately Charged Accused Persons -----	76-77
Other Reasons that Led to Upturning of Court Martial Judgments -----	77
Unsigned Judgment -----	77-79
No Reason given by Court Martial for its Judgment -----	79-82
Misapplication of Public Officers’ Protection Act -----	83-84
Court Martial Awarding Sentence beyond Stipulation of the Law -----	84-85
Confirming Authority Substituting Lesser Punishment with a Harsher One -----	85-86
Disposition of Appellate Courts Towards Court Martial Judgments -----	86-88

**CHAPTER FIVE**

Summary and Conclusion-----	89
Introduction -----	89
Summary-----	89-90
Findings-----	91-96
Recommendations-----	96-101
Conclusion-----	101-102
Bibliography -----	103-104

**ABSTRACT**

*Court martial is a major aspect of administration of military justice. In Nigeria, courts martial set up by the Army, Navy and Air Force have had numerous problems in the last 24 years leading to upturning of majority of the judgments by appellate courts. Judgments of about 70 percent of court martial cases that were appealed against in Nigeria between 1990 and 2014 were upturned by appellate courts. This work discovered that the major reasons that made appellate courts to upturn the judgments were on grounds of lack of jurisdiction, non-observance of the principles of fair hearing and lack of diligent prosecution among others. The Nigerian Armed Forces have lost several officers and soldiers to dismissals from courts martial of which their dismissals and sentence of imprisonment were upturned many years after, when it was difficult to get them back to service. This equally led to wastage of several man-hours prosecuting such cases at high expense. These were equally accompanied by harsh comments from justices of appellate courts which in some instances ridiculed the military justice system in Nigeria. The research is therefore aimed at proving that between 1990 and 2014, most of the court martial judgments were upturned on appeal based on lack of jurisdiction, non observance of the principles of fair hearing and lack of diligent prosecution. The major objective is to ensure that courts martial follow the prescribed procedures during trials. The research found out that one of the major reasons that makes court martial presidents and members conduct the procedures of the court in ways contrary to what it should be is command influence. Command influence is the negative influence of some convening authorities which makes the members to do his bidding at the courts martial. As a way out of the problem, the research recommended the insulation of courts martial from command influence and ensuring that those whose avoidable actions caused the upturning of court martial judgments on appeal get to feel the consequence of their actions. The principal ways of insulating courts martial from command influence as identified by the research include the Nigerian Armed Forces keying into the housing scheme of the Federal Mortgage Bank of Nigeria to get a personal house for every officer at the rank of Major. The officers are to bear the cost of the houses but to pay gradually from commission. In this way, officers will have a house to retire to, early in their career, thereby reducing the retirement phobia that facilitates command influence. The work equally recommended a situation where court martial members do not get evaluation reports from convening officers of courts martial where they are members. In the final analysis, the researcher believes that if these measures are adopted, the upturning of judgments of courts martial by appellate courts in Nigeria will be reduced to the barest minimum.*



## CHAPTER ONE

### 1.1 BACKGROUND TO THE STUDY

The Armed Forces of Nigeria like those of other countries of the world are created to defend the country from external aggression and maintain her territorial integrity. They are also created to secure her borders from violation on land, sea or air and to suppress insurrection and act in aid of civil authorities.<sup>1</sup> These functions form part of vital interests that are linked with the survival of the country. During wars and internal insurrections as currently experienced in North Eastern part of Nigeria, several members of the Armed Forces pay the supreme prize for the nation to survive. It is for this reason that a special way of ensuring that discipline and justice are maintained in the Armed Forces was crafted.

It is in line with the dangers associated with being a soldier and the need to ensure both discipline and justice in the Armed Forces that court martial was established. A court martial is a special court meant for only persons who are subject to military law, ie members of the Armed Forces and civilians working with military unit on active service.<sup>2</sup> The early concept of courts martial was that of a court of discipline rather than a court of justice. The quality of decisions that were handed down in those days was draconian in nature and without regard for justice.<sup>3</sup> The importance of ensuring quick dispensation of justice to the members of the Armed Forces may have informed the provision in the Constitution of the Federal Republic of Nigeria (CFRN) 1999, barring the Attorney General of the Federation<sup>4</sup> and of the States<sup>5</sup> respectively from instituting and undertaking criminal proceedings in courts martial.

---

<sup>1</sup>Section 217 Constitution of the Federal Republic of Nigeria 1999.

<sup>2</sup> Section 272 Armed Forces Act CAP A20 Laws of the Federation of Nigeria 2004.

<sup>3</sup>Chiefe, T.E.C. (2008), *Military Law in Nigeria Under Democratic Rule*. DiametricsNig Ltd, Lagos. p 97.

<sup>4</sup>Section 174 (1) (a) Constitution of the Federal Republic of Nigeria 1999.

<sup>5</sup>Section 211 (1) (a) CFRN 1999.

The interpretation of quick dispensation of justice in courts martial has however made many commanders who convene courts martial to look more on discipline than on justice which is the main essence of any court of law, courts martial inclusive. A court martial has the status of a High Court in Nigeria as appeals over decisions of courts martial lie to the Court of Appeal with the leave of the Court of Appeal.<sup>6</sup> It is only in a case where a court martial awarded a death sentence that the leave of the Court of Appeal is not required.<sup>7</sup> Out of about 40 studied cases that have left courts martial to appellate courts in Nigeria, about 70 percent of them have been upturned.<sup>8</sup> This situation may have justified the negative name and impression many people have about courts martial. For instance, Chiefe while citing Bishop Jnr in describing a court martial said that:

A court martial is a kangaroo proceeding in which a wretched conscript is dragged before the panel of sadistic matinees, convicted on the basis of perjured evidence and his own confession which has been extracted by torture and sentenced to fifty or sixty years military confinement, chained to the wall of subterranean dungeon and fed on bread and water<sup>9</sup>

---

<sup>6</sup> Section 284 Armed Forces Act CAP A20 Laws of the Federation of Nigeria 2004.

<sup>7</sup> Ibid.

<sup>8</sup> Akinwale v Nigerian Army (2001) 16 NWLR Pt. 738, 109, Anyankpele v Nigerian Army (2000) 13 NWLR Pt. 684, 209, Asake v Nigerian Army Council (2007) 1 NWLR Pt. 1015, 408, Capt Akande v Nigerian Army (2001) NWLR Pt. 714, 1, Col Clement Gami v Nigerian Army (Unreported) Appeal No CA/276/98, Col David Gabriel Akono v Nigerian Army (2000) 14 NWLR Pt. 687, 318, Cpl Isah Ahmed v Nigerian Army (2011) 1 NWLR Pt. 1227, 85, Cpl Segun Oladele & 22 Others v Nigerian Army (2004) 6 NWLR Pt. 868, 166, Dodo v Nigerian Army (2007) 43 WRN 123, Lt Cdr Ben Ofuani v The Nigerian Navy and Nigerian Navy Board (2007) 8 NWLR Pt. 1037, 470, Lt Cdr Anthony Bakoshi & 3 Ors v Chief of Naval Staff (2004) 15 NWLR, Pt. 896, 268, Lt Col Dayo Karim v Nigerian Army (2002) 4 NWLR Pt. 758, 716, Lt Col Gbolawole Femi Majekodunmi v Nigerian Army and the Attorney General of the Federation (2002) 16 NWLR Pt. 794, 451, Lt Cdr Obisi v Chief of Naval Staff (2004) 8 MJSC 137, Lt Col Iberi (Rtd) v Attorney General of the Federation (2004) 5 NWLR, Pt.1401, 610, Lt Col Komonibo v Nigerian Army (2002) 6 NWLR Pt. 762, 94, Lt Yahaya Yakubu v Chief of Naval Staff & ors (2004) 1 NWLR Pt. 853, 94, Maj Jacob Iyela v Nigerian Army (2008) 18 NWLR Pt. 1118, 113, Maj Suleiman Yekini v Nigerian Army (2002) 11 NWLR Pt. 777, 127, Maj IO Amachree v Nigerian Army (2003) 7 NWLR Pt. 807, 256, Mohammed v Nigerian Army (1998) 7 NWLR Pt. 557, 232, Nigerian Air Force v Obiosa (2003) 4 NWLR Pt. 810, 233, Nigerian Army v Aminun Kano (2010) 1 MJSC Pt. 1, 151, Nigerian Army v Col Umar Mohammed (2002) 15 NWLR Pt. 789, 42, Nigerian Army v Warrant Officer Banni Yakubu (2013) 8 NWLR Pt. 1355, 1, Nigerian Navy v Lt Cdr SA Ibe Lambert (2007) 11 MJSC, Nobert Okoro v Nigerian Army Council (2003) 3 NWLR Pt. 647, 77, Rear Admiral Agbiti v Nigerian Navy (2011) 4 NWLR Pt. 1236, 175, State v Sqd Ldr OT Onyeukwu (2004) 14 NWLR, Pt. 89 340, WO Aloysius Idakwo v Nigerian Army (2004) 2 NWLR Pt. 857, 249.

<sup>9</sup>Chiefe, op cit. p.99.

Some of the decisions of the Supreme Court and Court of Appeal on several court martial cases make some people doubt the capability of courts martial to ensure that accused persons who appear therein get justice. The trend has been so disturbing that some people wonder if there are lawyers in the Armed Forces and whether a lawyer is included in the jury and whether lawyers appear to defend accused persons before a court martial. In addition to having a lawyer as a judge advocate, defence and prosecution counsel, civilian lawyers, inclusive of Senior Advocates appear therein also.<sup>10</sup>

Most of the officers and soldiers who were convicted and sentenced to jail terms by courts martial never came back to the Armed Forces even after appellate courts would have quashed their convictions. This has led to the truncating of the career of many officers who could have been of immense benefit to the country. This situation negatively affects the morale of those in service as some of them believe that sooner than later, the same fate may befall them. There was therefore the need to find out the reasons for this age long trend. For the lawyers in the Nigerian Armed Forces, the problem started becoming stigmatic to the extent that it called for action, first to unearth the problems, analyse them and find solutions to guide future courts martial members and judge advocates in the Armed Forces. This is for the purpose of preserving the military justice system in Nigeria and invariably to ensure that the Armed Forces maintain cohesion, high morale and continue to fulfill their role of protecting the territorial integrity of Nigeria.

## 1.2 STATEMENT OF THE RESEARCH PROBLEM

The research problem is whether or not the issue of jurisdiction, non observance of fair hearing and lack of diligent prosecution were the major causes for reversal of most court martial decisions by appellate courts in Nigeria between 1990 and 2014. About 70 percent of court

---

<sup>10</sup>Ibid. p 125.

martial cases that went on appeal between 1990 and 2014 in Nigeria were overturned against the Armed Forces. Most of the cases at courts martial resulted in dismissals and jail terms for the convicted officers and soldiers. These wrongly decided court martial cases have therefore led to low morale among the troops who feel that their colleagues did not get justice, depletion of the strength of the fighting force through wrong dismissals, desertion from operation areas, jail terms and erosion of the confidence of some people in the justice system in the military. The outcome of some of these cases at courts martial have also done a lot of harm to the psyche of Nigerian soldiers. Anything that has to do with morale, strength and fighting efficiency of troops in a country like these wrong decisions by courts martial has a negative impact on the survival of the nation itself.

### **1.3 AIM AND OBJECTIVES OF THE STUDY**

Arising from the statement of the problem, this research work aims at establishing that between 1990 and 2014, most of the court martial judgments were overturned on appeal based on lack of jurisdiction, non observance of the principles of fair hearing and lack of diligent prosecution. The major objective is to analyze the issues raised by appellate courts that are linked to jurisdiction, fair hearing and lack of diligent prosecution with a view to correcting the anomaly in future court martial trials.

### **1.4 JUSTIFICATION**

This work will be of immense benefit to the Nigerian Armed Forces. It is hoped to stem the trend of unnecessary dismissals and imprisonment of Armed Forces personnel as subsequent courts martial will learn from the mistakes of the past when the members see the analyses of the failures of the past courts martial. It will be a form of compendium of lessons learnt for future members of courts martial. Specifically, members of courts martial, judge advocates and

prosecutors at courts martial will get to know the reasons why the court martial cases that were lost by the Armed Forces on appeal, were lost. They will avoid such situations as they suit their cases at the court martial. At appellate courts, defence lawyers will equally see the reasons for upturning of old cases and apply the ratios as appropriate, which would contribute to enhancement of legal studies. The work will equally be a handy source of material for policy makers in the Armed Forces, commanders, law students, judges who want to know more about courts martial and judge advocates at courts martial to give prompt and reasonable advice to court members. The research will equally be of immense benefit to Ahmadu Bello University Zaria, being the only University in Nigeria offering Military Judge Advocacy Course as a course of study at Post Graduate level. It is also hoped to provoke further research into courts martial and military law generally.

#### **1.5 SCOPE AND LIMITATION OF THE STUDY**

This work covered the critical appraisal of decisions of the Court of Appeal and Supreme Court on cases that emanated from courts martial in Nigerian Armed Forces from 1990 to 2014. This researcher studied 40 court martial cases of which the judgments were appealed against and 28 of the judgments were upturned by appellate courts in Nigeria. The number of cases of which the judgments were upturned on appeal constitutes 70 percent of the cases studied. The work was limited by scarcity of literatures on courts martial in Nigeria and the fact that aside Ahmadu Bello University which offers a Post Graduate Diploma in Military Judge Advocacy, no other University in Nigeria offers a diploma or degree in Military Law. It was therefore not easy to gather materials for this work.

## 1.6 RESEARCH METHODOLOGY

This work was based on doctrinal and teleological research methods. In terms of doctrinal research methodology, the researcher made use of statutes as primary sources and law reports, textbooks and journals as secondary sources. With regard to teleological research methodology, this researcher made use of his practical experience as a military lawyer in terms of prosecution, defence and supervision of courts martial.

## 1.7 LITERATURE REVIEW

The issue of courts martial and military law generally do not have as many literature as some other aspects of law. In buttressing this assertion,

Aboki<sup>11</sup> observed that:

There is a paucity of books written on Nigerian Military Law. Hence a general lack of understanding of military law by even some lawyers. This seems to have arisen from the fact, to the best of my knowledge that no Nigerian university offers Military Law as a course of study at degree or post graduate level

Aboki made this statement in 2009 and it is on record that it is only Ahmadu Bello University in Nigeria that is currently offering a Post Graduate Diploma in Military Judge Advocacy, a course which had not begun when he made the statement. In spite of the observation made above, this study, reviewed a sizeable number of literatures, including books and journals on courts martial and military law generally.

Chiefe<sup>12</sup> in his account of the origin of courts martial in relation to Nigeria, cited Section 315 of the Constitution of the Federal Republic of Nigeria which preserves existing laws, in which case the Armed Forces Act, CAP A20 Laws of the Federation of Nigeria 2004 is an

---

<sup>11</sup>Aboki, A. (2009). On Assessment of Court Martial Trials. *The Military Lawyer Journal*, Directorate of Legal Services, Abuja. vol 4 p.63.

<sup>12</sup>Chiefe, op cit. p.101.

existing law. He went ahead to clarify that Section 315 (1) of the Constitution provides that subject to the provisions of the 1999 Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with 1999 Constitution and shall be deemed to be an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by the 1999 Constitution to make laws.<sup>13</sup>

The reason for all this rigmarole is that the Constitution did not list court martial as a superior court of record in Nigeria under Sections 6(3) and (5) of the Constitution. He also cited Section 240 of the Constitution that states that the Court of Appeal shall have jurisdiction to the exclusion of any other court in Nigeria, to hear and determine appeals from courts martial,<sup>14</sup> which invariably makes a court martial a superior court of record at par with High Courts of justice. This researcher agrees with Chiefe on his introduction of courts martial. The author did not advance enough reasons why court martial members kept going contrary to well laid down principles which have led to colossal loss of cases by the Armed Forces. This gap was filled by this work.

Mukhtar (2009)<sup>15</sup> while commenting on the need for a Separate Justice System in the Armed Forces stated that military procedures are based on a formal system of hierarchy. According to him, if the trend of steadily subjecting the Nigerian Armed Forces to civilian values continues, the continued weakening of the military profession is predictable. He highlighted further that military experts have continued to emphasize that soldiers are trained for situation of war, where lack of discipline can seriously undermine combat effectiveness.<sup>16</sup>

---

<sup>13</sup> Ibid.

<sup>14</sup> Ibid, p.102.

<sup>15</sup> Mukhtar, A.S. (2009). The Doctrine of Exhausting Military Remedies and the Appellate Chain for the Military Justice System Under the Democratic Dispensation. *Military Lawyer Journal*, Abuja, Directorate of Legal Services (Army) Vol 4 p.23.

<sup>16</sup> Ibid.

He further said that:

It is emphasized that in most instances, while a civilian can walk away from his or her job, if a soldier quits in the middle of combat, the desertion could jeopardize the safety of the entire unit, if not the country. Therefore you cannot, for example fit a law made to apply in the safe, comfortable confines of Metropolitan Abuja or Lagos, to the bomb-laden streets of Kabul or Mogadishu.<sup>17</sup>

While this researcher agrees with Muhktar that there is no doubt that the military needs a special outfit as its own justice system as courts martial and the Armed Forces Act (AFA), he laid too much emphasis on discipline and left out justice. Courts martial in order to be effective and be seen as a court of justice must observe the rules of evidence. This is a gap he left in his article which will be filled in this work as many of the cases to be discussed were overturned by appellate courts due to non-observance of the tenets of justice. Discipline and justice need to go hand in hand in military trials.

Badewole (2009)<sup>18</sup> while stressing on the need to amend some provisions of the AFA based in part, on the upturning of court martial cases on appeal gave the reason as largely due to inadequate understanding of the *raison d'être* of military legal codes and procedures. He posited that in some instances, the setting aside was due to technicalities and non-compliance with procedural requirements by military courts convened to try accused Service personnel.<sup>19</sup> Badewole left out many vital issues in his article. Aside military legal codes and procedures, there are other obvious errors committed by courts martial which appellate courts could not have overlooked. In one of the instances, the Court of Appeal held that: “In the instant case, the case against the appellant was not proved beyond reasonable doubt as a lot of salient

---

<sup>17</sup> Ibid.

<sup>18</sup> Badewole, BM. (2009). Imperative for the Amendment of The Armed Forces Act Nigerian Army Projection for Military Law Reform. *Military Lawyer Journal*, Abuja, Directorate of Legal Services (Army) Vol 4 p.43.

<sup>19</sup> Ibid.



facts were left in the air, leaving yawning gaps.”<sup>20</sup> These were the gaps that the writer left and which this work will fill.

Achike<sup>21</sup> posited that:

To some critics, military law or military justice is a misnomer; to such critics, the term military law or justice means no more than the sum total of the discretionary powers exercised by military superiors over their inferiors.

The author elaborated on the procedures of military courts martial which have currently changed significantly as this book was written in 1978. Then, there were very few court martial cases and hardly had any of them been referred to the Court of Appeal. He used several foreign cases to buttress his point. This is one of the gaps in the book which this work filled by discussing purely Nigerian court martial cases decided at appellate courts in Nigeria.

Oghagha-Ukpong<sup>22</sup> published verbatim 25 court martial cases handled on appeal without analysis. Though she rightly called it a compendium, it was expected that the author would make her own comments on each of the cases, even when the decisions of the appellate courts were not quite clear. The author was too careful, neither to comment on the errors of the military authorities that convened the courts nor the errors of the appellate courts themselves. She did not also proffer solutions to the problems identified by the appellate courts as the problems of the cases that were overturned. These gaps will be filled in this work.

Omachi<sup>23</sup> enunciated on the procedures of courts martial and did some analysis. He cited only about 13 court martial cases that were decided at appellate courts when there were more of

---

<sup>20</sup>CaptAsake v Nigerian Army Council & AGF (2007) 1 NWLR pt 1015, p.408.

<sup>21</sup>Achike, O. (1978). *Groundwork of Military Law and Military Rule in Nigeria*. Fourth Dimension Publishers, Enugu.p.87.

<sup>22</sup>Oyagha-Ukpong, G.I.O. (2012). *Appellate Cases on the Nigerian Armed Forces Courts Martial (A Compendium)*. Divine Connections Printing and Packaging, Abuja.p.206.

<sup>23</sup>Omachi, AI. (2012). *Court Martial: Law and Practice in the Armed Forces*, Advance Concept Printers, Kaduna.p.5.

the cases that he would have used to buttress his point. Another gap he left was that he did not point out what must have made the military officers that constituted the courts martial to commit the kind of errors they committed that made appellate courts to overturn some of the judgments. He did not also suggest adequate solutions to avert future occurrence of such errors, aside what the appellate courts said. These gaps were covered in this work.

Oshuntoye (2010)<sup>24</sup> dealt extensively on military justice system in Nigeria and made use of some court martial cases but did not give reasons why some court martial members ignored to follow the tenets of justice in their decisions. This work filled that gap.

Dada<sup>25</sup> dealt with the problems of the administration of military justice in Nigeria and suggested some ways out of the quagmire. He compared what is obtainable in the United States of America and Britain with what is obtainable in Nigeria. Though he made some useful suggestions like the establishment of Judge Advocate General Corps, he left some gaps while analysing the reasons why so many court martial cases in Nigeria were overturned at appellate courts. These gaps were covered by this work and equally proffered more solutions to the problem.

## 1.8 ORGANISATIONAL LAYOUT

The research work is broken down into five chapters. Chapter One focuses on the introduction, statement of the problem, aim and objectives of the study and justification. Others are scope of the research, research methodology, literature review and this organizational layout.

Chapter two delves into the analysis of court martial cases overturned on appeal as a consequence of lack of jurisdiction. Some of the issues that deprived the courts of their

---

<sup>24</sup>Oshuntoye, A. (2010). *The Military Law and Society*. Obafemi Awolowo University Press Ltd, Ile Ife. p.80.

<sup>25</sup>Dada, O.A. (2014). *Administration of Military Justice and Discipline in the Nigerian Army*. (Unpublished), MSc Research Project, University of Ibadan. p.24.

jurisdiction that are discussed include featuring of officers who are junior to the accused as members of the court martial, retrial of condoned offence, a court martial acting while already *functus officio* among others.

Chapter three goes further to examine lack of fair hearing as one of the major reasons that led to upturning of court martial cases on appeal. Issues of bias, descent of President and members of court martial into the arena, same person convening and confirming court martial judgments were discussed as pointers to lack of fair hearing. Other manifestations of lack of fair hearing touched by the work include judgment based on single unsworn witness, substitution of charges during confirmation, confirming of sentence the same day of judgment without legal review and non-invitation of vital witnesses by the prosecution.

Chapter four appraised court martial cases upturned on appeal as a consequence lack of diligent prosecution. Some of the issues that were pointers to lack of diligent prosecution discussed in the work include reliance on evidence of co-accused, inability of the prosecution to prove its case beyond reasonable doubt and non-tendering of a vital document in evidence. Others are joint trial of separately charged accused persons and conviction based on suspicion. Numerous court martial cases upturned at Court of Appeal and at the Supreme Court are critically appraised in line with the issues raised above which led to their being upturned.

Chapter five, rounds off the dissertation with summary and conclusion encompassing summary, findings and recommendations.

## CHAPTER TWO

### ANALYSIS OF COURT MARTIAL CASES UPTURNED ON APPEAL ON GROUNDS OF JURISDICTION

#### 2.1 INTRODUCTION

Jurisdiction is a cardinal issue in any case before any competent court of law. It is like a foundation of a house from where a building is started. Proceeding with a case when a court lacks jurisdiction is like attempting to build a second floor of a two storey building without foundation and first floor. It is a waste of time and energy. On the importance of jurisdiction, the Supreme Court of Nigeria put it succinctly when it held that “the existence or absence of jurisdiction in a court goes to the root of the matter and sustains or nullifies whatever the decision the court may arrive at , no matter how brilliantly presented.”<sup>26</sup> On conditions for exercise of jurisdiction by court, the Supreme Court further held that:

For a court to be competent to assume jurisdiction, the following three conditions must be satisfied: the court must be properly constituted as regards number and qualification of members of the bench; the subject matter of the case must be within the jurisdiction of the court and the case must come before the court initiated by due process of law and upon fulfillment of all conditions precedent to the exercise of jurisdiction.<sup>27</sup>

The issue of jurisdiction is so important that the question as to whether the court has jurisdiction or not to entertain an action can be raised at any time of the proceedings and even for the first

---

<sup>26</sup>Hamzat v Sanni (2015) 5 NWLR Pt 1453, 486 488.

<sup>27</sup> Ibid.

time at the appellate court, inclusive of the supreme court.<sup>28</sup> Similarly, the Supreme Court held in the case of *Umanah v Attah*<sup>29</sup> that:

It is settled that a court is competent when the court is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or the other; the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction, and the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

It was also held by the Supreme Court in the case of *Aliyu v FRN*<sup>30</sup> that where a trial court lacks jurisdiction to try a case, the trial of the case by that court is a nullity. The decisions in above cases demonstrate the fact that the Supreme Court of Nigeria has been consistent, to the extent of using the same words to explain the importance of jurisdiction in different cases. The problem of jurisdiction with court martial cases in Nigeria has been like an albatross. It has kept repeating itself as a major cause of upturning of court martial cases by appellate courts. As pointed out by Supreme Court above, as soon as it is discovered that the court martial lacked jurisdiction during a trial, the appellate court overturns the judgment of the court martial no matter the offence the appellant committed. Out of about 40 cases discussed in this work, which the Nigerian Armed Forces lost at appellate courts, about 11 of them had lack of jurisdiction as a major reason for upturning them on appeal.

The problem of jurisdiction in courts martial manifests in different dimensions. They include featuring of junior officers to try their seniors contrary to the provisions of the Armed Forces Act,<sup>31</sup> retrial of condoned offence<sup>32</sup> and in a situation where a court martial pronounced a

---

<sup>28</sup> Ibid.

<sup>29</sup> (2006) 17 NWLR Pt 1009 503.

<sup>30</sup> (2014) 5 NWLR Pt 1399, 101 106.

<sup>31</sup> Section 133(3)(b) Armed Forces Act Cap A20 Laws of the Federation of Nigeria 2004.

<sup>32</sup> *Nigerian Army v Aminun Kano* (2010) 1 MJSC Pt 1, 151.

second judgment in a case after initially concluding the trial.<sup>33</sup> Others are situations where court martial trials were conducted with an unsigned convening order<sup>34</sup> and with unsworn members<sup>35</sup>. These situations are all contrary to the provisions of the Armed Forces Act<sup>36</sup> and case laws. What this chapter sets out to achieve is to highlight the ways through which lack of jurisdiction caused the overturning of the judgment of court martial cases on appeal. At the end of the chapter, the reader is expected to understand the major problems concerning court martial cases as far as jurisdiction is concerned and have an idea on how it can be prevented in subsequent courts martial.

## **2.2 WRONG CONSTITUTION OF COURT MARTIAL BASED ON SENIORITY OF MEMBERS**

Constitution of a court martial is a very important aspect of commencing a trial. If the convening authority does not get it right from the beginning, it deprives the court of its jurisdiction and renders the entire trial a nullity. The Armed Forces Act (AFA) made a specific provision with respect to seniority of the President of the court martial and its members. It provides that “where an officer is to be tried, the President shall be above or of the same or equivalent rank and seniority of the accused and the members thereof shall be of the same but not below the rank and seniority of the accused.”<sup>37</sup>The AFA however provides for a waiver where it is not possible to have officers with suitable qualifications to constitute the court. The solution in that regard is that “the convening officer may, with the consent of the proper superior

---

<sup>33</sup>Nigerian Army v Major Jacob Iyela (2008) 18 NWLR Pt 1118, 115.

<sup>34</sup>Lt Cdr Anthony Bakoshi & 3 Ors v Chief of Naval Staff (2004) 15 NWLR Pt 896, 268.

<sup>35</sup>Lt Yahaya Yakubu v Chief of Naval Staff & Ors (2004) 1 NWLR Pt 853, 94.

<sup>36</sup> Sections 1-39 Armed Forces Act, Cap A20 Laws of the Federation of Nigeria 2004.

<sup>37</sup>Ibid. Section 133(3)(b).

authority appoint any service officer as President of the court martial in lieu of, or as any other member of the court in lieu of, or in addition to any service officer or officers.”<sup>38</sup> This means that an officer who is junior to an accused officer can be made a member of the court martial to try such an accused officer but it has to be with the consent of a proper superior authority. In that case for example, a General Officer Commanding needs the express permission of the Chief of Army Staff to use an officer who is junior in rank or seniority to try an accused officer. This was correctly applied in the case of *Mohammed v Nigerian Army*.<sup>39</sup>

Non-compliance with these seemingly simple provisions has caused both the Court of Appeal and Supreme Court to overturn several judgments of courts martial. In the case of *Rear Admiral Agbiti v Nigerian Navy*,<sup>40</sup> the President of the court martial and one other member were three days junior to the accused. The Supreme Court, while allowing the appeal held that the court martial clearly lacked jurisdiction based on having the officers who were junior in seniority to the accused as President and member of the court. The Supreme Court went further to state that “the President did not place reason for using officers who were three days junior to the accused on record.”<sup>41</sup> It also stated that the President of the General Court Martial (GCM) did not properly invoke Section 133(7) of AFA. It stated further that the President did not place it on record that he placed the objection of the appellant before the convening officer. There must be a report to the tribunal to be read to the hearing of the tribunal that due to failure of the convening officer to secure a proper placement for both officers, he had secured the relevant consent for them to continue as members of the tribunal, regardless of the appellant’s objection.<sup>42</sup> While

---

<sup>38</sup>Ibid. Section 133(7).

<sup>39</sup>(1998) 7 NWLR Pt 557, 232.

<sup>40</sup>(2011) 4 NWLR Pt 1236, 175.

<sup>41</sup>Ibid.p.185.

<sup>42</sup>Ibid.

showing its frustration in allowing the appeal, and in demonstration of the deep effect of the GCM not being meticulous enough to correct the problem of jurisdiction early, the Supreme Court held thus:

This court appreciates the fact that the offences preferred against the Appellant are of great concern to Nigeria as a nation economically and security wise and nobody ought to be left off on technicalities on them but rules of evidence and statutory criminal procedure must be followed to the letter in prosecution of criminal cases. The procedure may appear to be onerous or tedious at a time when all agitations are for speedy trial. The nullification of this trial is however without prejudice to the appellant being re-arraigned before another panel of court martial.<sup>43</sup>

This case which came about due to the disappearance of a ship (African Pride) loaded with crude oil at the high sea began at the Navy Court Martial in 2005 and the Supreme Court gave its judgment on 4<sup>th</sup> February 2011, six years after.<sup>44</sup> The Appellant who was dismissed from the Armed Forces in 2005 could not be retried by another GCM probably due to administrative reasons. He was therefore reinstated, retired and paid all his emoluments for the six years that the case dragged from the Court of Appeal up to the Supreme Court.<sup>45</sup> The Appellant correctly objected to the membership of his juniors in the GCM but was over ruled. The effects of this flaw on the part of the GCM are enormous. Both the Appellant and the Respondent spent so much money from the initial trial up to the Supreme Court. So many man- hours and other resources which would have been used for the benefit of the Nigerian Navy were wasted. The Appellant was equally paid for six years that he did not work.

The same problem occurred in the case of *Maj Nobert Okoro v Nigerian Army Council*,<sup>46</sup> wherein the accused was tried for releasing a convicted coup plotter without being authorized by

<sup>43</sup>Ibid.p.216.

<sup>44</sup>Ibid.p.175.

<sup>45</sup>Nigerian Navy Central Pay Office records.

<sup>46</sup>(2000) 3 NWLR Pt 647, 77.



his Commanding Officer. The prison officials brought the papers for convict's release to the barracks on a Friday and though the due date for his release was on Sunday, they requested that he be released 24 hours before the Sunday according to prison regulations. When he could not get across to his commanding officer, he authorized the release.<sup>47</sup> In that case, the accused before the GCM was a major but two captains were included as members of the court. The Court of Appeal while allowing the appeal held thus:

There is nothing in the record of proceedings to show that the convening officer had satisfied himself that there was no officer of the same rank with the accused or of suitable qualification available at the place and time of constituting the court martial. Neither is there anything in the record to show that the convening officer had sought for or obtained the consent of the superior authority before co-opting the two captains into the court martial who are otherwise unqualified to be so appointed.<sup>48</sup>

The GCM that tried the Appellant concluded the trial in 1996 and the Court of Appeal allowed the appeal on 23<sup>rd</sup> December 1999<sup>49</sup>. After the court decided that the GCM had no jurisdiction to try the appellant, it did not bother to consider other issues he raised on the appeal. Though the appeal was allowed, he had completed serving 18 months jail term awarded to him by the GCM<sup>50</sup>. He was not also reinstated into the services of the Nigerian Army to continue serving but was eventually retired and paid his entitlements. The Appellant's career was therefore ruined as he could not continue to serve even after the Court of Appeal nullified the court martial judgment.

The same issue came up in the case of *Col David Gabriel Akono v Nigerian Army*.<sup>51</sup> In the matter, while allowing the appeal, the Court of Appeal observed that:

<sup>47</sup>Ibid.p.79.

<sup>48</sup>Ibid.p.82.

<sup>49</sup>Ibid.p.77.

<sup>50</sup>Ibid.p.85.

<sup>51</sup>(2000) 14 NWLR Pt 687, 318.

Upon a careful perusal of each of the members of the court martial in this case, both the Colonels and Lt Colonels are junior in seniority and rank to the appellant. Any member who is junior in rank and seniority stands disqualified to be a member of the court martial that tried the accused.<sup>52</sup>

Though the Appellant was a Colonel, there were Lt Cols in the GCM that tried him. The same thing happened in the case *Lt Col Dayo Karim v Nigerian Army*<sup>53</sup> wherein a Lt Col who was junior in seniority to the accused was a member of the GCM that convicted the appellant. The Court of Appeal equally allowed the appeal. These cases were not held in one location and the courts were not convened by one person which point to an indication of some inherent problems. In the case of *Lt Col Dayo Karim v Nigerian Army*<sup>54</sup> the Court of Appeal held that “the trial of the appellant must be declared a nullity for lack of jurisdiction. The appellant was tried at the Lagos Garrison where there were many officers of senior and corresponding ranks as the appellant but the convening officer chose a serving officer junior in seniority to the appellant.” The court went further to state that “the provision of the law (Section 133 (3) AFA) is spelt out in mandatory terms in order to maintain strict discipline in the Armed Forces. The officer under trial must be tried by his own peers.”<sup>55</sup>

In a recently decided case of *Lt Col Iberi (Rtd) v Attorney General of the Federation*,<sup>56</sup> one of the reasons given by the Court of Appeal for upturning the judgment of the court martial on grounds of jurisdiction was that officers junior to the accused were members of the court martial. In the matter, the appellant was arraigned before a GCM on a three count charge of conspiracy contrary to Section 114(1) of the AFA, cheating, contrary to and punishable under

---

<sup>52</sup> Ibid.

<sup>53</sup>(2002) 4 NWLR Pt 758, 716.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup>(2014) 5 NWLR Pt. 1401, 610.

Section 97(b) (ii) of the Act and impersonation contrary to and punishable under Section 97(b) of the said Act.<sup>57</sup> The appellant was at all material times a Lt Col in the Nigerian Army. However, the army officers that constituted the court martial that tried him included two majors, namely: Maj P.J.O Bojie and Maj RJ Diri.<sup>58</sup> At the conclusion of trial, the appellant was convicted and sentenced to two years imprisonment without option of fine. The appellant served his prison term before appealing against his conviction and sentence. While allowing the appeal, the court held that:

Where a court martial is composed of a disqualified member, the court's jurisdiction will be affected adversely. The entire proceedings embarked upon thereafter will amount to nullity...in the instant case, Major Bojie and Maj Diri sat as substantive members of the court martial that tried the appellant. Their participation as substantive members of the court martial when they were at all material times junior in rank to the appellant rendered the trial a nullity.<sup>59</sup>

It is necessary at this stage to examine the reasons for these repeated errors that nullified those trials on grounds of jurisdiction.

One principal reason for these repeated anomalies is what is termed in military parlance as command influence. Command influence is the negative influence of the convening officer or other senior officers to get a court martial in this instance to do what the senior officer exercising the power wants. It can be to convict or free a particular accused person or persons. In the cases examined above, it is the duty of the convening officer to select the court martial members and he selects who he wants. In some cases, he dictates for them what the outcome should be, hence

---

<sup>57</sup>Ibid.p.614.

<sup>58</sup> Ibid.

<sup>59</sup>Ibid.p.619.

the choice of such members whom he is sure will do his bidding. Popoola<sup>60</sup> defines command influence as:

A corrupt interference by a commander or person in authority for the said commander's personal gain or self-aggrandizement. It may also be called the mortal enemy of military justice. It occurs when senior personnel wittingly or unwittingly, have acted to influence a court martial or trial through court members, witnesses or others participating in military justice system.<sup>61</sup>

According to Bauka ,<sup>62</sup>“command influence could be brought about in military trials in so many ways. These could be by threat, doctoring the proceedings, inducement...cajoling etc.” It therefore follows that the convening officer could appoint officers who are juniors to the accused person to be able to achieve command influence. In military parlance, it is much easier to cajole junior officers to get what the senior wants. This equally happens because the convening officers can decide to ignore legal advice from the Legal Service Department, just to achieve a particular purpose. Many senior commanders think more of discipline and less of justice. Some of them would not care what happens at the appellate court as far as the accused is dismissed or jailed especially when convicted persons hardly get reinstated to the service even after appellate courts have overturned the conviction by courts martial.

The reason for this non re-instatement is usually because after the long years of legal battle, sometimes up to the Supreme Court, the officer may become undeployable due to the fact that his course mates may have been promoted far above his rank and it is unusual in the Armed Forces for an officer to be placed to serve under his junior, the current rank of his junior notwithstanding. In that case, such appellant gets paid off, which invariably means, that such

---

<sup>60</sup>Popoola, O. (2011). Limiting Command Influence in Military Trials. *The Military Lawyer*, Abuja, Directorate of Legal Services (Army) Vol 5.p.105.

<sup>61</sup> Ibid.

<sup>62</sup>Bauka, I.G. (2011). Curbing Command Influence in Military Trials. *The Military Lawyer*, Abuja, Directorate of Legal Services (Army) Vol 5.p.105.

convening officer had his way. The cases analysed above are clear examples. There is also the erroneous belief by many commanders that once a personnel is charged, he must not go free because it might serve as a bad precedence for other personnel thus, misunderstanding the entire concept of instilling discipline.<sup>63</sup> The effects of these errors are usually a chain reaction on discipline and professionalism as well as wastage of time, expended resources and irreparable damage to the careers of the affected personnel.<sup>64</sup> It is also a fact that discipline gets eroded in the Armed Forces when known offenders are freed by appellate courts purely based on technicalities like including a junior to the accused as a member of a court martial to try him without getting the required authority as prescribed by law.

### 2.3 RETRIAL OF CONDONED OFFENCE

Condonation is defined as “a victim’s express or implied forgiveness of an offence especially by treating the offender as if there had been no offence.”<sup>65</sup> Though the Black’s Law Dictionary states that condonation is not a defence in a criminal charge,<sup>66</sup> the Armed Forces Act expressly provides that “where a person subject to service law under this Act has had an offence condoned by his commanding officer, he shall not be liable in respect of that offence to be tried by a court martial or to have the case dealt with summarily under this Act.”<sup>67</sup> The Act keeps no one in doubt as to when an offence is deemed to have been condoned. It provides that:

An offence shall be deemed to have been condoned by the commanding officer of a person alleged to have committed the offence if, and only if, that

---

<sup>63</sup>Ibid. p.106.

<sup>64</sup>Adekagun,L. (2011). Enhancing Discipline and Professionalism in Nigerian Army Through the Instruments of Court Martial in a Democracy. *Military Lawyer*. Abuja, Directorate of Legal Services (Army) Vol 5.p.105.

<sup>65</sup> Garner, B.A. Black’s Law Dictionary Ninth Edition, West Publishing Company, Dallas, USA. 2004, p.336.

<sup>66</sup> Ibid.

<sup>67</sup> Section 171(1)(c) Armed Forces Act. Op. cit.

officer or any officer authorized by him to act in relation to the alleged offence has, with knowledge of all circumstances, informed him that he will not be charged with the offence.<sup>68</sup>

This situation played out in the case of *Nigerian Army v Aminun Kano*<sup>69</sup> and was finally decided by the Supreme Court. In this case, the respondent who was a Brig Gen in the Nigerian Army was charged with seven count charges which included making of false documents, negligent performance of duty, conduct to the prejudice of service discipline and false accusation.<sup>70</sup> The respondent at the court martial made a plea in bar of trial on ground that by virtue of a document in which the charges against the respondent were withdrawn and substituted with a final warning letter which was admitted by the trial court, the respondent could not have been subjected to trial any more. He asserted that the letter that withdrew the charges amounted to condonation by the respondent's commanding officer as provided by Section 171 of the Act. This plea was dismissed by the court martial.<sup>71</sup>

The court martial at the conclusion of the trial convicted the respondent and sentenced him to various terms of imprisonment and reduction in rank.<sup>72</sup> Dissatisfied, he appealed the judgment to the Court of Appeal which allowed the appeal. The conviction was quashed. Dissatisfied, the Nigerian Army appealed to the Supreme Court. While dismissing the appeal, the court held inter alia:

Where a person accused of committing a criminal offence which is recognized by law has shown that he has either been pardoned for that offence(s) by the appropriate authority or that he has been tried by a court of law or a tribunal set up by law, then he cannot be subjected to any further trial

---

<sup>68</sup> Ibid. Section 171(2)(c).

<sup>69</sup>(2010) 1 MJSC Pt 1, 151.

<sup>70</sup>Ibid.p.152.

<sup>71</sup>Ibid.p.153.

<sup>72</sup> Ibid.23

by any court or tribunal on that same offence(s). A bar to further prosecution has now been placed between him and those offences.<sup>73</sup>

The court additionally held that “once an offence had been condoned, any subsequent trial of the same offence(s) would amount to double jeopardy.”<sup>74</sup> The court martial tried the respondent in 2005 and the judgment of the Supreme Court was delivered on 29<sup>th</sup> January 2010, five years after. Quite unlike other cases that those jailed and or dismissed by court martial were not reinstated, he was reinstated, paid his salaries but could not be promoted further and got retired.<sup>75</sup>

The question that comes to mind is, should the Nigerian Army waste all this time, efforts and resources for five years only to go back to the starting point? For the five years, the respondent was not working for the Nigerian Army but was eventually paid. It appears that wrong understanding of the concept of instilling military discipline, and court members trying to impress the convening authority played out at the court martial. According to Bauka<sup>76</sup>,

By our military setting or arrangement, we are answerable to our higher commanders who on the other hand exercise a lot of authority including deciding our fate in the system. In such a situation, some commanders wanting to win the favour of their superiors or bosses and impress them (without minding the consequences), try to influence the outcome of trials in their commands.<sup>77</sup>

This problem equally exists with members of courts martial especially the president who may see discharge and acquittal as an affront to the convening authority who decides the next posting or appointments of both the president and other members of the court after the sitting. There was a situation in Lagos Garrison Command where all the members of a court martial and the judge advocate were retired immediately after the court delivered a judgment that the convening

---

<sup>73</sup>Ibid.p.154.

<sup>74</sup>Ibid.p.155.

<sup>75</sup>Nigerian Army Personnel Pay Office records.

<sup>76</sup>Bauka, IG, op cit. p.106.

<sup>77</sup> Ibid.

authority did not like.<sup>78</sup> In such situations, the advice of the judge advocate which tilts towards acquitting an accused person is usually ignored by court members. Some argue that cases like the one in question develop military law but must the Armed Forces sacrifice heavily like this for military law to develop?

This researcher believes that when the law is clear, like the case under consideration, there is no need to pursue shadow and waste time, energy and resources only to swallow the bitter pill several years after. The solution will lie on learning lessons from the effects of the waste accompanying this kind of wild goose chase. Playing down the effect of ego on the part of convening officers, listening to legal advice and dropping charges, when it is not necessary to send a case to court martial will go a long way in curbing this menace.

This is also a clear example of the effect of law on the economy of the Armed Forces of Nigeria considering that the resources spent pursuing this venture would have been used to improve the condition of living of members of the Armed Forces or to acquire modern equipment to enhance the professional capability of the force.

#### 2.4 COURT MARTIAL ACTING WHILE *FUNCTUS OFFICIO*

The expression '*functus officio*' is a Latin expression defined as "having performed his or her office... without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."<sup>79</sup> When any court delivers its judgment, it becomes *functus officio* with regard to that matter. In the case of *Nigerian Army v Maj Jacob Iyela*,<sup>80</sup> the respondent was a major in the Nigerian Army at the time of the court martial trial. He

---

<sup>78</sup>Nigerian Army v Lt Col AO Peters (Unreported), Popoola, O. Op cit. p.99.

<sup>79</sup> Black's Law Dictionary. Op cit. p.743.

<sup>80</sup>(2008) 18 NWLR Pt. 1118, 115.



was charged with two counts of illegal possession of arms punishable under Section 9(1) of Firearms Act by virtue of Section 114(1) of the Armed Forces Decree 105 of 1993 (as amended) and conduct to the prejudice of service discipline. Forty five live rounds of 7.62mm ammunition, 32 pieces of thunder flashes and 14 pieces of hand flare yellow pyrotechnics, property of the Nigerian Army were found in his house.<sup>81</sup> The GCM found the officer guilty and sentenced him to reduction in rank to captain for the first count and compulsory retirement from the Nigerian Army for the second count.<sup>82</sup>

The GCM delivered its judgment on 28 July 1998. On 4 August 1998, one week after the conclusion of the trial, the respondent was recalled. The judge advocate pointed out what he considered to be errors in the sentences and urged the GCM to revisit same. According to the judge advocate, compulsory retirement was not a punishment provided by the Armed Forces Decree (now AFA). The respondent raised an objection that the GCM was *functus officio*, having delivered its judgment and had no authority to review same. The GCM then changed the sentences to reduction in rank to captain with two years seniority and dismissal from the Nigerian Army on count two.<sup>83</sup> On appeal at the Court of Appeal, the judgment was set aside, the rank of the appellant was restored and he was discharged and acquitted. Dissatisfied, the Nigerian Army appealed to the Supreme Court which again, dismissed the appeal and upheld the decision of the Court of Appeal. The Supreme Court therefore held thus:

Once a court has given a final decision and necessary consequential orders in a matter presented before it for adjudication, it becomes *functus officio* and is precluded from reviewing or varying the form of judgment or order apart from the correction of clerical mistakes or accidental slips. In order words, such a

---

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

court has no jurisdiction thereafter to review or vary the decision, even if it realizes afterwards that the decision is manifestly wrong.<sup>84</sup>

The court therefore further held that the sentences passed on the respondent on the sitting of the GCM when it reconvened on 4 August 1998 was null and void as they did not come under the amendments which could be made under the ‘slip rule’.<sup>85</sup> This matter began at the GCM in 1998 and ended at the Supreme Court in 2008, 10 years after. Like most of the other cases that ended this way, the respondent had his rank restored and paid all his entitlements for the 10 years that the legal battle lasted.<sup>86</sup> Man-hours, money and other resources which would have been used to develop the Nigerian Army were wasted. The career of the respondent was equally truncated. The error of the judge advocate was grievous and caused by inadequate exposure of military lawyers to legal practice and lack of deep knowledge of the provisions of the AFA. Efforts have been made to obtain and sustain the Attorney General’s fiat for military lawyers to appear in civil courts on behalf of the Armed Forces but no tangible results have been obtained. Currently, the Chief of Army Staff directed Nigerian Army lawyers to appear alongside External Advocates on behalf of the Service<sup>87</sup> but it is doubtful if it will stand the test of time without the Attorney General’s fiat. Without regular appearance in civil courts, the knowledge of military lawyers is bound to become rusty which brings up challenges like the one in the case under discussion. If there is no ongoing court martial and no opportunity for military lawyers to appear before civil courts, the effects on administration of military justice could be devastating. This researcher is of the opinion that the Attorney General of the Federation should grant military lawyers fiat to appear before civil courts in matters pertaining to the Armed Forces. That however excludes

---

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.p.126.

<sup>87</sup> NA/COAS/G1/61 dated 31 July 2014.

private practice, in line with the Order 1(2) of the Entitlement to Practice as Barristers and Solicitors (Private Practice Officers) Order 1992.

## 2.5 UNSIGNED CONVENING ORDER

A convening order in a GCM is one of the preliminary issues to be considered to ensure that the court has jurisdiction. The Rules of Procedure Army provides that “upon a court martial assembling, the court shall, before opening, satisfy themselves; that the court has been convened in accordance with the Act and these rules.”<sup>88</sup> The foot note to this particular rule provides that “provided that the convening order is on the face of it correct and duly signed, the court may, unless it has reason to believe to the contrary, assume that the convening officer was authorized...to convene the court martial and that the provisions... have been complied with.”<sup>89</sup> In the case of *Bakoshi & 3 Ors v Chief of Naval Staff*,<sup>90</sup> the appellant was charged with conspiracy and stealing 5,700 litres of diesel supplied to NNS Hadeja, property of the Nigerian Navy, at the court martial. The convening order that brought the appellant to the court martial was not signed. He was convicted and sentenced to one year imprisonment. The Court of Appeal while unanimously allowing the appeal held that:

It is the convening order signed by the appropriate authority that originates the trial by court martial. It is the condition precedent to the exercise of jurisdiction by the GCM to embark on the trial... the absence of convening order means there was no valid trial as the GCM lacked jurisdiction to try the case. The purported trial of the appellant is therefore a nullity.<sup>91</sup>

---

<sup>88</sup> Rule 26(1)(a) Rules of Procedure (Army) 1972.

<sup>89</sup>Footnote 1 to Rule 26, Rules of Procedure (Army) 1972.

<sup>90</sup>(2004) 15 NWLR Pt 896, 268.

<sup>91</sup>*Ibid.*p.291.

What the respondent assumed to be a convening order was what was referred to as an addendum to another convening order. The court held that the law does not recognize an addendum as a convening order for the trial of an accused person in a court martial.<sup>92</sup>

The slip in this case that led to the overturning of the judgment of the court martial brings to the fore, the problem of some military authorities believing that when a court martial trial is concluded, it can hardly be overturned by a civil court. This belief is erroneous and encourages inefficiency among some officers whose duty it is to ensure that all administrative issues concerning convening of courts martial are efficiently handled. It is equally caused by ‘know all attitude’ of some officers of the Armed Forces who sometimes feel that they do not need the advice of a lawyer in this kind of situation.

## **2.6 UNSWORN MEMBERS OF COURT MARTIAL**

Swearing in of members of a court martial is an obligatory requirement for the court to have jurisdiction to try an accused person. On administration of oath and affirmation, AFA provides that: “An oath shall be administered to every member of a court martial and to any person in attendance on a court martial as judge advocate, waiting member, shorthand writers and interpreters.”<sup>93</sup> The Act further provides that:

Where a person, required by virtue of this Act to take an oath for the purpose of proceedings before a court martial, objects to being sworn and states, as the ground for his objection, either that he has no religious belief or that the taking of oath is contrary to his religious belief, or it is not reasonably practicable to administer an oath to the person as aforesaid in the manner appropriate to his religious belief, he shall be required to make a solemn affirmation in the prescribed form instead of taking an oath.<sup>94</sup>

---

<sup>92</sup> Ibid.

<sup>93</sup>Section 138(1), Armed Forces Act, Cap A20 LFN 2004.

<sup>94</sup>Ibid. Section 138(6).

From the above provision, the only condition under which the non-administration of oath to the court members can be excused is when such members made solemn affirmations before the proceedings of the court begins. On the meaning of the word 'shall' as used in a statute, the Court held in the case of *Bakoshi v Chief of Naval Staff* that:

In a statutory interpretation, the word 'shall' is a word of command. It denotes obligation and gives no room to discretion, it imposes a duty even though sometimes construed as merely permissive or directory to carry out the legislative intention. In the instant case, the word 'shall' in Section 138(1) of the Armed Forces Decree No.105 of 1993 (currently AFA) denotes a command, obligation or duty and it gives no room for discretion.<sup>95</sup>

It therefore goes to show that with reference to the administration of oath to court martial members, as provided by AFA, it is mandatory and not optional. This was one of the reasons for upturning the judgment of the court martial in the case of *Bakoshi v CNS*. There was nothing to show that the members affirmed when they did not take an oath. This was the same problem in the case of *Yakubu v CNS*<sup>96</sup> where the court held that:

The President of the court martial, members, waiting member, the judge advocate, the verbatim reporters all must swear to an oath. The essence of this oath taking cannot be over-emphasised... It is essential to bind the members not to be biased in the discharge of their onerous duty... It is well established by

plethora of decided authorities that non-compliance with statutory provision that are mandatory will render any proceedings thereupon void.<sup>97</sup>

It is obviously surprising that a court martial would sit and adjudicate over a matter without the members being sworn to an oath. It goes to show further the level to which some military

---

<sup>95</sup>(2004) 15 NWLR Pt 896, 268 274.

<sup>96</sup>(2004) 1 NWLR, Pt 583, 94.

<sup>97</sup>*Ibid.*p.102.

authorities disregard the provisions of the law while dealing with disciplinary matters. This could be attributed to the feeling of a commander being satisfied by the immediate outcome of the court martial process especially when the accused person was convicted. In most cases also, when appellate courts overturn decisions of courts martial, the commander who convened the particular court martial that its decision was overturned, like the case in question, must have been posted out of the unit. Other commanders bear the burden and military lawyers, whose pieces of advice were initially rejected, would still be the ones, in liaison with external advocates to go and face the embarrassment of arguing about something that was obviously a breach of the prescribed procedure. It is still strongly opined that there should be consequences for obvious breach of laid down procedures by commanders who convene courts martial. It is equally important that legal officers in such formations document their advice to such commanders so that it would not look like the advice was not given.

It is trite that jurisdiction is like the heart in any living being. In the absence of the heart, no living being would still be alive. Considering the importance of jurisdiction in all courts, courts martial inclusive, it is expected that every commander in the Armed Forces in conjunction with his or her legal department must ensure that all the preliminary issues that deprive a court martial of its jurisdiction are adequately addressed. In order for courts martial not to repeat the observed errors that led to overturning of judgments that emanated from them, convening officers must ensure that no officer who is junior to an accused officer in rank and seniority is made a member of such a court. In a situation where officers of required seniority are not available, an express authority has to be obtained from the appropriate superior authority to use officers that are junior to the accused. When an offence is condoned, it should not be retried and a court martial should not continue to deal with a case after it has delivered judgment on that particular

case. All convening orders must be signed by the convening officer and the president and members of all courts martial must be sworn before it starts deliberating on cases.

## CHAPTER THREE

### ANALYSIS OF COURT MARTIAL CASES UPTURNED ON APPEAL ON GROUNDS OF FAIR HEARING

#### 3.1 INTRODUCTION

Fair hearing is defined as a judicial or administrative hearing conducted in accordance with due process.<sup>98</sup> It is a cardinal principle in every trial, that of court martial inclusive. The Supreme Court of Nigeria held, with regard to fair hearing in the case of *Orugbo v Unda*<sup>99</sup> that: “fair hearing lies in the procedure followed in the determination of the case and not in the correctness of the decision. Where a court arrives at a correct decision in breach of the principle, an appellate court will throw out the correct decision in favour of the breach of fair hearing.”<sup>100</sup> Courts have continued to hold that the principle of fair hearing cannot be compromised. In a recent case of *Omoniyi v Alabi*<sup>101</sup> the Supreme Court held that “once it is shown that a party’s right to fair hearing guaranteed by Section 36(6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) has been breached, the decision reached, no matter how well considered, would be declared a nullity and is bound to be set aside.” The Section provides among others that every person who is charged with a criminal offence shall be entitled to be

---

<sup>98</sup>Garner, B.A. Black’s Law Dictionary Ninth Edition, West Publishing Company, Dallas, USA. 2004, p.789.

<sup>99</sup>(2002) 12 MJSC 14.

<sup>100</sup> Ibid.

<sup>101</sup>(2015) 6 NWLR Pt 1456, 572 578.



informed of the nature of the offence and should be given adequate time and facilities for the preparation of his defence. It further provides that such a person is entitled to examine in person or by his legal practitioners, the witnesses called by prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf in a court or tribunal.

Furthermore, the Supreme Court explained the meaning of fair hearing in the case of *Charles Okike v Legal Practitioners Disciplinary Committee*<sup>102</sup> where Acholonu J.S.C stated thus:

The expression fair hearing which has been variously interpreted in numerous judgments in the common law countries does not require quantitative analysis. Fair hearing denotes and imports the concepts and practices speaking jurisprudentially, of a very fundamental tenet which behoves of the court, tribunal or any quasi-judicial body to conduct its affairs so transparently open that it accords all the parties involved in any dispute the opportunities of marshalling their case adroitly to their possible best so that a common man in the street can easily see and declare that the person affected has been freely allowed to put his case forward for consideration.

Fair hearing also requires the observance of twin pillars of the rules of natural justice namely: *audi alteram partem*, that is, hear the other side and *nemo iudex in causa sua*, that is, no one should be a judge in his own cause. This is a rule against bias.<sup>103</sup>

Lack of fair hearing has been a major problem in court martial trials in Nigeria. About 15 court martial cases were overturned on appeal within the period under review based on issues bordering on fair hearing. Considering the nature of military service, some prominent officers like Charles De Gaulle believed that rights of soldiers, including right to fair hearing should not be strictly observed. He stated that:

There is no human right in the profession of arms. Men who adopt the profession of arms submit of their own free will to a law of perpetual

---

<sup>102</sup>(2005) MJSC 1 at 23.

<sup>103</sup>Rear Amiral Agbiti v Nigerian Navy (2011) 4 NWLR Pt 1236, 175, 187.

constraint of their own accord. They reject the right to live where they choose, to say what they think, to dress as they like from the moment they become soldiers, it needs but an order to settle them in this place, to move them to that place, to separate them from their families and to dislocate their normal lives. On the word of command, they must rise, march, endure bad weather, go without sleep or food, be isolated in some distant post, and work till they drop. They have ceased to be masters of their fate. If they drop in their tracks, if their ashes are scattered to the winds, that is all part and parcel of their job.<sup>104</sup>

A practical war situation where troops are being killed and those who are living are ordered to continue to advance seems to give credence to the above quotation and indirectly influences some officers during court martial trials. Such situations or beliefs do not stop appellate courts from standing on the side of justice to take appropriate decisions when cases that were decided without due consideration to the principles of fair hearing are brought before them.

The AFA made provision to ensure fair hearing in courts martial. It provides that :

An officer who, at any time between the date on which the accused was charged with the offence and the date of trial, has been commanding officer of the accused and any other officer who has investigated the charge against the accused, or who under service law has held or has acted as one of the persons holding an inquiry into matters relating to the subject matter of the charge against the accused, shall not sit as a member of a court martial or act as a judge advocate at the court martial.<sup>105</sup>

This chapter seeks to analyze the specific actions of courts martial in different cases which breached the principle of fair hearing. This is done with a view to making future court martial presidents and members avoid such actions in subsequent trials.

The problem of lack of fair hearing that led to the upturning of court martial cases being analyzed were the issue of bias, descent of the court president and members into the arena and same person convening a court martial and confirming its decision. There is equally the problem

---

<sup>104</sup> De Gaule, C.A.J.M. *The Edge of the Sword*. Faber and Faber, Paris, 1960. p.54.

<sup>105</sup> Section 134(2) Armed Forces Act, op cit.

of judgment based on single unsworn witness, substitution of charges during confirmation, confirming sentence same day of judgment without legal review and non-invitation of vital witnesses to testify in a case. The issues will be discussed subsequently in preceding paragraphs. It is necessary to point out that some court martial cases were conducted correctly and the tenets of fair hearing were observed and the judgments were upheld by appellate courts.<sup>106</sup> The focus of the research is however on the cases that their judgments were overturned on appeal.

### 3.2 ISSUE OF BIAS RAISED BUT OVERRULED

The word bias when used in a judicial proceeding implies the favouring of one side against the other by the judge or members of a jury or tribunal. In the case of *Rear Admiral Agbiti v Nigerian Navy*<sup>107</sup>, the appellant objected to the participation of two members of the court martial, namely Rear Admiral JM Ajayi (President) and Rear Admiral AO Oni (Member). He gave the reason that he had crossed path with the President who had through a conversation considered him as his problem in the Nigerian Navy. Rear Admiral Oni on the other hand was said to have been actively involved in the publication in the Insider Weekly Magazine which contained adverse comments on the appellant. The objection of the appellant was on the ground of bias and he was overruled.

The appellant had a right to object to the membership of any member of the court martial he felt was going to be biased against him. The AFA provides that “an accused about to be tried by a court martial shall be entitled to object, on any reasonable grounds to any member of the court martial or the waiting member whether appointed originally or in lieu of another

---

<sup>106</sup> Nigerian Air Force v Ex Wing Comd LD James (2002) 18 NWLR Pt. 798, 295, Nigerian Air Force v Wg Comd Shekete (2003) 2 MJSC 63, Nigerian Air Force v Obiosa (2003) 4 NWLR Pt. 810, 233, The State v Sqd Ldr Olatunji (2003) 14 NWLR Pt. 839, 218, Lt Cdr Obisi v Chief of Naval Staff (2004) 8 MJSC 137, Capt Akande v Nigerian Army (2001) NWLR Pt. 714, 1, Maj Bello Magaji v Nigerian Army (2004) 16 NWLR Pt. 899, 222, Cpl Isah Ahmed v Nigerian Army (2011) 1 NWLR Pt. 1227, 89 and Odunlami v Nigerian Navy (2011) 6 NWLR Pt. 1244, 589.

<sup>107</sup>(2011) 4 NWLR Pt 1236 175.

officer.”<sup>108</sup> For the purpose of enabling the accused to avail himself of this right, the Act further provides that the names of the members of the court martial and the waiting member shall be read over to the accused before they are sworn.<sup>109</sup> An objection made by an accused to an officer shall be considered by the other officers appointed members of the court martial.<sup>110</sup> The Act also provides that if the objection is made against the president of the court martial and not less than one-third of other members allow it, the court martial shall adjourn and the convening officer shall appoint another president.<sup>111</sup> If however the objection is made to a member of the court martial other than the president and one half of the members entitled to vote allow it, the member objected to shall retire and the vacancy may be filled if the court will be reduced below the legal minimum, in the prescribed manner.<sup>112</sup>

The implication of these provisions is that the president of a court martial cannot sit to deliberate on whether an objection to his membership of the court by an accused should be overruled or not. In the case of *Rear Admiral Agbiti v Nigerian Navy*,<sup>113</sup> after the appellant objected to the membership of the president, it was the same president of the court who acted as judge in his cause, to pronounce judgment, discharged and acquitted himself of the allegations against himself.

The Supreme Court while allowing the appeal on relevant consideration in determining real likelihood of bias in the case of *Rear Admiral Agbiti v Nigerian Navy* held inter alia that:

In considering whether there was likelihood of bias, the court does not look at the mind of the Chairman of the tribunal or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the

---

<sup>108</sup> Section 137(1) Armed Forces Act, Cap A20 Laws of the Federation of Nigeria 2004.

<sup>109</sup> Ibid. Section 137(2).

<sup>110</sup> Ibid. Section 137(3).

<sup>111</sup> Ibid. Section 137(4).

<sup>112</sup> Ibid. Section 137(5).

<sup>113</sup> (2011) 4 NWLR Pt 1236 179.

other. The court looks at the impression which would be given to other people. Even if he was as impartial as he could be, nevertheless, if right minded persons would think that in the circumstances, there was a real likelihood of bias on his part, then he should not sit.<sup>114</sup>

This is therefore a clear example of where the president of the court martial would not have sat due to likelihood of bias.

The Court of Appeal equally raised the issue of bias in the case of *Colonel Clement Gami v The Nigerian Army*.<sup>115</sup> The sentencing and confirmation of the court martial's decision were done within four days. Oguntade J.C.A (as he then was) in his leading judgment expressed his displeasure in the following words:

I am however shocked or greatly disturbed by the fact that the confirmation of the decision of the GCM was done in 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 should not be confirmed. The confirming authority by proceeding to confirm the decision of the GCM without waiting for the representations of the appellant would appear to have believed that nothing the appellant said could have persuaded it to change its mind. The confirming authority had thus exposed itself to a justifiable accusation of bias against the appellant and unfairness of its approach.<sup>116</sup>

It is necessary at this juncture to consider what may have caused the court martial and the confirming authority in the above cases to resort to procedures that led to appellate courts to upturn the decisions based on bias.

One of the pointers to the reason for the position taken by the president and other members of the courts martial in being biased is command influence. In the words of Ihejirika,<sup>117</sup>

The Army of today is slightly an improved version of what some of our colleagues had during their time. If a GOC (General Officer Commanding) sets

---

<sup>114</sup>Ibid.p.189.

<sup>115</sup> Appeal No. C.A/276/98 (unreported) delivered in February 2001.

<sup>116</sup>Chiefe, T.E.C. (2008). *Military Law in Nigeria Under Democratic Rule*. DiametricsNig Ltd, Lagos.p.179.

<sup>117</sup>Ihejirika, O.A.Comments on Reasons Why Court Martial Trials are Upturned by Appellate Courts.*Military Lawyer*, Abuja, Directorate of Legal Services (Army) Vol.5.p.54.

up a court martial today, he does not need to come to AHQ (Army Headquarters) to confer with the COAS (Chief of Army Staff) as to which punishment should be awarded. It is not false that in the past, the COAS or the GOC will set up a court martial and suggest possible punishment, while the members work towards it.

This observation was made in 2011 by the then Chief of Army Staff. This is a clear evidence to show that command influence in courts martial is not imagined but real. In a situation where the convening officer has suggested punishment and the members work towards it, it simply means that anything that will make the court members to deviate from the target verdict would be resisted. In the case of *Rear Admiral Agbiti v Nigerian Navy*,<sup>118</sup> the GCM dismissed the objection based on the likelihood of bias as lacking in merit. All the preliminary objections which would have made two members of the court martial not to participate in the proceedings were dismissed by the court. It does not mean that there were no other officers in the Nigerian Army, Nigerian Navy and the Nigerian Air Force in Lagos then to replace the officers that informed the objection by the appellant. It simply suggests that, as the former Chief of Army pointed out, it appeared that the court members were given a target and changing them may not have yielded the result required by the convening authority. The refusal of the GCM to change the members, whose memberships were genuinely objected to, caused the upturning of the judgment on appeal.

Making courts martial truly independent is suggested as a way out of this problem wherein the court members are told what to do. The practice in Ghana appears to ensure more independence for courts martial than what is currently obtained in Nigeria. The Ghana Armed Forces (GAF) operates a unified code of military justice wherein the Judge Advocate Department, equivalent of Directorate of Legal Services in Nigerian Army, is answerable to the Minister of Defence. The Department is headed by a Judge Advocate General of the rank of

---

<sup>118</sup>(2011) 4 NWLR Pt. 1236, 175.

Brigadier General or equivalent.<sup>119</sup> The Chief of Ghana Armed Forces in consultation with the Chief Justice of Ghana appoints the Judge Advocate General who is also a member of National Judicial Council.<sup>120</sup> The Judge Advocate is directly responsible to the Judge Advocate General. There exists a direct relationship between Ghana's judicial system and the Ghana Armed Forces Justice System.<sup>121</sup> The established rank of the head of Legal Department of the Nigerian Army is Maj Gen which is better than that of Ghana but the military lawyers who serve in courts martial in Ghana are, to a large extent insulated from command influence. The appointment and removal of the Judge Advocate General are not within the powers of the military authorities, though he is equally responsible to them in military matters. This guarantees some level of institutional independence and would be good for the Nigerian Armed Forces.<sup>122</sup> It is similar to what is obtainable in the United States of America where there is also the Judge Advocate General Corps. The judge advocates are usually made up of retired military lawyers but who are appointed to the bench.<sup>123</sup>

When those who serve in courts martial do not have their yearly personal evaluation reports written by the convening officer, they may exercise some independence and not be afraid of their careers being truncated for voting contrary to the dictates of the convening officer at a court martial. Experience shows that at some point, some court martial members are helpless as they have to return the verdict to please the convening officer, even against their conscience as pointed out by the former Chief of Army Staff above.

---

<sup>119</sup>Dada,OA. (2014). *Administration of Military Justice and Discipline in the Nigerian Army*.(Unplished),MSc Research Project, University of Ibadan.p.19.

<sup>120</sup> Article 153(i) Constitution of the Federal Republic of Ghana 1992.

<sup>121</sup> Dada, O.A., op cit. p.19.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

### 3.3 DESCENT INTO THE ARENA BY PRESIDENT AND MEMBERS OF COURTS MARTIAL

Descending into the arena is a situation where a judge takes the position of either the prosecuting or defence counsel instead of remaining as an arbiter. In all courts of justice, the judge is not expected to descend into the arena. In a recent case of *Addah v Ubandawaki*<sup>124</sup> the Supreme Court of Nigeria, on the onus of trial judge not to descend into the arena of dispute, held by Muhammad J.S.C held that:

I am afraid, the learned trial judge entered into the arena, which of course he is not entitled to do. A case before a court of law belongs to the parties and not to the court as a court is not competent to make a case for any of the parties. The judge is an umpire and must limit himself to what is pleaded and established by the parties before him. Otherwise, he will be accused of going against the known and well cherished principle of fair trial.<sup>125</sup>

In courts martial, the role of the president and members is similar to the role of the judge or panel of justices in a civil court. Descent into the arena by court martial president and or members has been a major problem that led to several court martial cases being overturned on appeal on account of lack of fair hearing.

In the case of *Nigerian Army v Col Umar Mohammed*,<sup>126</sup> the Supreme Court, affirmed the decision of the Court of Appeal by overturning the judgment of the court martial in the matter principally on grounds of fair hearing. The respondent was arraigned before a GCM on eight count charges of conduct to the prejudice of service discipline, offences in relation to service and

---

<sup>124</sup>(2015) 7 NWLR Pt 1458, 325 334.

<sup>125</sup> Ibid.

<sup>126</sup>(2002) 15 NWLR Pt. 789, 42.



public property and extortion. He was found guilty on six count charges and sentenced to a total of nine years imprisonment to run concurrently.<sup>127</sup>

The five justices of the Supreme Court in affirming the decision of the Court of Appeal dismissed the appeal for lacking merit. The judgment was quite brief as the Supreme Court mainly relied on observations of the Court of Appeal. The main contention was that the president of the GCM made disparaging statements that made it obvious that the respondent was not given fair trial and was sure to be convicted. Belgore, J.S.C held:

The President of the General Court Martial no doubt went to town virtually finding the respondent guilty before the end of the trial. Several documents received in evidence ought not to have been admitted in view of Evidence Act S.92. The respondent never had a fair trial and the judgment amounts to miscarriage of justice. Court of Appeal was perfectly right to allow the appellant's appeal. It is true court martial is a military court, it is however always bound by rules of evidence and manifestation of fair trial. The respondent was virtually not allowed fair trial. I find no reason to disturb the judgment of the court of appeal.<sup>128</sup>

In order to properly analyse this case, it is pertinent to refer to the pronouncements of the Court of Appeal in the matter.<sup>129</sup> The Court observed that in one or two instances, the president of the court martial made rulings on the objections raised by the prosecutor without giving the defence a hearing. In other instances, the president issued threats of prosecution against defence counsel without any obvious cause, thereby giving an impression that those threats were intended merely to cow the defence and weaken defence counsel in the performance of their duties to the appellant.<sup>130</sup> In one of the instances, the president told the prosecutor "don't over flog the dead

---

<sup>127</sup> Ibid.

<sup>128</sup> Ibid. p.43.

<sup>129</sup> Mohammed v The Nigerian Army (1998) 7 NWLR Pt 557, 232.

<sup>130</sup> Ibid.p.248.

horse”<sup>131</sup> while he was making a point, giving an impression that the court martial had concluded on the decision to take.

The Court of Appeal also noted that he intervened at random in the course of cross examination. At a stage, he was reported to have said, “stop making references because I am going to take a decision, the court is mine, I am going to take a decision to clear doubts I have. Your rules of procedure will wait, whatever you want to quote there will wait.”<sup>132</sup> Acholonu J.C.A, (as he then was) described the statements of the court martial president as “betraying a primordial intent of conviction very much reminiscent of a remark by a sheriff in the wild west in USA who, while speaking of a horse thief said ‘we will give him a fine trial and after that, we hang him.’”<sup>133</sup> He stated further that “the unnecessary prejudice and the devil may care attitude shown by the presiding adjudicator in the trial court martial does not augur well for the tenets and principle of fair hearing enshrined in our Constitution to reign.”<sup>134</sup>

On the test of whether a judge has descended into the arena of trial, the Court of Appeal held inter alia on this matter that:

It is true that whether a Judge has descended into the arena depends on the perception of the whole trial, of the objective bystander and of the appellate court putting itself in the position of that objective bystander. While the trial judge is not expected to be a note-taking robot, recording evidence and not intervening to clarify ambiguities that may arise from unclear statements or from the evidence generally, where the interventions go beyond clarification of evidence but can be seen as an exercise designed to assist one party at the expense of another or to confirm a preconceived notion of the Judge of what the facts are, such become objectionable by reason of incompatibility with the fairness of the trial.<sup>135</sup>

---

<sup>131</sup>Ibid.p.249.

<sup>132</sup> Ibid.p.248

<sup>133</sup>Ibid.p.253.

<sup>134</sup>Ibid.p.254.

<sup>135</sup>Ibid.p.238.

In all these, no one is still asking whether the appellant at the Court of Appeal who is also the respondent at the Supreme Court committed the offences he was convicted of or not. The emphasis shifted to the procedure adopted during the trial. The outcome of this trial at appellate court has a very negative effect on discipline in the Armed Forces hence the need to ensure that such procedural errors do not repeat themselves. The accused was set free, not that he did not commit the offence, but that the president of the court martial did not conduct himself the way he ought to have conducted himself. Would-be offenders may be encouraged that there is hope to escape justice through such procedural errors.

The problem of court martial members descending into the arena was equally one of the reasons for overturning the judgment of the court martial in the case of *Lt Col Ahmed Dayo Karim v Nigerian Army*.<sup>136</sup> The appellant was arraigned before a GCM on three count charges of stealing contrary to Section 66(a) of the AFD 105 of 1993 and making of false documents contrary to Section 90(d) of the same Decree. He was alleged to have authorized the issue of green terylene cloth materials used in the Army for ceremonial dresses to a civilian without authority to do so.<sup>137</sup> In this matter, the Court of Appeal defined descending into the arena as “not only asking too many questions by the Judge but also asking a few questions that will decide the case one way or the other.”<sup>138</sup> A prosecution witness was also recalled to testify after the judge advocate had summed up which is contrary to the Rules of Procedure Army which provides that “the court may at any time before they close to deliberate on their finding or if there is a Judge Advocate before he begins to sum up, call a witness or recall a witness if in the opinion of the court it is in

---

<sup>136</sup>(2002) 4 NWLR Pt. 758, 716.

<sup>137</sup>*Ibid.*p.719.

<sup>138</sup>*Ibid.*p.725.

the interest of justice to do so.”<sup>139</sup> The court therefore observed that “it is clear that the power of the court to call a witness or recall a witness is limited to the period before the Judge Advocate sums up.”<sup>140</sup> While referring to the recalling of a witness after the judge advocate’s sum up, Galadima J.C.A (as he then was), who read the leading judgment observed thus: “I must say that this invidious and unorthodox procedure is not only scandalous but it is also fatal to the entire proceedings thereby rendering the trial of the appellant procedurally null and void.”<sup>141</sup>

The Court of Appeal, while allowing the appeal in this matter, summed up the duty on the court not to descend into the arena in the following words:

Although Section 223 of the Evidence Act gives a court and a court martial liberty to discover or to obtain proof of relevant facts by asking questions of witnesses, the court cannot under that section appropriate a case and constitute itself into a prosecuting agency. The liberty given by that section is extensive but it is limited by the duty of fairness. The breach of this duty of fairness can arise from the duties that pertain to the adjudicator and those duties that relate to the conduct of the proceedings. In the latter category are instances of undue interference by the adjudicator in the proceedings and descent by the adjudicator into the arena of contest manifested by taking a dynamic role in the cross examination of the witnesses or the accused or seizing the conduct of the case from counsel for one side.<sup>142</sup>

This matter further exposed the court martial system in the Armed Forces to ridicule. The court members obviously had a fixated mind on finding the accused guilty by all means. This particular case had other problems aside the issue of the court members descending into the arena of trial.

In the case of *Lt Yahaya T Yakubu v Chief of Naval Staff*,<sup>143</sup> the problem of the president of the court martial descending into the arena was one of the grounds under which the decision

---

<sup>139</sup>Rule 56(1) Rules of Procedure Army 1972 applicable under Section 181 of AFD 105 1993.

<sup>140</sup>Lt Col Ahmed Dayo Karim v Nigerian Army.Op cit.

<sup>141</sup>Ibid.p.736.

<sup>142</sup>Ibid.p.724.

<sup>143</sup>(2004) 1 NWLR Pt.853, 94.

of the court martial was overturned by the Court of Appeal. In the matter, the appellant was arraigned before a court martial at NNS Anansa at Calabar on a –two count charge of conspiracy and stealing contrary to Section 516 of the Criminal Code and Section 114 of the AFD 105 of 1993 respectively. The appellant was alleged to have stolen some quantity of diesel in a tanker vehicle.<sup>144</sup> The court held with regard to fair hearing that “the trial court actually descended into the arena and advised the prosecutor to go and prepare his case properly.”<sup>145</sup> As ridiculous as it may sound, the court martial president while advising the prosecutor in open court to rewrite his final address stated thus:

Probably, you are not able to put it properly. So yourself and your other colleagues, as soon as we adjourn on your behalf right now, go and do that thing properly, the way it should be. Do your rehearsal and then you can come up and present it at 2000 hours...The Judge Advocate, the liaison officer, they will discuss with you on how to be able to get that thing done properly. Do not just bring it anyhow. Do you understand?<sup>146</sup>

It is obvious from the proceedings of this court martial that no appellate court would have allowed a decision that came out of this kind of proceeding to stand. The unfortunate thing is that in such situations even when such senior officers are advised not to say such things in a trial, they will claim to know the law sometimes more than the judge advocate whose duty it is to advise the court on legal matters.

The same problem of court martial members descending into the arena of trial was an

---

<sup>144</sup>Ibid.p.96.

<sup>145</sup>Ibid.p.118.

<sup>146</sup> Ibid.

issue in the case of *Lt Col EO Anene v Nigerian Army*<sup>147</sup> wherein the president of the court martial subjected the appellant to serious examinations on matters that were not relevant facts. The Court of Appeal while allowing the appeal held that “the appellant’s right to fair hearing was breached.”<sup>148</sup>

### **3.4 SAME PERSON CONVENING COURT MARTIAL AND CONFIRMING ITS JUDGMENT**

The essence of having a different person convening a court martial from the person or persons that make up the court and those that review the findings of the court martial and the third layer which is made up of the person or persons who confirm the findings is to ensure fair hearing.<sup>149</sup> Some of the court martial cases were overturned on appeal on grounds of one person performing the duty of convening the court and confirming its decision.

One of such cases is that of *Anyankpele v Nigerian Army*.<sup>150</sup> The appellant, a Brigadier General in the Nigerian Army then, was the Chief of Staff and the Nigerian Contingent Commander of ECOMOG in Liberia. He was arraigned before a GCM on a two-count charge, along with seven other officers. The first count was on disobedience to a standing order contrary to Section 57(1) of the AFD 105 of 1993 in that the appellant at Liberia in March 1996 caused to be shipped to Nigeria a motor car in contravention of a standing order which forbade such importation. The second count on which he was tried alone was on conduct to the prejudice of service discipline contrary to Section 103(1) of the AFD 105 of 1993 for sending a travellers’ cheque of 300 US dollars to the Commanding Officer of the Special Investigation Bureau which

---

<sup>147</sup> C.A/L.144/97 (Unreported). Chiefe, op cit. p. 111.

<sup>148</sup> Ibid.

<sup>149</sup> Section 134, Armed Forces Act Cap A20 Laws of the Federation of Nigeria 2004.

<sup>150</sup> (2000) 13 NWLR Pt. 684, 209.

was investigating the matter.<sup>151</sup> He was found guilty on both counts and sentenced to one year imprisonment on each of the charges. The conviction and sentence were confirmed by the confirming authority. Dissatisfied, the appellant appealed to the Court of Appeal. By the provision of Section 131(2) of the AFD 105 of 1993, the Chief of Army Staff was authorized to convene the court martial. Contrary to the tenets of the principles of fair hearing, the Chief of Army Staff also confirmed the conviction and sentence.

The Court of Appeal while allowing the appeal observed that the principle of fair hearing was not adhered to, in the process leading to the confirmation of the judgment of the court martial. The court held:

Under Section 131(2) of the Decree, the Chief of Army Staff was the convener of the General Court Martial set up to try the appellant; he appointed the members of the GCM and the Judge Advocate. He is also the confirming authority of the judgment of the GCM. Can the appellant be reasonably expected to believe that he would have fair hearing before such a body. Can the members of the GCM themselves claim to be impartial and seen to be so? It must not be forgotten that the composition of the GCM carries with it the authority to exercise judicial powers by its members. Impartiality is the greatest attribute which any adjudicating body must always lay claim to. This means that not only must the judge not appear to favour either party, he must not take sides...A situation where the accusers shall be the prosecutors and the judge at the same time can never guarantee fair hearing or fair trial.<sup>152</sup>

It is almost impossible to think that there will be a difference in this trial from what the convening officer wants, and what the judgment of the court martial and decision of the confirming authority would have been. The court members would have had it difficult to take a decision that would not be the intention of the convening officer who was still the confirming authority. The Chief of Army Staff would have stepped aside in the Army Council during the confirmation of the judgment of a court martial that he set up.

---

<sup>151</sup>Ibid.p.211.

<sup>152</sup>Ibid.p.215.

The same problem of fair hearing led to the overturning of the court martial judgment in the case of *Akinwale v Nigerian Army*.<sup>153</sup> In that case, the appellant who was a Lt Col in the Nigerian Army then was arraigned before a GCM at Lagos Garrison Command on eight-count charges. The charges were on illegal possession of arms, conduct to the prejudice of service discipline for being in possession of two Nigerian International passports and harassment of civilians among others.<sup>154</sup> At the trial, the appellant pleaded guilty to four of the charges and while two of the charges were struck out, the remaining two were withdrawn. He was sentenced to 15 years imprisonment on each of the charges to run concurrently. On the same 16/8/96, the conviction was confirmed but the sentence was reduced by the confirming authority to 10 years imprisonment on each count, to run concurrently. The confirming authority was the same commander of the Lagos Garrison Command who convened the GCM.<sup>155</sup>

While allowing the appeal, the Court of Appeal held thus:

Generally, the twin pillars of fair hearing are embodied in the latin maxims *nemo iudex in causa sua*, that is, ‘you shall not be a judge in your own cause’ and *audi alteram partem* that is, ‘hear the other side’...In this case, the procedure adopted by the Lagos Garrison Commander, the convening officer, by being the initiator of the investigation into the wrong doings by the appellant; the convener of the General Court Martial and also the confirming authority, offends the principles of fair hearing.<sup>156</sup>

Both the AFD which has been replaced by AFA made adequate provisions to avoid a situation where one person plays the role of the prosecutor and judge.<sup>157</sup> Contrary to all known tenets of fair hearing, the convening officers in the two cases analysed above convened the GCM and confirmed the judgments. This situation is wrong and instead of ensuring discipline and justice,

---

<sup>153</sup>(2001) 16 NWLR Pt. 738, 109.

<sup>154</sup>Ibid.p.111.

<sup>155</sup> Ibid.

<sup>156</sup>Ibid.p.113.

<sup>157</sup>Section 152(2), Armed Forces Act, Cap A20 Laws of the Federation of Nigeria 2004.



they only exposed the justice system in the Nigerian military to ridicule. It is therefore opined that the provisions of AFA on ensuring fair hearing should be strictly adhered to.

### 3.5. JUDGMENT BASED ON SINGLE UNSWORN WITNESS

Witnesses are necessary for proving a case beyond reasonable doubts. The Evidence Act provides that all oral evidence given in any proceeding must be given on oath or affirmation administered in accordance with Oaths Act or Law as the case may be.<sup>158</sup> The only exceptions are situations where it is unlawful by the religious belief of the witness or who by reason of want of religious belief ought not, in the opinion of the court, to be admitted to give evidence upon oath.<sup>159</sup> The other exception is the evidence of a child who has not attained the age of 14 years, if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth.<sup>160</sup> The essence of swearing or affirming of a witness is to ensure that he tells the truth and that he gets cross examined by the defence in order to ensure fair hearing. Cases can also be proved by documentary evidence, either by primary<sup>161</sup> or secondary<sup>162</sup> documentary evidence. Production of documents without giving evidence is also allowed by the Evidence Act.<sup>163</sup> However, “a person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.”<sup>164</sup>

It will however be a breach of fair hearing to base a judgment only on documents produced by a person who was not called as a witness, was not cross-examined and there was no

---

<sup>158</sup> Section 205 Evidence Act, CAP E.4 2011.

<sup>159</sup> Ibid. Section 208.

<sup>160</sup> Ibid. Section 209.

<sup>161</sup> Ibid. Section 86(1).

<sup>162</sup> Ibid. Section 87.

<sup>163</sup> Ibid. Section 218.

<sup>164</sup> Ibid. Section 219.

other witness as was the case in *Col David Akono v The Nigerian Army*.<sup>165</sup> In that case, the appellant was arraigned before a GCM in Lagos Garrison Command on three count charges. Two of the counts were on conduct to the prejudice of service discipline contrary to Section 103(1) of AFD 105 of 1993 for lying in a memorandum he sent to the Chief of Administration (Army) about the position of his transaction with one Chief Igbokwe. The second count was related to the appellant's letter to the same Chief Igbokwe which was said to have portrayed the Nigerian Army in bad light. The third count was scandalous conduct of an officer contrary to Section 91 of the AFD in that he was involved in a monetary transaction with the same person in a manner, unbecoming of an officer and gentleman.<sup>166</sup> He was found guilty on the first two charges, reduced to the rank of Lt Col with four years seniority in rank and sentenced to two years imprisonment.<sup>167</sup>

One of the reasons why the Court of Appeal allowed the appeal was on grounds of fair hearing. The court observed that the GCM relied solely on documentary evidence which was admitted through one MWO Musa Abiri, a Chief Clerk, who was the custodian of the document, but he was neither sworn in nor was he cross-examined by the defence.<sup>168</sup> The court held that "it is true that the witness MWO Abiri can produce the documents Exhibit 1, under Section 192 of Evidence Act (1990) but the prosecutor did not call him as a real witness to be sworn and cross-examined as provided for, under Section 193 of the same Evidence Act."<sup>169</sup> If there had been another witness who was sworn and cross-examined, it would have been more reasonable to convict based on such evidence. The court was dismayed that the only evidence upon which

---

<sup>165</sup>(2000) 14 NWLR Pt. 687, 318.

<sup>166</sup> Ibid.p.326

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup>Ibid.p.327.

the court martial was the documents tendered by the Chief Clerk who was not called as a witness. It

was clearly a breach of fair hearing of the appellant. It appeared as if it were a script that was just acted hence the Court of Appeal upturned the judgment. The court also held that “the GCM was in great and grave error in admitting in evidence, documents tendered by a person who was not called as a witness.”<sup>170</sup>

### 3.6 SUBSTITUTION OF CHARGES DURING CONFIRMATION

A court martial trial begins from arraignment of the accused who takes a plea to the charge on which he is arraigned.<sup>171</sup> The charge is read to him to ascertain that he is the person named therein and properly described and that he understands the charge before taking his plea of guilty or not guilty.<sup>172</sup> Everything about a particular case revolves round the charge(s) from arraignment to the conclusion of trial, finding and sentencing. After the conclusion of trial, the judge advocate compiles the record of proceedings within 60 days from the date of finding and forwards same to the confirming authority.<sup>173</sup> The record of proceedings contain the charge sheet(s), the convening order, exhibits admitted in the trial and a verbatim recording of the court’s proceedings from beginning to the end of the trial. Before confirmation of the finding and sentence of the court martial, the record of proceedings is reviewed by the Directorate of Legal Services (Army) that recommends to the confirming authority the legality and appropriateness of the finding and sentence awarded by the court martial.<sup>174</sup> The Directorate can recommend that

---

<sup>170</sup> Ibid.p.321.

<sup>171</sup> Rule 35 Rules of Procedure Army 1972.

<sup>172</sup> Ibid.

<sup>173</sup> Section 147(1) Armed Forces Act, Cap A20 Laws of Federation of Nigeria 2004.

<sup>174</sup> Ibid. Section 149(3).

the finding and sentence of the court martial should be upheld or quashed. The legal review is strictly based on the record of proceeding which contains the exact charge(s) upon which the accused was tried.

The Court of Appeal was therefore amazed at a situation where in the case of *Lt Col Komonibo v Nigerian Army*<sup>175</sup> the charges sent to the confirming authority were different from the charges upon which the appellant was arraigned at the court martial. The appellant, who was the Commanding Officer of 243 Recce Battalion Monguno, Borno State, was alleged to have used the Ration Cash Allowance (RCA) of the troops to rehabilitate the generating plant of the unit.<sup>176</sup> He was arraigned before a court martial on three count charges on offence in relation to public and service property contrary to Section 66(a) of the AFD 105 of 1993, conduct to the prejudice of service discipline contrary to Section 103 of the Decree and failure to perform military duty contrary to Section 62(b) of the same Decree.<sup>177</sup> He was found guilty, convicted and sentenced on all the charges. The conviction and sentence imposed by the court martial was confirmed by the Nigerian Army Council. However, the letter of confirmation showed that the offences alleged to have been committed by the appellant were aiding and abetting and absence without leave. These were offences different from the ones for which the appellant had been convicted.<sup>178</sup> The respondent conceded that the substitution of charges was a grave error<sup>179</sup> but the Court of Appeal held that “the appellant was not heard on those substituted charges which showed bias on the part of the confirming authority...Apart from show of bias, there was unfair hearing as the appellant was not heard on the substituted charges.”<sup>180</sup>

---

<sup>175</sup> (2002) 6 NWLR Pt. 762,,94.

<sup>176</sup> Ibid.p.97.

<sup>177</sup> Ibid.p.103.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

This error was a serious administrative lapse that did not portray the Nigerian Army in good light. The appellant was eventually cleared of his conviction based on the judgment of the Court of Appeal. This problem requires proper enlightenment of the administrative staff and all those who are connected with the process of reviewing cases, forwarding same to the confirming authority and conveying the decision of the confirming authority to ensure that this kind of error does not occur.

### **3.7 CONFIRMATION OF SENTENCE SAME DAY OF JUDGMENT WITHOUT LEGAL REVIEW**

The AFA makes provision for obtaining a legal review of a court martial's proceedings before confirmation of the finding of guilty and sentence of a court martial by the confirming authority.<sup>181</sup> This is to ensure that the principle of fair hearing is adhered to and to ensure that the confirming authority takes a decision based on sound legal advice. If there was any obvious breach of rules of evidence or fair hearing during the trial, the Directorate of Legal Service would point such lapse out in order that the confirming authority is not misled. Those that review the court martial proceeding of a particular case do not include any person who has acted as a member, judge advocate, trial counsel, defence counsel or investigating officer in the matter.<sup>182</sup>

In order to equally ensure fair hearing, the AFA gives some time for the accused who has been convicted and sentenced, to petition the confirming authority with a view to quashing the conviction and sentence. In that regard, it provides that: "An accused may, within three months after being sentenced by a court martial and before the sentence is confirmed, submit to the

<sup>181</sup> Section 149(3) Armed Forces Act Cap. A20 Laws of the Federation 2004.

<sup>182</sup> Ibid.

confirming authority any written matter which may reasonably tend to affect the confirming authority's decision whether to disapprove a finding of guilty or to approve the sentence.”<sup>183</sup>

It was therefore absurd to find that in the case of *Maj Suleiman Yekini v Nigerian Army*,<sup>184</sup> the finding and sentence of the court martial were confirmed the same day of judgment without legal review. In the matter, the appellant was arraigned before a GCM on a two-count charge of aiding, abetting service offence punishable under Section 98 of AFD 105 of 1993 and extortion, punishable under Section 108 of the same Decree. The offences arose from his duties as the Chairman of a committee mandated to register all military pensioners. One of the issues that led to overturning of the decision of the court martial was that of fair hearing. The court held that “the confirming authority confirmed the conviction and sentence the same day judgment was delivered – 12/6/98. The action was taken without any legal review from the Directorate of Legal Services, contrary to that requirement as provided for by Section 149(3) of AFD 105 of 1993.”<sup>185</sup> The court held further that “the confirming authority in the instant case, failed and neglected to comply with this section of the law.”<sup>186</sup> The procedure adopted in the confirmation of the case was a clear breach of the provisions of the AFD, now AFA. The accused was not given the opportunity to make his presentations to the confirming authority as to why the finding and sentence of the court martial should not have been confirmed. He was shut out of that privilege which could have been capable to assuage the confirming authority to revise the decision of the

---

<sup>183</sup>Ibid. Section 149(1).

<sup>87</sup>(2002) 11 NWLR Pt. 777, 127.

<sup>185</sup>Ibid.p.130.

<sup>186</sup> Ibid.p.135

court martial if its mind was not already made up. This was another judicial process that negatively affected the image of the Nigerian Army as far as the administration of justice in the military is concerned.

### 3.8 NON INVITATION OF VITAL WITNESS BY THE PROSECUTION

A vital or material witness is a witness whose testimony will help the court to decide a matter in one way or the other. The prosecution is not bound to call any number of witnesses. His duty is only to call such number of witnesses sufficient to prove his case.<sup>187</sup> The number of witnesses the prosecution would call to prove his case would naturally include vital or material witnesses.

In the case of *Capt GNH Asake v The Nigerian Army Council & The Attorney General of the Federation*,<sup>188</sup> the Court of Appeal overturned the judgment of the court martial based on the fact that a vital witness in the matter was not called by the prosecution to testify. In the case, the appellant was arraigned before a GCM on a one count charge of conduct to the prejudice of service discipline punishable under Section 71 of Nigerian Army Act 1960 (Revised). He was alleged to have borrowed the sum of 300 USD from a soldier while serving in Operation Liberty in Monrovia, Liberia in 1991. He was found guilty and sentenced to reduction in rank with three years seniority on the rank. The confirming authority changed the sentence to dismissal. It was stated that the appellant paid a part of the money. The soldier from whom the appellant borrowed money was not called to testify and the adjutant who was told to take record of the part payment made by the appellant was not also called to testify.<sup>189</sup>

---

<sup>187</sup> Akpan v State (1992) 2 NWLR Pt. 296, 64.

<sup>188</sup> (2007) 1 NWLR Pt. 1015, p. 408.

<sup>189</sup> Ibid.p.410.

<sup>93</sup> Ibid.p.416.

On the effect of failure to call material witness by prosecution on this matter, the court held thus:

Where a material witness who ought to have been called by the prosecution to testify on his allegation and who would have been subjected to cross-examination, a portent tool for perforating falsehood, was not called and no plausible explanation was given to call him, the allegation is left for speculation by the court. In the instant case, LCpl Yau Suleiman who complained to P.W.1 that the appellant borrowed money from him was not called to give evidence before the military court. He was a material witness and failure to call him has left the alleged financial transaction between the soldier and the appellant to speculation by the military court.<sup>190</sup>

The non-invitation of the vital witnesses in this case deprived the appellant of fair hearing because he would have had the opportunity of cross examining them on the allegation made against him. The witnesses were not called and the court martial still went ahead and convicted the appellant.

It is necessary to point out that this researcher humbly, with respect, disagrees with the Court of Appeal on one of its decisions in this matter that the Captain borrowing money from a LCpl was not an offence because it is not written in any law that borrowing money is an offence.<sup>191</sup> With due respect to the court, the military is a peculiar institution that requires some peculiar rules to survive. Integrity is a major aspect of the life of an officer and it is very essential for effective command. It is difficult for a Captain to borrow money from a LCpl and still effectively command him. A Captain can be equated with Level 13 officer in the Federal Civil Service while a LCpl can be equated to Level 4. Borrowing of money by the Captain from the LCpl naturally has a negative effect on discipline in the unit commanded by that Captain. That is the reason why Nigerian Army Act, AFD and AFA made provision for the offence of conduct to the prejudice of service discipline.

---

<sup>191</sup>Ibid.p.413.



In the case of *Zakari v The Nigerian Army*<sup>192</sup> the Court of Appeal held that “to secure the conviction of an accused for conduct prejudicial to service discipline...the prosecution must prove the following: that the accused is subject to service law, that he is guilty of an act which is prejudicial to service discipline and that such an act or conduct must have brought the Armed Forces into disrepute.”<sup>193</sup> This is the latest decision of the Court of Appeal on this provision of AFA. Certainly, a Captain borrowing money from a LCpl is prejudicial to service discipline. The embarrassment faced by the appellant when the case came up at the court martial is an indicator that such an act was unbecoming of a gentleman officer. It is expected that the Captain who receives more money than the LCpl and is about nine levels above the LCpl should not borrow money from him. Worse still, he did not pay back the money which prompted the soldier to report him and led to his being prosecuted at the court martial.

Non-invitation of a material witness to testify at the court martial was also the problem that led to overturning of the judgment of the court martial in the case of *Maj IO Amachree v Nigerian Army*.<sup>194</sup> In the case, the appellant was arraigned before a GCM on two count charges of conspiracy punishable under Section 114(1) AFD 105 of 1993 and cheating punishable under Section 516 Criminal Code Act Cap 77 Laws of the Federation of Nigeria 1990. He was alleged to have conspired with one Zamani Karfa to cheat one Mr Jude of Idowu Taylor Street Victoria Island Lagos of One Hundred and Ninety Thousand Naira (N190,000.00). He was also alleged to have actually cheated Mr Jude of the said amount of money.<sup>195</sup>

---

<sup>192</sup>(2012) 5 NWLR Pt. 1294, 478.

<sup>96</sup>Ibid.p.487.

<sup>194</sup>(2003) 7 NWLR Pt. 807, 256.

<sup>195</sup>Ibid.p.259.

<sup>99</sup>Ibid.p.278.

The only major evidence the prosecution had was the confessional statement of the appellant which he alleged was made under duress but was admitted by the GCM after a trial within trial. The appellant stated that he made the confessional statement based on threat and promise. The account of the appellant on why he made the confessional statement which the Court of Appeal held to be involuntary notwithstanding that the GCM admitted it after trial within trial, is worthy of repeating in this work. He said:

I was surprised when Lt Col Frank said ‘after giving you seven years, you will forget your wife and your friends will fork your wife,’ I was weak. ‘We are not after you...just go and admit what this woman said-I will set you free.’ He kept me on the chain throughout and followed me with a report that I was going to escape.<sup>196</sup>

The revelation made by the appellant during the court martial trial as contained in the record of proceedings made the Court of Appeal to hold that “the GCM was wrong to admit the confessional statement as it was obvious that it was not made voluntarily.”<sup>197</sup>

It was therefore obvious that the appellant’s right to fair hearing was breached at the trial. Having nullified the admission of the statement, there was nothing again to hold on to in convicting the appellant, as other vital witnesses were not called, the court unanimously allowed the appeal. On presumption raised by failure of prosecution to call a vital witness in this case, the court held inter alia that:

Where the prosecution fails to call an investigating officer against whom an accused person has made allegations of inducement and threat in respect of a confessional statement as a witness in trial within trial or at all during the trial, the court will presume under Section 149(d) of the Evidence Act that the evidence of the investigating officer would not be favourable to the prosecution’s case. In the instant case, the failure of the respondent to call the investigating officer whom the appellant alleged made the inducement to and threat at him in respect of his confessional statement greatly prejudiced the respondent’s case.<sup>198</sup>

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.p.265.

Furthermore, Ene J.C.A (as he then was), observed in the case that “there can be no gain saying that based on the facts of this matter, Mr Jude looked every inch a crucial witness for the prosecution but he was not called to testify.” One then wondered how the GCM arrived at its verdict without calling Mr Jude who was the complainant in the matter, to testify at the court martial.<sup>199</sup>

It is necessary to note that this case happened in 1999, during military regime when such investigations were held to be unchallengeable by the military. The statement of the appellant as to how he was interrogated is an indicator to how desperate they were to convict the appellant without considering his right to fair hearing. The important thing is that those who are in any way involved in military justice system would learn that appellate court would nullify judgments of courts martial when the procedure followed is similar to the case analysed.

In the case of *Col David Akono v Nigerian Army*,<sup>200</sup> the Court of appeal while stressing the importance of having vital witnesses to testify at trial courts held that “a vital witness is a witness whose evidence may determine a case one way or the other. Failure to call Chief Igbokwe who was a vital witness by the prosecution is fatal to the prosecution’s case.” Chief Igbokwe was the complainant but was not called to testify at the trial, yet the GCM found the appellant guilty. The appellant did not have the opportunity to listen to the complainant and cross-examine him based on the allegations he levelled against the appellant. The principle of fair hearing was breached in this matter as one part of the two pillars of rules of natural justice- *audi alteram partem* (listen to the other side) was neglected.

---

<sup>102</sup> Ibid. p.265.

<sup>200</sup> Col Gabriel Akono v Nigerian Army 92000) 14 NWLR Pt 687, 318 323

Having pointed out the faults at the courts martial based on the breach of fair hearing of the appellants in the analysed cases, this research would look further to identify the probable reasons for such faults and what should be done to avoid repeating them in the future. One central reason why many court martial presidents and members conclude trials and convict many accused persons even when it is obvious that their right to fair hearing was breached, appears to be the fear of not being promoted or the fear of retirement. This situation may not be obvious for non-military personnel. Every military officer has a maximum of 35 years to serve<sup>201</sup> subject to the age on rank. There are age ceilings attached to every rank and on reaching that age on the particular rank, such an officer will be retired.<sup>202</sup> Every officer has three chances to be presented for promotion on a particular rank and if he doesn't get promoted at the third attempt, he would be retired.<sup>203</sup> Yearly personal evaluation reports and exams in certain situations and courses are used in considering an officer for promotion.<sup>204</sup> The personal evaluation report<sup>205</sup> is usually written by an officer's immediate commander and reviewed by a higher commander. The immediate commander scores his officer on several attributes based on his performance in that particular year. It is a condition precedent for any officer to be promoted. Convening officers of courts martial appoint officers under their command as president, members and judge advocate of the courts martial. The same convening officer is usually the one to write the personal evaluation report of those officers or he reviews their reports, depending on their ranks and the units they are serving in. Considering the importance of the personal evaluation report to be

---

<sup>201</sup> Armed Forces of Nigeria Harmonised Terms and Conditions of Service for Officers 2012 (Revised), p.86.

<sup>201</sup> Ibid.p. 9.

<sup>203</sup> Ibid.p.59.

<sup>204</sup> Ibid.pp.54-60.

<sup>205</sup> Form NA 2077A (Revised) 2006.

written or reviewed by the convening officer to the promotion of the officers, in some cases, they are usually very careful not to give a verdict that the convening officer will not like.

In the case of *Nigerian Army v Lt Col AO Peters*<sup>206</sup>, all the members of the court martial and the judge advocate were compulsorily retired shortly after the case for returning an unsatisfactory verdict.<sup>207</sup> The court martial discharged and acquitted the accused officer in that case and the members paid the prize with their careers. That incident which is a typical example of terrible command influence is still fresh in the memory of many officers.

The economic situation in the country does not also help matters in this regard. Many retired officers find things difficult especially if they did not have the opportunity of holding lucrative appointments like defence attaches, being seconded to the United Nations Headquarters etc while in service. Many officers find it difficult to build their own house while in service and therefore dread retirement. A clear example of how some officers fear to be retired was demonstrated in 2013 when 51 senior Army officers were retired from service. In the words of Soriwei, while reporting on the reaction of the senior officers who were retired then, he wrote:

The recent retirement of 51 top officers of the Nigerian Army has caused a raging controversy as those affected have indicated their reluctance to pull out of the service. The affected officers had written to the Army Council to appeal for service extension but their appeals were turned down by the council. Some of the affected officers had written to the council to appeal for extension in order to use the extra period to build their own houses. The 51 retired officers include 12 Major Generals, 24 Brigadiers Generals and 15 Colonels.<sup>208</sup>

---

<sup>206</sup>Nigerian Army v Lt Col AO Peters (Unreported), Popoola, O. (2011) Limiting Command Influence in Military Trials. *The Military Lawyer*, Abuja, Directorate of Legal Services (Army) Vol 5.p.105.

<sup>207</sup>Popoola, O., op cit. p.99.

<sup>208</sup>Soriwei, F. Why Generals are Reluctant to Leave Army-Investigation. In: *Punch Newspaper*. Saturday, 5 January 2013.p.8.

The above situations are pointers to the fact that many officers may not want to sacrifice their careers by not allowing command influence in courts martial where they participate. The fear is real and more obvious to serving military personnel. That does not mean that there are no courts martial where convening officers do not interfere with the proceedings of the court. That does not also mean that there are no officers who would stake their careers to ensure that the right thing is done. The percentage of this category of officers is however not high.

## CHAPTER FOUR

### AN ASSESSMENT OF COURT MARTIAL CASES UPTURNED ON APPEAL ON GROUNDS OF LACK OF DILIGENT PROSECUTION AND OTHER REASONS

#### 4.1 INTRODUCTION

The word ‘diligent’ is defined as “careful, attentive; persistent in doing something”<sup>209</sup> while prosecute is “to institute and pursue a criminal action against a person.”<sup>210</sup> The Rules of Professional Conduct provides that “it is the duty of a lawyer to devote his attention, energy and expertise to the service of his client and, subject to any rule of law, to act in a manner consistent with the interest of the client.”<sup>211</sup> Lack of diligent prosecution as used by courts mainly refers to situations where the plaintiff has been absent when his case is called for some periods without showing cause or when the plaintiff did not file his brief of argument within time or did not file it at all.<sup>212</sup>

In terms of criminal prosecution, the Supreme Court used the word ‘dilatatory’ to define lack of diligent prosecution.<sup>213</sup> That is when the prosecution has been slow to act or acts in a way that is intended to cause delay. In this research however, lack of diligent prosecution is not limited to delay or non-appearance of the prosecution but includes all acts of the prosecution that showed that he was not careful and did not show enough skill or diligence which caused

---

<sup>209</sup>Garner, B.A. Black’s Law Dictionary Ninth Edition, West Publishing Company, Dallas, USA. 2004, p.523.

<sup>210</sup>Ibid.p.1341.

<sup>211</sup>Rule 14, Rules of Professional Conduct for Legal Practitioners 2007.

<sup>212</sup>Ekpeto v Wanogho (2005) MJSC 67.

<sup>213</sup>Abiodun Odeiran v The State (2006) 18 NWLR Pt 1012, 87.

appellate courts to overturn the judgment of the court martial. The Supreme Court in the recent case of *Adelu v State*,<sup>214</sup> while lamenting on the unseriousness of some lawyers commented: (by Ngwuta J.S.C) that “the facts of this case constitute a sad commentary of the over confident attitude exhibited by some trial lawyers. In a trial in court, a lawyer who takes anything for granted does so at the expense of his client.” In this work therefore, lack of diligent prosecution includes situations as described by the Supreme Court above. The client of the prosecution in court martial cases is usually the Nigerian Armed Forces who suffer in different ways when the prosecution takes anything for granted. They are situations when the prosecution did not prove its case beyond reasonable doubt, when the prosecution relied on evidence of co-accused and the court martial relied on it to convict the accused person. Other situations include, when the prosecution did not tender the main documents that formed the crux of the matter and joint trial of separately charged accused persons. A situation when a court martial convicted an accused person on the basis of suspicion is also included under this purview as this is an indication that the prosecution did not provide concrete evidence for the court to rely on. These issues contributed to the overturning of about 10 court martial cases by appellate courts in Nigeria during the period covered by this research.

This chapter therefore sets out to examine those actions or inactions of the prosecution in courts martial within the period under review that were interpreted by appellate courts as not being diligent and caused such court martial judgments to be overturned. These actions and inactions are examined with a view to avoiding such pitfalls by the prosecution in future courts martial.

---

<sup>214</sup>(2014) 13 NWLR Pt. 1425, 465 472.



#### 4.2 LACK OF PROOF BEYOND REASONABLE DOUBT

In criminal cases which are the major pre-occupation of courts martial, the standard of proof is beyond reasonable doubt although not beyond all shadow of doubt.<sup>215</sup> The Supreme Court in explaining what proof beyond reasonable doubt in a criminal matter held in the case of *Igbele v State*<sup>216</sup> that:

In criminal proceedings, the accused is constitutionally presumed innocent until the contrary is proved by the prosecution. The onus of proof is on the prosecution in a criminal case and does not shift. The accused therefore need not utter a word in his defence in a criminal trial against him. He may remain silent or mute and can still win the case against him at the end of the day. The burden throughout in the criminal trial is on the prosecution to prove the guilt of the accused.

The Supreme Court also held in the case of *Idowu v The State*<sup>217</sup> that suspicion, no matter how grave it may be, cannot found a conviction.

It is also trite that if there is any doubt in the prosecution's case, it must be resolved in favour of the accused.<sup>218</sup> There have been situations where the prosecution has done shoddy jobs at the courts martial leading to the nullification of convictions passed by such courts.

In the case of *Cpl Segun Oladele & 22 Others v The Nigerian Army*<sup>219</sup> the 23 soldier-appellants in this case were wounded Nigerian ECOMOG soldiers who served in Liberia and Sierra Leone. They were referred from Military Hospital Yaba, Lagos to Hassabo Hospital,

---

<sup>215</sup>Agbo v State (2006) 6 NWLR Pt. 977, 545.

<sup>216</sup>(2006) 6 NWLR Pt. 975, 200.

<sup>217</sup>(1998) 11 NWLR Pt 574, 354.

<sup>218</sup>Onuoha v State (1998) 5 NWLR Pt. 548, 118.

<sup>219</sup>(2004) 6 NWLR Pt. 868, 166.

Cairo, Egypt for further treatment. While in Egypt, the appellants claimed that the medical treatment which they received in Egypt was grossly inadequate and that they were not paid their estacode and were subjected to untold hardship which prompted them into protesting.<sup>220</sup> They were returned to Nigeria and arraigned before a GCM on three count charges of mutiny, punishable under Section 52(2) of AFD No 105, 1993 (as amended). The second charge was conduct to the prejudice of service discipline punishable under Section 103 of AFD and disobedience to particular order, punishable under Section 56(1) of the AFD. They were all found guilty and sentenced to different terms of imprisonment.<sup>221</sup>

The major problem with the case was that the prosecution did not prove its case beyond reasonable doubt. PW5, a Colonel who was a star witness in the case in his evidence said that “he did not see the appellants commit the offence and that it was only reported to him.”<sup>222</sup> The Court of Appeal while allowing the appeal and based on the testimony of this witness in part held that “it has not been shown that the appellants disobeyed any order deliberately nor did they use any violence.”<sup>223</sup> The witness further stated that some of the appellants went out of the hospital in Cairo to other hospitals for medical treatment in protest of not receiving good medical attention in Hossado International Hospital to which they were taken to. He however stated that he never kept the record of such persons. On this point, the Court of Appeal held that “this was a piece of allegation calling for strict proof beyond reasonable doubt.”<sup>224</sup> The court further held that “having failed to establish or show an existing written or oral order which the appellants

---

<sup>220</sup>Ibid.p.168.

<sup>221</sup> Ibid.

<sup>222</sup>Ibid.p.180.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

allegedly disobeyed, it was submitted that no person shall be charged or convicted for an offence which he is incapable of committing at the time it was alleged to have been committed<sup>225</sup>” From the pronouncement of the Court of Appeal on this matter, it was obvious that the prosecution did not prove the case beyond reasonable doubt, yet the GCM went ahead to convict and sentence the appellants.

In the case of *Lt Col Iberi v Attorney General of the Federation*,<sup>226</sup> the court made it clear that the court is under duty to discharge an accused person if the prosecution, at the close of its case has not proved the essential ingredients of the offence. There is however the erroneous belief among some court martial members that the mere fact that a service personnel is arraigned before a court martial is an indication that he should not be set free. Some see it as a sign of weakness to free an accused person. This kind of erroneous belief discourages some prosecutors from working very hard to ensure that all the ingredients of an offence are proved beyond reasonable doubt. The effect is the numerous cases upturned on appeal for the failure of the prosecution to prove them beyond reasonable doubt. A case that does not deserve to be prosecuted should not be brought to court martial at all. If courts martial discharge and acquit accused persons whose offences were not proved at courts martial, it would make more prosecutors to work harder and thereby save the Armed Forces the huge embarrassment it faces by the outcome of the judgments of many courts martial at appellate courts.

In the case of *Lt Cdr Ben Ofuani v The Nigerian Navy and Nigerian Navy Board*<sup>227</sup> the judgment of the court martial that tried the appellant was nullified on appeal based on wrongly

---

<sup>225</sup> Ibid.

<sup>226</sup>(2014) 5 NWLR Pt.1401, 610.

<sup>227</sup>(2007) 8 NWLR Pt. 1037, 470.

drafted charges and lack of proof of those charges. In the matter, the appellant was arraigned before a GCM at NNS Oloku, Apapa Lagos on two count charges of sexual relationship with a service personnel's spouse and scandalous conduct contrary to Section 79 and 91 of AFD 105 of 1993 respectively. The GCM discharged and acquitted the appellant on count one and convicted him on count two. The main ingredient of the charges is having carnal knowledge of a rating's wife. The Court of Appeal held that "the prosecution did not read the words of Section 91 of AFD before laying the charge in count two." The court stated further that the prosecution added unnecessary surpluses in the charge and failed to prove them. For instance, in the charge of scandalous behaviour, the prosecution added penetration and having carnal knowledge of the woman as particulars of the offence. The court in what seems to be an advice for prosecutors in courts martial stated that "a person can be found guilty of scandalous behaviour if he defecates in the public. In the circumstances of this case, merely entering the inner chambers of accuser's house with the accuser's wife with or without carnal knowledge would be sufficient."<sup>228</sup> The court further stated that he needed not to have carnal knowledge of the woman nor was penetration required. This problem was caused by lack of diligence on the part of the prosecution who did not stick to the words provided by the statute in drafting the particulars of the offence. For scandalous behaviour of an officer, what is required to be included in the particulars of the offence should not require any technicality to prove. As rightly observed by the Court of Appeal, all that is required is any conduct that is unbecoming of the character of an officer and a gentleman. Adding ingredients that make up another offence that is more difficult to prove simply makes it difficult to secure a conviction and if the court martial convicts based on such error, the possibility is that it will be overturned on appeal.

---

<sup>228</sup>Ibid.p.475.

The same problem of lack of proof beyond reasonable doubt was experienced in the case of *Ex WO Aloysius Idakwo v The Nigerian Army*.<sup>229</sup> In the matter, the appellant was arraigned before a GCM on two count charges of offences in relation to public and service property punishable under Section 66(a) of the AFD 105 of 1993. He was alleged to have fraudulently misapplied Flag Staff House telephone number in receiving personal fax messages from Israel. The second count was attempt to commit military offence punishable under Section 95 of the same Decree. The particulars of the offence were that he, at Lagos gave price list for international calls in respect of lines to LCpl Sunday Adebisi for the purpose of commercializing the telephone lines.<sup>230</sup> While allowing the appeal, the Court of Appeal observed that the prosecution did not prove the first count beyond reasonable doubt and did not properly draft the second count. For the first count, the court held that “there was no fax message presented before the GCM to prove that the appellant received fax messages from Israel.”<sup>231</sup> For the second count, the court held that “Section 95 of the AFD did not create an offence but referred to another substantive offence in the Decree of which the appellant must have attempted to commit. Charging the appellant on the Section simpliciter makes it an offence not known to law.”<sup>232</sup> It is important to observe that in this case also, the GCM did not heed the advice of the Judge Advocate. He spelt out the legal requirements of the offences. It was his submission that the ingredients of the offences were not proved, especially in respect of the second count as the prosecution did not tender evidence to show that the price list was in respect of the mentioned

---

<sup>229</sup>(2004) 2 NWLR Pt 857, 249.

<sup>230</sup>Ibid.p.251.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

five telephone lines.<sup>233</sup> The result of the GCM's refusal to listen to the advice of the Judge Advocate was the acquittal of the accused warrant officer on appeal. It therefore remains very important that the prosecution should always be diligent in the task of proving its cases beyond reasonable doubt and the GCM should not hesitate to discharge an accused person when the reverse is the case.

The problem of lack of proof beyond reasonable doubt was equally experienced in the case of *Maj Suleiman Yekini v Nigerian Army*.<sup>234</sup> In that case, the Court of Appeal held that the appellant was convicted on the basis of suspicion and the prosecution failed to prove most of the ingredients of the offence. It went further to hold that suspicion no matter how strong or how grave can never take the place of legal proof. One of the offences was aiding and abetting and the court held that knowledge was an essential ingredient of the offence which the prosecution failed to establish. The appellant was therefore discharged and acquitted on the basis of this lack of diligence on the part of the prosecution among other faults.

The case of *Lt Col Gbolawole Femi Majekodunmi v Nigerian Army and the Attorney General of the Federation*<sup>235</sup> was another example where the Court of Appeal discharged and acquitted the appellant based on lack of proof beyond reasonable doubt. In the matter, the appellant, who was a Lt Col in the Nigerian Army gave a mechanic a military vehicle assigned to him to repair in Ibadan, after which he was told to test drive it to Lagos in company of the appellant's relative to bring his family from Lagos. The mechanic picked three passengers on the way and also showed the Nigerian Army identity card of the appellant bearing his picture as a

---

<sup>233</sup> Ibid.

<sup>234</sup>(2002) 11 NWLR Pt 777, 127 131.

<sup>235</sup>(2002) 16 NWLR Pt. 794, 451.

major while he was a Lt Col at that time. He was arraigned on three count charges of making away with military vehicle contrary to Section 61(1)(c) of the AFD 1993 in that at Ibadan on 10<sup>th</sup> February 1996, he gave a military vehicle number NA 950594 issued to him for use for military purpose to a civilian.<sup>236</sup> The second charge was making away with a military document contrary to Section 68(1)(c) of AFD 1993, in that he gave away his military identity card Number 030562 to a civilian... for unlawful purpose. Count three was on permitting improper carriage of persons in a service vehicle without lawful authority contrary to Section 74(c) of the AFD 1993.<sup>237</sup> The particulars of offence were that he, being in command of the vehicle, carried on board the vehicle, persons not being his immediate dependants or members of the Armed Forces.

The GCM found the appellant guilty on the three count charges and sentenced him to two years imprisonment on each count. On the ingredients of improper carriage of persons in a service vehicle, the Court of Appeal held among others that to find an accused guilty of this charge, he must be in physical command of the service vehicle..and that he must have carried another person or persons, not his dependants or not a member of the Armed Forces.<sup>238</sup> On the other hand, Section 68(1)(c) of the AFD makes negligence or causing damage to the service property as essential ingredients of the offence. The court therefore held that the prosecution did not establish any act of negligence and damage to the property. It held that in the circumstance, the offence alleged against the accused person was not established.<sup>239</sup> On the issue of identity card, it was established that the appellant did not give it away but that the mechanic took it away

---

<sup>236</sup>Ibid.p.453.

<sup>237</sup> Ibid.

<sup>238</sup>Ibid.p.456.

<sup>239</sup>Ibid.p.455.

from the car without the knowledge of the appellant. So the issue of giving away his identity card could not be sustained.

Considering the way the Court of Appeal felt about this case and some others from courts martial, Oguntade J.C.A as he then was held:

It is really worrying that in a case as plain as this, where the observance of elementary principles of justice ought to have led the GCM to return a verdict of not guilty, the GCM found the appellant guilty. In the process, the career prospects of the appellant, a Lt Col at that time of his trial were needlessly ruined. Perhaps, it is not out of place to say here that those called upon to conduct these trials should very carefully consider the ingredients of an offence under the Armed Forces Decree before rail-roading their colleagues into prison and ruination in very undeserving situations.<sup>240</sup>

A close study of this case shows that the prosecution framed the wrong charges and was unable to prove the charges. In terms of military identity card for instance, the practice is that when a service personnel is promoted, he changes the old identity card and gets a new one. The personnel must however submit the old identity card. If it has been lost, he has to produce a police report and an affidavit as evidence. Not submitting the old identity card before getting the new one could have been an offence if there was no evidence of loss. The person who issued such new identity card if there was no evidence of loss would have been charged with conspiracy if the necessary ingredients of meeting of minds to commit an illegal act, was established.

One very important question to ask following this kind of case is why should a prosecutor take this kind of case to GCM when it looked porous and most unlikely to be proved beyond reasonable doubt. Experience shows that command influence plays a role in this circumstance to the extent that the prosecutor is under obligation to do his best to prove the case beyond

---

<sup>240</sup>Ibid.p.467.



reasonable doubt. The prosecutor may equally be comforted that the GCM may still find the accused guilty even if he does not prove the case and thirdly and most importantly, some of the cases are badly investigated. In the instant case, getting to establish the reason why the appellant still had his old identity card in his car may have assisted the prosecutor to consider other options if he must prosecute. In line with the problems of investigation as one of the reasons why some cases are not proved beyond reasonable doubt, a Judge of the Federal High Court observed that “the other important point is the issue of investigation. I think the Armed Forces need to invest in investigation and actually retrain the investigators so that they will bring the necessary ingredients to ground an offence”<sup>241</sup>

It is therefore necessary that investigations are properly done and prosecutors get properly trained. It is not also compulsory that all cases must be prosecuted at the court martial. It is better that a case that is not worthy of being prosecuted at the court martial gets dropped or gets sorted out administratively than to spend all the time and resources to prosecute a case at the court martial only for it to be overturned on appeal with some harsh words from appellate courts to the military justice administrators as in this case.

The Court of Appeal took the same position in the case of *Lt Yakubu v Chief of Naval Staff*<sup>242</sup> while allowing the appeal against the judgment of the court martial. On the onus on the GCM to ensure that the guilt of an accused person is proved before conviction, it held thus:

The guilt of an accused person standing trial must be proved beyond reasonable doubt before a conviction based on any offence under the Armed Forces Decree can be made. Those heading General Courts Martial to try their colleagues in the Armed Forces must ensure that allegations of crime against them are proved properly, that is, beyond reasonable doubt before convicting them. In the instant

---

<sup>241</sup>Ajoku, P.I. (2013) *Military Lawyer Journal*, Abuja, Directorate of Legal Services (Army) Vol 4.p.153.

<sup>242</sup>Yakubu v Chief of Naval Staff (2004) NWLR Pt. 853, 94

case, the prosecution did not discharge her duty of establishing the guilt of the appellant beyond reasonable doubt.<sup>243</sup>

It is suggested that in addition to other measures, there should be court martial law report. This will make it possible for decisions of courts martial to be published and studied for the purpose of drawing lessons for future court martial members to learn from the mistakes of the previous ones.

In the case of *Nigerian Navy v Lt Cdr SA Ibe Lambert*,<sup>244</sup> the main issue for the prosecution to prove was not proved, yet she was found guilty by the GCM that tried her. In the matter, the respondent (a lady) was arraigned before a GCM on a five count charge. She was discharged and acquitted on four of the counts and convicted on one count of disobedience to standing orders contrary to Section 57(1) of the AFD 105 of 1993. She appealed to the Court of Appeal which allowed the appeal, discharged and acquitted her. The Nigerian Navy appealed to the Supreme Court. The particulars of the offence were that the lady travelled to Paris and London contrary to the standing order. However, the standing order with reference number DHQ/401/13/ADM dated 3 July 1995 prohibited military officers from unofficially visiting foreign missions as it was termed to be unethical and embarrassing. The order which was signed by Cdr I Ogohi (as he then was) for the Chief of Naval Staff had visit to foreign missions as the main offence and not visit to foreign countries.<sup>245</sup> The Supreme Court held that an essential element in the case against the respondent was that she personally visited foreign missions. The statement by her that her husband obtained the visas with which she travelled could not be relied

---

<sup>243</sup>Ibid. 119.

<sup>244</sup>(2007) 11 MJSC 1.

<sup>245</sup>Ibid.p.5.

upon by the appellant as evidence that she had herself visited any foreign mission.<sup>246</sup> While the GCM felt that the statement of the lady, accepting that she travelled abroad was an admission that she visited a foreign mission, both the Court of Appeal and Supreme Court felt otherwise hence her conviction was quashed. The Supreme Court dismissed the appeal as unmeritorious.<sup>247</sup>

It appeared that the prosecution in this matter was not careful in interpreting the ingredients of the offence hence the decision of both the Court of Appeal and the Supreme Court. The fact that someone got a visa in the husband's name through the husband's business partners does not mean that she visited the foreign mission. The question is, is it possible for her to obtain the visa without visiting the embassy of the country of visit? If no, was there any credible evidence which indicated that she was physically at the embassy? If there was no evidence to substantiate the charge that she personally visited the embassy, it was obvious that the conviction based on that would be overturned. This problem equally relates to investigation and the ability of the prosecutor to distinguish facts and situations before prosecuting. It is always necessary to confirm the exact ingredients of an alleged offence and ensure that investigation has been able to substantiate it before approaching the court martial or any court at all for prosecution. If the prosecution is not convinced that the investigation can sustain the charge, it is always better to send the matter back to be reinvestigated or not to prosecute at all instead of the matter ending like the instant case. It requires the courage of the Legal Officer to convince the convening authority with available facts that the case is not worthy of prosecution.

---

<sup>246</sup>Ibid.p.8.

<sup>247</sup>Ibid.p.9.

#### 4.3 RELIANCE ON EVIDENCE OF CO-ACCUSED

The Supreme Court of Nigeria defined a co-accused as “a person who has his own purpose to serve. The evidence of such a witness must be suspect and regarded with considerable caution”<sup>248</sup> It is therefore obvious that the evidence of a co-accused is not what the prosecution should advance and have confidence that it would ground a conviction. In the case of *State v Sqd Ldr OT Onyeukwu*,<sup>249</sup> the Court of Appeal overturned the judgment of the court martial based on reliance on the evidence of a co-accused in convicting the appellant. The Nigerian Air Force then appealed the judgment of the Court of Appeal to the Supreme Court, which equally dismissed the appeal in favour of the respondent mainly because of the reliance placed on the evidence of a co-accused to convict the respondent.

This case was among the Nigerian Air Force cases wherein nine Air Force officers were tried and convicted at a GCM on account of stealing and receiving stolen property. In this appeal at the Supreme Court, contrary to all others, the appeal by the State (Nigerian Air Force) was dismissed. The respondent was arraigned before a GCM on nine count charges which included conspiracy to defraud contrary to Section 422 of the Criminal Code, stealing and receiving stolen property contrary to Section 66(a) and (b) of AFD 105 of 1993. Others were conspiracy to commit official corruption contrary to Section 98(2) of the Criminal Code and illegal possession of firearm contrary to Section 28(1) of Firearms Act 1958.<sup>250</sup> He was found guilty on seven counts and sentenced to various terms of imprisonment and ordered to pay some amount of

---

<sup>248</sup>Ononuju v State (2014) 8 NWLR Pt 1409, 345 351.

<sup>249</sup>(2004) 14 NWLR, Pt 893, 340.

<sup>250</sup>Ibid.p.342.

money by way of restitution. The convictions, sentences and order of restitution were confirmed by the confirming authority.<sup>251</sup>

On whether confession of an accused person can be used as evidence against a co-accused as in the instant case, the Supreme Court held thus:

A confession of an accused person is not evidence against a co-accused but it is a relevant fact against only the maker by virtue of Section 27(3) of the Evidence Act. However, if the confession was made by a person in the presence of one or more persons with whom he is jointly charged and such other persons adopted his statement by words or conduct, then it becomes a relevant fact against them. In the instant case, exhibit 13, the confessional statement of the 6<sup>th</sup> accused person was not evidence against the respondent.<sup>252</sup>

The court equally held, with respect to whether evidence of accused person is admissible for or against co-accused that:

The evidence of an accused person in a criminal trial cannot be received as evidence either for or against another accused person, the reason being that otherwise, there would be great danger that one accused person would be tempted to exculpate himself at the expense of his co-accused. Thus, a statement of an accused person cannot be used as evidence against aco-accused, without corroboration. The evidence when not corroborated goes to no issue. And neither the evasiveness nor the brazen lies of a co-accused would be an excuse for the prosecution to assume that the case has been proved beyond reasonable doubt.<sup>253</sup>

The judgment of the Supreme Court in this matter appears to show that the prosecution at the court martial was not diligent enough to secure other pieces of evidence instead of relying solely on the statement of a co-accused for the prosecution of the respondent. The concurrent decision of both the Court of Appeal and the Supreme Court in the matter should serve as a lesson for prosecutors at courts martial and indeed in other courts. This is also a pointer to the fact that the investigation left a gap. The investigators ought to do a thorough job and get necessary statement

---

<sup>251</sup>Ibid.p.343.

<sup>252</sup>Ibid.p.349.

<sup>253</sup> Ibid.

from vital witnesses before recommending the case for prosecution. It is equally the duty of the prosecutor to review the investigation file of a case he is going to prosecute and advise the convening officer on whether it is properly investigated or not. If it is not properly investigated, he ought to return the case file to the investigator with a memorandum, pointing out the deficiencies or pointing out unanswered questions. This would naturally ginger the investigator into doing a more thorough job.

#### 4.4 MAIN DOCUMENTARY EVIDENCE RELIED ON NOT TENDERED IN COURT

Documentary evidence, be it primary or secondary is a vital means of proving a case when such document is central to the matter. If a document is vital for proving a case beyond reasonable doubt, it becomes very important that such a document should be tendered in evidence. In the case of *Brig Gen Anyankpele v The Nigerian Army*,<sup>254</sup> one of the reasons why the Court of Appeal overturned the judgment of the court martial on the matter was that the main documentary evidence was not tendered in court. In the matter, one of the charges against the appellant was disobedience to standing orders contrary to Section 57(1) of the AFD 105 of 1993. On the ingredients of standing orders as provided by the Decree, the Court of Appeal while allowing the appeal held inter alia that:

Knowledge of the order is of essence. The combined effect of Section 283, 284 and 254(7) of the Decree is that evidence must be adduced at the trial to prove that the order was published in the sense that the receipt of same was acknowledged in writing and copies of same posted at recognized places to make it binding on officers and soldiers under the command of the commanding officer. Evidence must be adduced at the trial to prove that the order was published. There was no evidence to show that the said order was published.<sup>255</sup>

---

<sup>254</sup>(2000) 13 NWLR Pt 684, 209.

<sup>255</sup>Ibid.p. 223.

The prosecution argued that the court martial ought to take judicial notice of the standing order. The Court of Appeal stated further that “it is settled in our jurisprudence that the duty of a court, tribunal or any adjudicating body is to limit itself to the evidence before it and not go fishing for evidence”<sup>256</sup> The standing order being referred to, was so fundamental that the prosecution ought to have tendered it in evidence. It was lack of diligence for the prosecution to believe that the court could convict when the main document that the charge was based on was not tendered. Even as the court martial convicted the appellant, it was just a matter of time for such a conviction to be reversed. It is therefore a lesson for prosecutors at courts martial to be diligent and ensure that they gather and tender all necessary documents that would help in proving the case beyond reasonable doubt. The prosecution should not plead judicial notice of such a vital document even if the court ought to take judicial notice of it. It is better to ensure that all vital pieces of evidence are tendered to avoid the kind of decision the Court of Appeal reached in this matter.

#### 4.5 **JOINT TRIAL OF SEPARATELY CHARGED ACCUSED PERSONS**

It is trite that the basis of trial of an accused person is the charge sheet. It is equally obvious that joint charge is allowed in law but what is not allowed is to jointly try accused persons who are not jointly charged. This anomaly was one of the major reasons why the Court of Appeal overturned the judgment of the court martial in the case of *Yakasai v Nigerian Air Force*.<sup>257</sup> In the case, the appellant who was a Squadron Leader in the Nigerian Air Force was

---

<sup>256</sup> Ibid.

<sup>257</sup>(2002) 15 NWLR Pt 790, 294.

arraigned together with eight other officers who were each separately charged.<sup>258</sup> He was convicted and sentenced on a count of civil offence contrary to Section 422 of the Criminal Code and punishable by virtue of Section 114 of the AFD 105 of 1993, in that he conspired with the 3<sup>rd</sup> accused officer to defraud the Nigerian Air Force.<sup>259</sup> While allowing the appeal, and while restating the position of the law on propriety or otherwise of joint trial of accused persons who were separately charged, the Court of Appeal held that:

When it is intended to try more than one accused person jointly, there must be a joint charge. It is impermissible to try jointly persons separately charged. There are rules in criminal law governing the treatment to be accorded to the evidence of a co-accused which incriminates the other accused person or persons. There are also rules of practice in criminal law as to the treatment of the evidence of accomplices and the necessity for corroboration...Therefore, to jointly try persons separately charged is bound to create complications which could not be overcome without doing a grave injustice to the persons being tried jointly. It was a mistrial which ought to be pronounced a nullity and set aside. The error completely vitiated the trial.<sup>260</sup>

This was the same problem in the case of *Lt Col Ahmed Dayo Karim v Nigerian Army*<sup>261</sup> wherein the appellant was jointly tried with eight other persons who were separately charged. The Court of Appeal held that “what happened in this instant case...is scandalous and a clear travesty of justice. It is a blatant departure from all known practices and procedures governing criminal trials. This is another reason why the trial of the appellant before the GCM must be pronounced a nullity.”<sup>262</sup>

Joint trial of accused persons who are not jointly charged equally has a problem of jurisdiction but this research is discussing it under lack of diligent prosecution. This is because in

---

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.p.297.

<sup>260</sup> Ibid.p.302.

<sup>261</sup> *Lt Col Ahmed Dayo Karim v Nigerian Army* (2002) 4 NWLR Pt. 578, 716.

<sup>262</sup> Ibid.p. 734.



addition to the effect on jurisdiction, it shows that the prosecution failed to do his duty of properly drafting the charges and ensuring that those to be jointly tried are jointly charged. Though the GCM in both cases convicted the appellants, it does not exonerate the prosecution from being the major cause of the problem. The issue was no more whether the accused committed the alleged offence but the problem of wrong procedure. It is however believed that any prosecutor who reads the outcome of these trials at appellate courts would not repeat such an error in a future trial.

#### **4.6 OTHER REASONS THAT LED TO UPTURNING OF COURT MARTIAL JUDGMENTS**

Aside problems of jurisdiction, fair hearing and diligent prosecution, there are some other reasons that have led to upturning of court martial judgments in Nigeria by appellate courts. They include unsigned judgments, no reason given for judgment, misapplication of the Public Officers' Protection Act and confirming authority substituting a lower punishment with a harsher one.

##### **4.6.1 Unsigned Judgment**

The Constitution provides that “every court established under this constitution shall deliver its decision in writing and furnish all the parties to the cause or matter determined with duly authenticated copies of the decision within seven days.<sup>263</sup> The Court of Appeal took this provision into account when it upturned the judgment of the court martial in the case of *Yakubu v Chief of Naval Staff*.<sup>264</sup> The court also considered the provision of Section 245 of the Criminal Procedure Act, 1990 which provides that “the Judge or Magistrate shall record his judgment in

---

<sup>263</sup>Section 294(1) Constitution of the Federation of Nigeria 2004.

<sup>264</sup>*Yakubu v Chief of Naval Staff* (2004) 1 NWLR Pt.853, 94.

writing and shall be dated and signed by the Judge or Magistrate at the time of pronouncing it.”<sup>265</sup> Based on the aforementioned, the Court of Appeal held thus: “Therefore signing and dating of a judgment of a court martial is a mandatory statutory requirement and failure by the court martial to sign and date the judgment at the time of pronouncing the verdict is void and thus rendered the entire exercise a nullity.”<sup>266</sup>

Though the appeal was allowed, it is necessary to point out a little difference from the decision of this court and the provisions of the AFA with regard to furnishing copies of judgments to parties within seven days and the issue of signing judgments as provided by the Criminal Procedure Act. The AFA provides that “ a finding of guilty or sentence of a court martial shall not be treated as a finding or sentence of the court martial until it is confirmed.”<sup>267</sup> The implication of this provision is that the judgment of a court martial when the finding is guilty is not a final judgment until it is confirmed. It is also pertinent to point out that the judgment of a court martial is contained in the record of proceedings which is a verbatim recording done by Secretariat members who are sworn in before the commencement of trial.<sup>268</sup>

The record of proceedings is made available to the person tried by the court martial. The AFA provides that “...a person tried by a court martial shall be entitled to obtain from the convening officer on demand at any time within the relevant period and on payment therefore, at such rate as may be prescribed, a copy of the record of the proceedings of the court martial.”<sup>269</sup> The Act defines relevant time as “where he was convicted, of the

---

<sup>265</sup>Ibid.p.115.

<sup>266</sup> Ibid.

<sup>267</sup> Section 148 of the Armed Forces Act Cap A20 Laws of the Federation of Nigeria 2004.

<sup>268</sup>Section 138 Armed Forces Act.Cap. A20 Laws of the Federation of Nigeria 2004.

<sup>269</sup> Section 176(2) Armed Forces Act Cap A20 Laws of the Federation of Nigeria 1999.

promulgation of the finding and sentence.”<sup>270</sup> It therefore means that the person tried by court martial is only entitled to the record of proceedings when the promulgation of the finding and sentence of the court martial is done. It cannot therefore be within seven days as prescribed by the Constitution, except the judgment is confirmed and promulgated within seven days after the trial. Rules of Procedure Army 1972 equally refers to signing of record of proceedings at the end of the trial and not just judgment. It provides inter alia: “Immediately after the conclusion of the trial, the president and judge advocate (if any) shall date and sign the record of the proceedings. The president and judge advocate shall then forward it as directed.”<sup>271</sup>

#### 4.6.2 No Reason Given by Court Martial for its Judgment

The judgment of a court contains the evaluation of evidence given by both the prosecution and the defence and the reasons why the court decided the case the way it did. While defining a good judgment, the Court of Appeal held in the case of *Ciroma v Ali* that: “A good judgment should set out the nature of the action before the court and the issue in controversy; review the cases for parties; consider the relevant laws raised and applicable to the case; make specific findings of fact and conclusion and give reasons for arriving at those decisions.”<sup>272</sup> In the case of *Brig Gen Anyankpele v The Nigerian Army*<sup>273</sup> one of the reasons why the Court of Appeal allowed the appeal was that the GCM which tried the appellant did not give reasons for

---

<sup>270</sup> Ibid. Section 176(5)(b)

<sup>271</sup> Rule 76(3) Rules of Procedure Army 1972.

<sup>272</sup> (1999) 2 NWLR Pt. 590 317.

<sup>273</sup> (2000) 13 NWLR Pt. 684, 209.

arriving at its decision. Similar to the attributes of a good judgment given in the case of *Ciroma v Ali*<sup>274</sup> the Court of Appeal also held in Anyankpele's case that:

A good judgment must contain:

- (a) A resume of the type of action or charge;
- (b) The claim or charge well set out;
- (c) A review of the totality of the evidence led;
- (d) Perception and evaluation of the whole evidence;
- (e) A consideration of the legal submissions and or arising and findings of law on them and
- (f) Conclusion

In the instant case, of a criminal matter, the plea must be recorded. If the plea is one of guilty, no issues arise for determination and consequently no evidence is required. But if the plea is one of not guilty, then all the constituent elements of the offence or offences charged are put in issue. 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.<sup>275</sup>

The expression that no court or tribunal can negotiate a non-compliance with the requirements simply makes it obligatory in the views of the Court of Appeal in this matter. However in a contradictory judgment also by the Court of Appeal in the case of *Komonibo v Nigerian Army*,<sup>276</sup> the court held that: "In pronouncing its verdict, a General Court Martial is not obliged to give reasons and this is in consonance with its jurisdiction as prescribed under Section 141 of the Armed Forces Decree No. 105 of 1993 as amended."<sup>277</sup> For emphasis, Section 141 of AFD, currently AFA provides that "without prejudice to the provisions of Section 139 of this Act, (the section states that courts martial shall sit in open court) the finding of a court martial on each charge shall be announced in open court, and if the finding is guilty, shall be announced as being

---

<sup>274</sup>(1999) 2 NWLR Pt. 590, 317.

<sup>275</sup>Anyankpele v Nigerian Army (2000) 13 NWLR Pt. 684, 209, 214.

<sup>276</sup>(2002) 6 NWLR Pt. 762, 94.

<sup>277</sup>Ibid.p.116.

subject to confirmation.” Coincidentally, Oguntade J.C.A presided in the two cases at the Lagos Division of the Court of Appeal. While the judgment in the case of Anyankpele was delivered on 5 June 2000, that of Komonibo was delivered on 10 December 2001. The other justices in Anyankpele’s case were Pius Aderemi J.C.A (read the Leading Judgment) and Amiru Sanusi J.C.A. The other justices with Oguntade J.C.A as he then was in the case of Komonibo were Suleiman Galadima J.C.A and Eneh J.C.A (read the Leading Judgment).

The same problem of judgment not containing the essential ingredients was noticed in the case of *Cpl Segun Oladele & 22 Ors v The Nigerian Army*<sup>278</sup> wherein the Court of Appeal held that :

“The requirement that a judgment must clearly demonstrate that the conclusions arrived at in the case were not based on intuition and whim of the judge but on evidence properly evaluated and the law is not an insistence on mere form, but derives from the need to ensure and demonstrate that substantial justice has been done in the case. Thus, where a court has in its judgment failed to give a fair summary of the cases presented by the parties and summarize the evidence and make findings on facts on the various material issues raised in the pleadings, he cannot be seen to have discharged his judicial function properly. In the instant case, the record of appeal has not shown a resolution of the issues presented to the Court Martial for resolution, let alone a clear resolution in the case.<sup>279</sup>

The Court of Appeal equally stressed on the need for military courts to state evidential basis for conclusions reached in the case of *Asake v Nigerian Army*. It held that:

Military courts must remember that appeals against their decisions lie to the Court of Appeal, and the facts and evidential basis for the conclusions reached must therefore be clear on the record to enable an appellate court determine whether or not it had been right in its approach to the case and the conclusions arrived at.<sup>280</sup>

---

<sup>278</sup>Oladele v Nigerian Army (2004) 6 NWLR Pt. 868, 166.

<sup>279</sup>Ibid.p.172.

<sup>280</sup>Asake v Nigerian Army (2007) 1 NWLR Pt. 1015, 408 414.

In the case of *WO Aloysius Idakwo v The Nigerian Army*,<sup>281</sup> one of the reasons for allowing the appeal was that the GCM did not give reasons for its findings. The Court of Appeal held that:

Every finding of a court or tribunal must be based on reasons and the reasons, for reaching a particular finding or conclusion must definitely be based on facts. It is therefore imperative on every court or tribunal to give reasons for its decisions or judgment. The submission by the respondent counsel, in the instant case, that the General Court Martial by virtue of Section 141(1) of the Armed Forces Decree No.105 of 1993 is not obliged to give reasons for its finding is misconceived. This is because the rules as to evidence to be observed in proceedings before a court martial, by virtue of Section 143(1) of the same Armed Forces Decree of 1993, shall be the same as those observed by criminal courts in Nigeria. Therefore, it is mandatory on a General Court Martial to give reasons for its decisions or judgment based on the facts and evidence presented before it.<sup>282</sup>

The judgment of the court martial in the case read thus; ‘WO Aloysius Idakwo, you are charged with two offences. The first one, misapplication of service property. Your second charge is attempt to commit military offence. In charge one, the court finds you guilty and in charge two the court finds you guilty.’<sup>283</sup> This was obviously not good enough to be presented as the judgment of the court martial and the Court of Appeal was justified to react the way it reacted.

Though the teaching is that where there are two contradictory judgments by the same court, that one should choose any of the two for application, this researcher is of the opinion that it is better for courts martial to give reasons for arriving at their judgments. Moreso, when the Court of Appeal in three out of the four judgments discussed above has maintained that the court martial should give reasons for its judgment. In terms of timing, the latest cases support giving of reasons. This will remove unnecessary arguments when such a decision is appealed for the fact

---

<sup>281</sup>(2004) 2 NWLR Pt.857, 249.

<sup>282</sup>Ibid.p. 252.

<sup>283</sup>Ibid.p.261.

that no reason was given for the verdict of the court martial. The judgment may not be as detailed as a judgment in a civil court but it should contain the essential ingredients of a judgment and must contain reasons for the decision.

#### 4.6.3 Misapplication of Public Officers' Protection Act

The Public Officers' Protection Act bars any redress arising out of a summary trial if it is not reported within 3 months of the dismissal of the worker. In the case of *The Nigerian Army v Warrant Officer Banni Yakubu*,<sup>284</sup> while prosecuting the appeal at the Supreme Court, the Nigerian Army, sought to use the Public Officers' Protection Act to bar the respondent from appealing the judgment of the court martial. The respondent at the Supreme Court was convicted along with another soldier. He contended that he wrote to the Chief of Army Staff for his conviction to be reconsidered but got no response. He therefore sought leave at the Court of Appeal for extension of time within which to apply for leave to appeal against the decision of the court martial, leave to appeal against the decision and extension of time within which to appeal against the decision. The appellant argued that his application was statute barred under Section 2(a) of Public Officers' Protection Act. The Court of Appeal dismissed the preliminary objection of the Nigerian Army hence it appealed to the Supreme Court.<sup>285</sup>

On whether Public Officers' Protection Act is applicable in judicial acts, the Supreme Court held that: "The provision of Section 2(a) of the Public Officers' Protection Act does not bar a relief sought in connection with an error committed purely in judicial capacity...the Act was incapable to prevent the respondent from seeking leave to appeal against the decision of the

---

<sup>284</sup>(2013) 8 NWLR Pt. 1355, 1.

<sup>285</sup>Ibid.p.4.

court martial.”<sup>286</sup> This matter was therefore mainly based on preliminary objection based on whether the matter was statute barred or not. It has therefore been made clear by the Supreme Court that in judicial matters like the appeal against the decision of a court martial, the provision of Section 2(a) of the Public Officers’ Protection Act would not apply. It is therefore better to concentrate on the main issue when time is the problem, instead of wasting so much time pursuing preliminary objection on time up to Supreme Court. It is however important to point out that this decision having been tested would guide future cases when this decision is given a wide circulation to avoid a repeat dismissal of an appeal based on this issue.

#### 4.6.4 Court Martial Awarding Sentence Beyond Stipulation of the Law

Every offence provided for in the AFA has a maximum sentence it attracts and such a sentence is specified in the punishment section of the offence. The most repeated sentence in the AFA is two years imprisonment. There is death sentence, life imprisonment, reprimand etc as punishments. It is therefore strange for a court martial to award a punishment beyond what is provided for, in the Act. This was one of the reasons for upturning the court martial judgment in the case of *Dodo v Nigerian Army*<sup>287</sup> by the Court of Appeal. The appellant was sentenced to seven years imprisonment on the first count of offence in relation to public and service property punishable under Section 66(a) of the Armed Forces Decree No 105 of 1993 which carried a maximum sentence of two years. The GCM also sentenced the appellant to seven years imprisonment on the offence of making of false documents punishable under Section 90(a) of the same Decree when the maximum punishment is two years. Though the major reason why the

---

<sup>286</sup>Ibid.p.8.

<sup>287</sup>(2007) 43 WRN 123.



Court of Appeal overturned the judgment of the court martial was that the judge advocate was from the Corps of Military Police, the Supreme Court allowed the appeal of the Nigerian Army. This was based on the fact that the judge advocate is not considered as a member of the court martial but only an adviser on points of law.

In the case of *Obisi v Chief of Naval Staff*<sup>288</sup> the Court of Appeal unanimously dismissed the appeal on conviction and allowed the appeal on sentence because the court martial gave a sentence that was beyond what was stipulated by law. The court held, on appropriate sentence for an accused convicted pursuant to Section 57(1) of the Armed Forces Decree thus:

An accused person convicted under Section 57(1) of the Armed Forces Decree No 105 of 1993 (as amended) is liable to imprisonment for a term not exceeding two years or any lesser punishment provided by the Decree. In the instant case, the court martial, sequel to its returning a verdict of guilt in each of the three counts preferred against the appellant, sentenced him on count one to 15 years imprisonment...on count two, five years imprisonment, and on count three, five years imprisonment. The sentences were far in excess of what the Decree stipulates and they ought to be reduced in conformity with the dictates of the law.<sup>289</sup>

This type of error should not ordinarily happen, because the maximum sentence is always provided and there is no way an appellate court would overlook this type of judicial rascality. It is however a lesson for future courts martial that no matter how terrible the court martial members feel about an accused person or the offence, they should not take the laws into their hands. They can however submit a bill to the National Assembly, seeking to amend the number of years stipulated for an offence and until the law is amended, court martial members must abide by the provisions of the AFA.

#### 4.6.5 Confirming Authority Substituting Lesser Punishment with a Harsher One

---

<sup>288</sup>(2002) 2 NWLR Pt. 752, 400.

<sup>289</sup>Ibid.p.407.

Beginning from the Nigerian Army Act 1960, through the Armed Forces Decree No 105 of 1993, up to the Armed Forces Act Cap A20 Laws of the Federation of Nigeria 2004, the confirming authority has always had the powers to confirm conviction and sentence or quash conviction and sentence but not to increase a sentence awarded by a court martial.<sup>290</sup> In the case of *Asake v Nigerian Army*,<sup>291</sup> the court martial sentenced the appellant to reduction in rank with three years seniority and the confirming authority substituted the original sentence with a punishment of dismissal from service.<sup>292</sup> The Nigerian Army Act under which the appellant was tried only authorized the confirming authority to substitute invalid with valid sentence, quash the finding and sentence if need be.<sup>293</sup> Reduction in rank is a valid sentence and could not have been substituted for being invalid. The AFA has however made it clearer that even if the confirming authority wants to vary a sentence awarded by a court martial, it has to be less than what was originally awarded. This substituting of sentence may have prompted the appeal in the first place. Armed Forces personnel hardly appeal court martial sentences if they are neither dismissed nor jailed. Confirming authorities are therefore supposed to be guided by the legal review from the Directorate of Legal Services of each of the services in any particular case.

#### 4.6.6 Disposition of Appellate Courts towards Court Martial Judgments

The appellate courts from our discussions are justified in majority of their decisions arising from courts martial. Aside the cases analysed in this work, there are other cases which were decided in favour of the Armed Forces at the appellate courts. It is however important to point out that there were cases in which the appellate courts appeared not to have grasped the

---

<sup>290</sup> Section 151(3) Armed Forces Act Cap. A20 Laws of the Federation of Nigeria 2004.

<sup>291</sup>(2007) 1 NWLR Pt. 1015, 408.

<sup>292</sup>Ibid. p.411.

<sup>293</sup>Section 106, Nigerian Army Act 1960.

peculiarity of the military setting. Some of them include the case of *Nigerian Army v Major Iyela*<sup>294</sup> and that of *Obisi v Chief of Naval Staff*<sup>295</sup> among others. In some instances, the appellate courts did not appreciate the peculiar nature of the workings of the military. For instance, in the case of Major Iyela, the Court of Appeal held in one of the ratios that an officer or any service personnel can arm himself without lawful authorization simply because he is in military service.<sup>296</sup> The Supreme Court went ahead to uphold the decision of the Court of Appeal in the matter without pronouncing on that aspect of the judgment, having declared it moot in the light of other issues already determined.<sup>297</sup> Even the Firearms Act made it clear that the possession of arms and ammunition by service personnel must be for official purposes. It provides that: “The provisions of this Act shall not apply to any member of the Armed Forces of the Federation, or to a member of the Police Force in relation to any firearm or ammunition issued to him for official purposes...”<sup>298</sup> It will be a dangerous trend for any military personnel to bear arms when he is not issued and he is not using it at that particular time for official purposes. It is for this purpose that armouries and magazines are provided for in every barracks for service personnel to sign for weapons when the need arises and to deposit them when they are not in use for official purposes. In this kind of instance, it would have been necessary for the Supreme Court to pronounce on this very important issue even if, as it already pointed out, the pronouncement would not have changed its final position on the appeal.<sup>299</sup>

---

<sup>294</sup>(2008) 18 NWLR Pt. 1118, 115.

<sup>295</sup>(2002) 2 NWLR Pt. 752, 400.

<sup>296</sup>Adekagun,L. (2011). Enhancing Discipline and Professionalism in Nigerian Army Through the Instruments of Court Martial in a Democracy. *Military Lawyer*. Abuja, Directorate of Legal Services (Army) Vol 5.p. 58.

<sup>297</sup>*Nigerian Army v Iyela* (2008) 18 NWLR Pt. 1118, 135.

<sup>298</sup> Section 38 Firearms Act Cap F28 LFN 2004.

<sup>299</sup>*Nigerian Army v Iyela*, op cit. p. 135.

In the case of *Obisi v Chief of Naval Staff*,<sup>300</sup> the Supreme Court described the position of the judge advocate, relative to the strict constitution of the court martial as being the same with that of a waiting member.<sup>301</sup> It took eight years for the Supreme Court to correct this impression in the case of *Nigerian Army v Dodo*,<sup>302</sup> where it pointed out that the judge advocate's role at the court martial is advisory. The waiting member replaces any member who is not sitting because he sits every day. He is not a lawyer like the judge advocate and he does not advise the court on legal matters like the judge advocate.

This problem was pointed out initially by Adekagun citing Achike that the administration of military law or justice is not an exercise easily understood by civilians.<sup>303</sup> The drafters of AFA foresaw these problems and provided a solution which has not been explored. It provides thus:

The Court of Appeal may, if it thinks it necessary or expedient in the interest of justice, appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court of Appeal that such special knowledge is required for the proper determination of the case.<sup>304</sup>

It is obvious from some of the pronouncements of the appellate courts on the cases analyzed that the actions and inactions of the prosecution caused the upturning of the cases where lack of diligent prosecution was obvious. The observed lapses in those ones and the ones whose upturning of the judgments were caused by other reasons are capable of being corrected in future courts martial.

---

<sup>300</sup>(2004) 8 MJSC 137.

<sup>301</sup>Ibid. p.146.

<sup>302</sup> (unreported) SC.290 judgment delivered on 8 July 2012.

87

<sup>303</sup>Adekagun, L, op. cit. p. 58.

<sup>304</sup> Section 188 Armed Forces Act, Cap. A20 Laws of the Federation of Nigeria 2004.

## CHAPTER FIVE

### SUMMARY AND CONCLUSION

#### 5.1 INTRODUCTION

This part of the research deals with summary, findings, recommendations and conclusion. The summary captures the major highlights of the work which will naturally dovetail into findings. The findings bring out the major problems discovered by the research which leads to recommendations that highlight ways of solving the numerous problems identified with court martial system in Nigeria.

#### 5.2 SUMMARY

This work identified that the court martial system in the Nigerian Armed Forces has been having numerous problems. These problems invariably led to the upturning of up to 70 percent of court martial cases at appellate courts in Nigeria between 1990 and 2014. The problem was more pronounced during the military regime in Nigeria. However, it has not abated as the case of *Lt Col Iberi v Attorney General of the Federation*<sup>305</sup> decided in 2014 reveals.

The research analyzed court martial cases upturned on appeal on grounds of lack of jurisdiction. The case highlighted above was upturned on appeal because officers that were junior to the accused officer were members of the court martial that tried him. This practice is contrary to the provisions of the Armed Forces Act.<sup>306</sup> The fact that this error still occurred in a case decided in 2014 portrays the need to ensure that such practice is stopped. On the issue of

---

<sup>305</sup>Lt Col Iberi (Rtd) v Attorney General of the Federation (2014) NWLR Pt 1401.

<sup>306</sup> Section 133 (3) (b) of the Armed Forces Act, Cap A20 LFN 2004.

jurisdiction, wrong constitution of court martial based on seniority of members and retrial of a condoned offence were discussed with cases where such errors were made. Other issues concerning jurisdiction as analyzed in the work include a situation where a court martial acted while *functus officio*,<sup>307</sup> convening a court martial with an unsigned convening order<sup>308</sup> and where members of courts martial were not sworn.<sup>309</sup> .

One other major reason that accounted for upturning of court martial cases at appellate courts analyzed by this research is the issue of fair hearing. Non-observance of fair hearing has remained a major problem in the administration of military justice. Some of the aspects of fair hearing highlighted in the work include situations where the court members descended into the arena,<sup>310</sup> and where the same person convened a court martial and confirmed its judgment.<sup>311</sup> There is also the issue of substitution of the charges an accused person was tried on with other ones during confirmation of the judgment of the court martial by the confirming authority<sup>312</sup> among others.

There is equally the issue of numerous cases upturned on appeal on grounds of lack of diligent prosecution. This research redefined lack of diligent prosecution to include situations where the prosecution did not do his job well and not only when he fails to attend court sittings. These situations include where the prosecution did not prove its case beyond reasonable doubt,<sup>313</sup> where the prosecution relied on evidence of co-accused for proof of its case<sup>314</sup> among others.

---

<sup>307</sup>Nigerian Army v Major Jacob Iyela (2008) 18 NWLR Pt 1118, 115.

<sup>308</sup>Bakoshi & 3 Ors v Chief of Naval Staff (2004) 15 NWLR Pt 896, 268.

<sup>309</sup>Yakubu v Chief of Naval Staff (2004) 1 NWLR Pt 538, 94.

<sup>310</sup>Nigerian Army v Col Umar Mohammed (2002) 15 NWLR Pt 789, 42.

<sup>311</sup>Anyankpele v Nigerian Army (2000) 13 NWLR Pt 684, 209.

<sup>312</sup>Lt Col Komonibo v Nigerian Army (2002) 6 NWLR Pt 762, 94.

<sup>313</sup>Cpl Segun Oladele & 22 Ors v Nigerian Army (2004) 6 NWLR Pt 868, 166.

<sup>314</sup>State v Sqd Ldr Onyeukwu (2004) 14 NWLR Pt 893, 340.

The research identified several problems that dictate the behaviour of court martial members which invariably make them to act the way they do and equally brought about the negative outcome of the court martial judgments. These problems will be discussed under findings while the suggested solutions will form part of the recommendations.

### **5.3 FINDINGS**

After a thorough analysis of the numerous problems that have led to the upturning of majority of court martial cases at appellate courts in Nigeria, the most outstanding ones are brought out as findings. Unknown to many, the most outstanding cause of negative actions of court martial members that lead to wrong decisions and which cause their being upturned on appeal is command influence. Closely linked with command influence is the fear of retirement that makes some officers to take certain actions for the sake of survival in the military system. In addition, some justices at appellate courts do not have sufficient knowledge about the military justice system thereby using certain criteria to judge certain situations in military courts which ought not to be. It is also known that those who refuse to listen to legal advice, even from the judge advocate in a court martial do not get reprimanded for wrong decisions which cause the military a lot of time, human and material resources wastes. Such acts therefore continue in certain circumstances. In terms of limited knowledge on the part of some military prosecutors, the barring of their official practice even in cases concerning their organisation limits their exposure. It is equally true that some senior military officers do not have adequate respect for legal procedures in courts martial hence the negative outcome of some of the court martial cases at appellate courts. These points would be discussed further individually.

#### **5.3.1 Command Influence is a Major Problem in Courts Martial in Nigeria**

What command influence entails has been adequately explained in this work. For the purpose of emphasis, the military is strictly hierarchical and a senior officer in the military has enormous powers to determine the advancement or otherwise of another officer under his command. This is so

91

because the commander writes the personal evaluation report for officers serving under him and what he writes about his officers is hardly challenged. Though there is a column for an officer to comment on whether he agrees with the comments of the reporting officer on him, officers written on, hardly disagree with their commanders.<sup>315</sup>

No officer would want to attract harsh comments from his commander in the evaluation report. If therefore a convening officer has an interest in a court martial case, the members of such a court martial would require extra courage to decide the case against the wish of the convening officer. If the convening officer discovers that the court may decide a case against his wish, he could dissolve the court and set up another one giving any other reason.<sup>316</sup> Command influence does not happen in all cases and there are convening officers that give courts martial free hand to decide cases the way they should be decided in the interest of justice. Where command influence exists, the outcome of such a case could be obvious. In one of the cases decided by a court martial at Lagos Garrison Command, all the members of the court martial were retired because the court discharged and acquitted the accused officer.<sup>317</sup>

---

<sup>315</sup> Form NA 2077A (Revised) 2006, p.7.

<sup>316</sup> Section 136 Armed Forces Act Cap A20 Laws of the Federation of Nigeria 2004.

<sup>317</sup> Nigerian Army v Lt Col AO Peters (Unreported), Popoola, O. (2011). Limiting Command Influence in Military Trials. *The Military Lawyer*, Abuja, Directorate of Legal Services (Army) Vol. 5 p. 99.



### **5.3.2 The Fear of Retirement by Some Court Martial Members Contributes to the Adoption of Wrong Procedures in Some Cases**

The retirement of all the members of the court martial that discharged and acquitted Lt Col AO Peters remains a threat to some court martial members. The nature of military job is such that there is hardly time for a military officer in many instances to engage in any other form of business. They therefore mainly rely on their monthly salaries for their upkeep and other requirements. It is not easy for a military personnel, especially the middle cadre personnel to build a personal house with his monthly salary.

When there is therefore a threat of retirement, many officers avoid it by all means. The military job is equally consuming to the extent that it is not easy for many military officers to seek and get other jobs easily after retirement especially with the saturated nature of Nigeria's job market. This research gave an instance in 2013 when some senior military officers were reported to have asked for extension of their service in order to build their personal houses. If senior officers would want to stay longer to build or complete their personal houses, the plight of middle cadre officers can therefore be imagined. The officers who did not hold lucrative appointments like serving outside the country with the United Nations or in Nigerian Embassies among others, find it difficult to build personal houses where they will live after retirement.

In a court martial therefore, many officers would not want anything to lead to their either being retired or their getting negative reports from their commanders who may be the convening officer. A bad report eventually leads to lack of promotion and subsequent retirement. It should be noted that it is not every convening officer or commander that negatively influences court martial members to give a judgment to satisfy their whims and caprices. Where the threat exists,

such a court martial would not likely observe fair hearing in their proceedings.<sup>318</sup> This research therefore discovered that in some instances, the fear of the consequences of the judgment of a court martial influences some members in the way they vote. The case of Lt Col Peters (Rtd) is a clear example.

### **5.3.3 Lack of Sufficient Knowledge about Court Martial System on the Part of Some Appellate Court Justices**

As earlier highlighted in this research, administration of military justice is not known by many civilians, including some justices of appellate courts. In the case of *Obisi v Chief of Naval Staff*, the Supreme Court described the judge advocate as “a legal officer whose duty is to prosecute anyone arraigned before a court martial.” It also stated that the “judge advocate is like a waiting member.”<sup>319</sup> The Supreme Court corrected these wrong assertions in the case of *Nigerian Army v Dodo*,<sup>320</sup> more than 8 years after. In the same *Dodo’s* case, the Court of Appeal held that the judge advocate in a court martial is a member of the court martial. This judgment was delivered on 27<sup>th</sup> April 2007<sup>321</sup> and it remained the law until the Supreme Court corrected it when it delivered its own judgment on 8<sup>th</sup> July 2012.<sup>322</sup> For 5 years, provost officers were not allowed to be judge advocates in courts martial based on the judgment of the Court of Appeal on the matter. This was on the assumption that a judge advocate is a member of a court martial and that a provost officer, being from a department that investigates crime, should not be a member of the court martial. With all due respect, the decision of the Court of Appeal, stating that a judge

---

<sup>318</sup>Lt Col Akinwale v Nigerian Army (2001) 16 NWLR Pt. 738, 109.

<sup>319</sup>*Obisi v Chief of Naval Staff* (2004) 8 MJSC 137, 146.

<sup>320</sup> (Unreported) SC.290/2009 delivered on 8 July 2012.

<sup>321</sup>Lt PD Dodo v Nigerian Army (Unreported) CA/L/241M/2002.

<sup>322</sup>*Nigerian Army v Dodo* (Unreported) SC.290/2009.

advocate is a member was based on lack of sufficient knowledge about court martial system in the military. It is therefore a part of the problem.

#### **5.3.4 The Inhibition of Military Lawyers to Appear in Civil Courts Reduces the Capacity of Military Prosecutors in Courts Martial**

Military lawyers are prohibited from appearing in civil courts. This prohibition includes situations where the military are direct parties in such matters, by virtue of Rule 8 of the Rules of Professional Conduct for Legal Practitioners 2007. Though contestable by virtue of the decision of the Supreme Court in the case of *The Federal Republic of Nigeria v George Osahon*,<sup>323</sup> wherein it was held that a legal practitioner called to the Nigerian Bar has a right of audience in courts provided he paid his practicing fees. Though this case was particularly decided based on the question as to whether police officers can prosecute matters in civil courts, it could be applied to military lawyers handling cases with the military. For now however, some federal parastatals like the Federal Road Safety Commission,<sup>324</sup> Economic and Financial Crimes Commission<sup>325</sup> have express authority for their lawyers to appear and prosecute their cases. While the former is through the Attorney General of the Federation's fiat,<sup>326</sup> the latter is a direct Act of the National Assembly wherein the Legal and Prosecution Unit of the Commission was created and has prosecution of offenders as its role.

---

<sup>323</sup>(2006) 5 NWLR Pt 973, 361.

<sup>324</sup> Section 12 Entitlement to Practice as Barristers and Solicitors Federal Road Safety Commission Legal Officers Order 1997.

<sup>325</sup>Section 12 Economic and Financial Crimes Establishment Act 2004.

<sup>326</sup> Section 2(3) Legal Practitioners' Act Cap L11, Laws of the Federation of Nigeria 2004.

As earlier pointed out in this work, the Chief of Army Staff authorized Nigerian Army lawyers to appear alongside its external advocates in cases concerning the Nigerian Army.<sup>327</sup> That authority does not however cover the Navy and Air Force lawyers. It is also clearly different from the Attorney General's fiat to practice which is derived from the Act of the National Assembly.<sup>328</sup> The inhibition is therefore still there and when a lawyer does not appear in court regularly, he or she gets stale. Such a lawyer can hardly be up to date in laws and methods of practice. It is therefore one of the problems that military prosecutors face that contributes to some of them not performing optimally. In a situation where a prosecutor does not do his work well, even if the court martial passes judgment in his favour, such a judgment is usually bound to be upturned on appeal.

### **5.3.5 Lack of Negative Consequence on those who Caused Court Martial Cases to be Upturned on Appeal Encourages others to do Same**

Participating in a court martial as a president, member or judge advocate is a judicial function which ordinarily should be clothed with immunity. The only time this research discovered that there was a consequence on members of a court martial pertaining to their role was the one that was not supposed to be. That was the one wherein the members were retired for being courageous to discharge and acquit an accused person who was not found wanting by the court in the case of Lt Col Peters (Rtd). This research did not see where a convening officer was

---

<sup>327</sup>NA/COAS/G1/61 dated 31 July 2014.

<sup>328</sup>Section 2(3) Legal Practitioners' Act Cap L11, LFN 2004.

sanctioned for including officers who are junior to the accused person in a court martial even when there were enough senior officers in such a location to use for that purpose.<sup>329</sup> There has not been anything obvious about the consequence of causing the military to be embarrassed at appellate courts and to this extent there has not been any deterrence.

## 5.4 **RECOMMENDATIONS**

Having highlighted the most outstanding causes of the problems bedeviling court martial cases on appeal, this research recommends five ways to reduce the problem to the barest minimum. The recommendations include insulating courts martial from command influence, the grant of the fiat for military lawyers to appear in civil courts in cases concerning the military. Others are the employment of qualified retired military lawyers as assessors at appellate courts and sanctioning officers who intentionally cause a case to be overturned on appeal.

### 5.4.1 **Appropriate Service Headquarters or the National Assembly should Insulate Courts Martial from Command Influence**

Command influence remains the most outstanding problem of the administration of military justice and particularly the court martial system in Nigeria. If command influence is removed from the court martial system, appellate courts will have no cause to overturn majority of the cases decided by courts martial. This research suggests three major ways to check command influence in courts martial. Insulating courts martial from command influence could be achieved by making courts martial members not to be under the command of the convening authority. To

---

<sup>329</sup>Okoro v Nigerian Army Council (2000) 3 NWLR Pt 647, 77.

this extent, it is recommended that court martial members should be selected from outside the command of the convening officer. For instance, officers serving in 1 Division should be selected to make up a court martial set up by 3 Division.

It is also suggested that the personal evaluation report of the members of the court martial should be written by the commander of their main unit. Officers should be selected for membership of courts martial in a way that they would have merited the personal evaluation of the year in their unit before being selected for membership of courts martial in other formations. Amending the Armed Forces Act to make a way for courts martial to be headed by a high court judge, serving or retired is another way of solving this problem. This can be done by proposing a bill to that effect to the National Assembly which should in turn pass the amendment into law. If a civil judge is picked to adjudicate in court martial cases, no military commander will easily intimidate a civilian judge. The judge can also do the job as a vacation job or like an election tribunal judge who leaves the court of his primary assignment to adjudicate over election matters for some time. If this is done, command influence in courts martial will be reduced to the barest minimum.

Ghana Armed Forces has achieved this to some extent by making the appointment of the Judge Advocate General to be done by the Chief of Ghana Armed Forces in consultation with the Chief Justice of Ghana. The appointment and removal of the Judge Advocate General are not within the powers of the military authorities, though he is equally responsible to them in military

matters.<sup>330</sup> It is similar to what is obtainable in the United States of America where there is also the Judge Advocate General Corps. The judge advocates are usually made up of retired military lawyers but who are appointed to the bench.<sup>331</sup>

#### **5.4.2 Nigerian Defence Headquarters Should Make Retirement Less Dreadful for Officers**

Making retirement less dreadful for officers could be achieved by the Armed Forces of Nigeria keying into the Federal Mortgage Bank initiative of providing houses for Nigerians. To achieve this, it is suggested that, on commission, an officer should begin contribution and choose any part of Nigeria to have a house built for him. The officer has to complete payment as or before the rank of major and should have the house delivered to him at the rank of major. This measure will reduce the fear of retirement by some court martial members and make them more independent minded.

In this way, as a major, or equivalent, every officer has a house built for him or her in any state of his or her choice in Nigeria. The state chosen would determine the cost of the building. If the officer does not conclude the payment at the rank of major, he or she is made to continue to pay but the house is delivered to the officer at the rank of major. If this is done, every retiring officer after the rank of major has no fear as to where he will move in with his family. It will make many officers to develop more confidence to follow the dictates of their conscience while voting in courts martial.

---

<sup>330</sup> Dada, O.A., (2014). *Administration of Military Justice and Discipline in the Nigerian Army*. (Unpublished), MSc Research Project, University of Ibadan.p.19.

<sup>331</sup> Ibid.

### **5.4.3 The Court of Appeal should Employ Retired Military Lawyers as Assessors for Military Cases on Appeal**

The Armed Forces Act makes provision for assessors to be employed by the Court of Appeal in technical matters.<sup>332</sup> Military law and court martial procedures have some technicalities that would be better handled by military lawyers. This work cited some decisions of appellate courts in Nigeria which would have been decided in another way if the courts had sought the opinion of retired or serving military officers. A clear example was the case of *Capt Asake v Nigerian Army Council*<sup>333</sup> wherein the court of appeal held that a Captain borrowing money from a Corporal did not constitute an offence. Anyone with military background knows that it is an aberration for a Captain in the army to borrow money from a Corporal. Worse still, when the captain refused to pay and it led to his being court martialed. It will not be easy for such a Captain to command his troops where such a corporal he borrowed money from is one of them. Integrity is one of the qualities of a military officer and lacking integrity for an officer is like death.

### **5.4.4 The Attorney General of the Federation should Grant Military Lawyers the Fiat to Appear in Civil Courts for the Military**

The non-appearance of military lawyers in civil courts militates against their development of advocacy skills unlike their civilian counterparts. Instances have been cited

---

<sup>332</sup>Section 188 Armed Forces Act, Cap.A20 LFN 2004.

<sup>333</sup>Capt Ashake v Nigerian Army Council (2007) 1 NWLR Pt. 1015, 408.



where the Attorney General of the Federation granted fiat to lawyers in public service to represent their organisations. These organisations like the Economic and Financial Crimes Commission and the Federal Road Safety Commission among others have had their lawyers prosecute their cases. It is recommended that the Attorney General of the Federation should do the same for military lawyers. Military law is equally technical and military lawyers are actually the best placed to defend cases emanating from courts martial. This emasculation of military lawyers is climaxed in the provision in the Armed Forces Act, stipulating that appeals emanating from court martial proceedings are to be prosecuted by the Attorney General. It provides thus: *“It shall be the duty of the Attorney General of the Federation on an appeal against a decision of a court martial to undertake the defence of the appeal.”*<sup>334</sup>

If the Attorney General of the Federation grants military lawyers the fiat to appear in civil courts for the military, it will go a long way in eliminating the problem of lack of diligent prosecution among them. Their capacity will increase and administration of military justice will be enhanced.

#### **5.4.5 Defence Headquarters should Ensure that there is a Consequence for Military Officers whose Actions or Inactions Cause Court Martial Cases to be Upturned on Appeal**

In civil courts, judges do not usually like their decisions to be upturned by an appellate court. A High Court judge who has majority of his or her judgments upturned on appeal may not likely be promoted to the Court of Appeal. In a sharp contrast, many officers, either as court martial conveners or members who caused the upturning of the cases discussed in this research

---

<sup>334</sup> Section 190 Armed Forces Act, Cap A20 Laws of the Federation of Nigeria 2004.

had no negative consequence of their actions or inactions.<sup>335</sup> Most times, the senior officers who caused the problem would have retired when appellate courts deliver their judgments on the matters. It is necessary to have a negative consequence on those who cause the problems especially when they had the opportunity to receive legal advice but jettisoned it.

The negative consequence can be in form of publishing military law reports to equally contain court martial cases of which their judgments were appealed against with comments on reasons for the decision of the appellate courts. No commander would like the negative image such a publication will generate even in his retirement. The publication should contain both the judgments in favour and the ones against. It could be a part of military law curriculum in Nigerian Army schools. The cooperation between Ahmadu Bello University and Nigerian Army Legal Services School should be expanded to include other Nigerian Army schools to enhance the teaching of rule of law. The young officers will learn how best to be members of courts martial, president and even convening officer at an early age.

## 5.5 CONCLUSION

This research highlighted the problems that have confronted courts martial in the Nigerian military between 1990 and 2014. These problems as brought out in the work include issues bordering on lack of jurisdiction, lack of fair hearing and lack of diligent prosecution among others. As a solution, the work suggested insulation of courts martial from command influence, and granting of fiat to military lawyers by the Attorney General of the Federation for them to appear in civil courts for the military as a way of improving their capacity. The research

---

<sup>335</sup>Lt Col Akinwale v Nigerian Army (2001) 16 NWLR Pt 738, 109.

equally suggested the publicizing the appellate judgments on court martial cases, pointing out the different roles played by all the actors in making of the outcome of the case, either positively or negatively.

At the end of the day, it is believed that this work has contributed to knowledge as far as court martial procedures and ways of improving the conduct of court martial cases in Nigeria are concerned. It is the wish of this researcher that the work is given a wide publicity especially among military officers.

## **BIBLIOGRAPHY**

### **BOOKS**

Achike, O.(1978). *Ground Work of Military Law and Military Rule in Nigeria* Enugu, Fourth Dimension Publishers.

Chiefe T.E.C,(2008). *Military Law in Nigeria Under Democratic Rule*, Lagos, Diametrics Nig Ltd 2008

De Gaule, (1960). C.A.J.M. *The Edge of the Sword*. Paris, Faber and Faber.

Omachi, AI. (2012). *Court Martial: Law and Practice in the Armed Forces*, Advance Concept Printers, Kaduna.

Oshuntoye, A. (2010). *The Military Law and Society*. Obafemi Awolowo University Press Ltd, Ile Ife.

Oyagha-Ukpong, G.I.O. (2012). *Appellate Cases on the Nigerian Armed Forces Courts Martial (A Compendium)*. Divine Connections Printing and Packaging, Abuja.

Rules of Procedure Army 1972.

Rules of Professional Conduct for Legal Practitioners 2007.

### **ARTICLES/JOURNALS**

Adekagun,L. (2011). *Enhancing Discipline and Professionalism in Nigerian Army Through the Instruments of Court Martial in a Democracy*. Military Lawyer. Abuja, Directorate of Legal Services (Army) Vol 5.

Badewole, BM. (2009). Imperative for the Amendment of The Armed Forces Act Nigerian Army Projection for Military Law Reform. *Military Lawyer Journal*, op cit. p.43.

Bauka, I.G. (2011). Curbing Command Influence in Military Trials. *The Military Lawyer*, Abuja, Directorate of Legal Services (Army) Vol 5.

Dada,OA. (2014). *Administration of Military Justice and Discipline in the Nigerian Army*. (Unplished), MSc Research Project, University of Ibadan.

Ihejirika, O.A. (2011). *Comments on Reasons Why Court Martial Trials are Upturned by Appellate Courts*. Military Lawyer, Abuja, Directorate of Legal Services (Army) Vol 5.

Mukhtar, A.S. (2009). *The Doctrine of Exhausting Military Remedies and the Appellate Chain for the Military Justice System Under the Democratic Dispensation*. Military Lawyer, Abuja, Directorate of Legal Services (Army) Vol 4.

Popoola, O.(2011). *Limiting Command Influence in Military Trials*. The Military Lawyer, Abuja, Directorate of Legal Services (Army) Vol 5.

## **INTERNET**

[www.nigerianarmy.org](http://www.nigerianarmy.org)

