JOHNSON AJE v. THE STATE

(2019) LPELR-46828(CA)

In The Court of Appeal of Nigeria

On Thursday, the 7th day of February, 2019

CA/B/414C/2017

Before Their Lordships

HELEN MORONKEJI OGUNWUMIJU Justice of The Court of Appeal of Nigeria

SAMUEL CHUKWUDUMEBI OSEJI Justice of The Court of Appeal of Nigeria

MOORE ASEIMO ABRAHAM ADUMEIN Justice of The Court of Appeal of Nigeria

Between

JOHNSON AJE Appellant(s)

AND

THE STATE Respondent(s)

Other Citations

RATIO DECIDENDI

1. APPEAL - GROUND(S) OF APPEAL: Whether ground(s) of appeal as well as issue(s) formulated therefrom must arise from the decision appealed against and effect of failure thereof

"...The above ground of appeal does not arise from the judgment of the trial Court delivered on the 4th day of May, 2017 which the appellant has appealed against. The law is settled and it is that a ground of appeal must arise and have its roots from the decision or judgment appealed against. See Ogbe v. Asade (2009) 18 NWLR (Pt. 1172) 106; Achonu v. Okuwobi (2017) 14 NWLR (Pt. 1584) 142 and Umma

Mohammed & 23 Ors. v. The Minister, Federal Ministry of Environment & 5 Ors. (2018) 16 NWLR (Pt. 1644) 179. Therefore, ground 3 (three) in the appellant's grounds of appeal is incompetent and it is liable to be struck out." Per ADUMEIN, J.C.A. (P. 14, Paras. B-E) (...read in context)

2. APPEAL - ISSUE(S) FOR DETERMINATION: Effect of issue(s) for determination framed from an incompetent/invalid ground(s) of appeal

"The appellant has distilled his Issue 1 from ground three, which I have held to be incompetent. Issue 1 formulated from ground three is incompetent and it is liable to be struck out. The law is that an issue framed from an incompetent ground of appeal should be struck out. See Idika v. Erisi (1988) 2 NWLR (Pt. 78) 563 and Ime Umanah Jnr. V. Nigerian Deposit Insurance Corporation (2016) 14 NWLR (Pt.1533) 458. This issue is accordingly struck out for being incompetent." Per ADUMEIN, J.C.A. (Pp. 14-15, Paras. F-B) (...read in context)

3. CRIMINAL LAW AND PROCEDURE - MANDATORY SENTENCE(S): Whether the courts can impose anything less than the mandatory sentence prescribed by a statute

"Section 218 of the Criminal Code Law, Cap. C21, Laws of Delta State, 2006 provides thus: "218. Any person who has unlawful carnal knowledge of a girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for life." Under Section 218 of the Criminal Code law of Delta State, it is mandatory that a person found guilty of the offence of unlawful carnal knowledge be sentenced to imprisonment for life. The Court has no discretion to impose a lesser sentence. See Joseph Amoshima v. The State (2011) 14 NWLR (Pt. 1268) 530 at 553, per Onnoghen, JSC (as he then was, now CJN) where the Supreme Court stated as follows: "It is settled law also that where a statute prescribes a mandatory sentence in clear terms as in the instant case, the Courts are without jurisdiction to impose anything less than the mandatory sentence as no discretion exists to be exercised in the matter. It is a duty imposed by law." In page 561 of the said case, His Lordship, Fabiyi, JSC, held as follows: "The appellant's counsel should be reminded of the doctrine of separation of powers as enshrined in the 1999 Constitution. The legislature is to enact laws while it is the duty of the judiciary to interpret the laws as enacted. And where a mandatory sentence is provided as in this matter, same must be pronounced without any reservation. There is no escape route." Per ADUMEIN, J.C.A. (Pp. 30-31, Paras. E-F) (...read in context)

4. CRIMINAL LAW AND PROCEDURE - OFFENCE OF DEFILEMENT: What the prosecution must prove in order to sustain a conviction for the offence of defilement

"The ingredients of the offence of defilement were set out by the Supreme Court in the case of Boniface Adonike v. The State (2015) 7 NWLR (Pt. 1458) 237 at 284 - 285, per Rhodes-Vivour, JSC as follows: "Section 218 supra creates the offence of defilement of a girl under the age of 11 years. To succeed the prosecution must prove beyond reasonable doubt: (a)that the accused/appellant had sex with the child who was under the age of 11 years. (b)that there was penetration into the vault of the vagina. (c)the evidence of the child must be corroborated. The evidence for defilement is the same as in rape expect that for defilement it is immaterial whether the act was done with or without the consent of the child. This is the well laid down position of the law, that a girl under the age of 11 is a child and so is not capable of consenting to sex. The Court would hold that she did not consent even if she did consent. A child cannot consent to sex, that is the position of the law." See also Edwin Ezigbo v. The State (2012) 16 NWLR (Pt. 1326) 318." Per ADUMEIN, J.C.A. (Pp. 27-28, Paras. B-A) (...read in context)

5. CONSTITUTIONAL LAW - RIGHT TO FAIR HEARING: Whether a party who had an opportunity of being heard but did not utilize it can bring an action for breach of fair hearing

"the record of proceedings, summarized earlier in this judgment, shows that the appellant was given adequate opportunity to cross-examine PW3 but he wasted that opportunity by insisting that the learned trial Judge should transfer the case, without advancing a reason for his request. In the case of Newswatch Communications Limited v. Alhaji Aliyu Ibrahim Atta (2006) 12 NWLR (Pt. 993) 144 at 181 - 182, per Mahmud Mohammed, JSC (as he then was), the Supreme Court held, concerning the concept of fair hearing as follows: "There is no doubt at all that the principles of fair hearing is fundamental to all Court procedure and proceedings. Like jurisdiction, the absence of it vitiates proceedings however well conducted. See Salu v. Egeibon (1994) 6 NWLR (Pt.348) 23 at 40; Ceekay Traders Ltd. v. G.M. Company Ltd. (1992) 2 NWLR (Pt. 222) 132 and Atano v. A.G., Bendel State (1988) 2 NWLR (Pt. 75) 201. Fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. See Ekpeto v. Wanogho (2004) 18 NWLR (Pt. 905) 394 at 411. Fair hearing in accordance with the law also envisages that the Court or tribunal hearing the parties' case, should be fair and impartial without it showing any degree of bias against any of the parties. See Nwafor Elike v. Nwakwoala & Ors. (1984) 12 S.C. 301 and Isiyaku

Mohammed v. Kano N.A. (1968) 1 All NLR 424." Therefore, a denial of a party of his right to be heard is a breach of his constitutional right as enshrined in Section 36(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and a breach of natural justice. See Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587 and State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 33. Where however, a party decided to indulge in delays, as in this case, he cannot be heard complaining of denial of his right to fair hearing. See Mohammed v. Kano Native Authority (1968) 1 All NLR 424 and Okoduwa v. State (1988) 2 NWLR (Pt. 73) 333. An indolent party, also, cannot complain of lack of fair hearing and the Court cannot aid him in such a case. See Vincent Ugo v. Diokpa Ummuna (2018) 2 NWLR (Pt. 1602) 102 at 131, per M. D. Muhammad, JSC." Per ADUMEIN, J.C.A. (Pp. 15-17, Paras. B-B) (...read in context)

6. INTERPRETATION OF STATUTE - SECTION 3 OF THE ILLITERATE PROTECTION LAW OF DELTA STATE, 2006: Interpretation of Section 3 of the Illiterate Protection Law of Delta State as regards which document or letter requires an illiterate jurat

"Section 3 of the Illiterates Protection of Delta State, Laws of Delta State, 2006 provides as follows: "Any person who shall write any letter or document at the request, on behalf or in the name of an illiterate person shall also write on such letter or other document, his own name as the writer thereof and his address, and in so doing shall be equivalent to a statement (a) that he was instructed to write any letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions..." The above statutory provision is clear and unambiguous and its ordinary and plain grammatical meaning should be attached to it. It is a settled principle of interpretation of statutes that where the words of a statute are simple and straightforward, the Court should adopt their ordinary grammatical meanings in the interpretation of the statute. See Ahmed v. Kassim (1958) 3 FSC 51; (1958) SCNLR 28; Yerokun v. Adeleke (1960) 5 FSC 126; Nafiu Rabiu v. The State (No. 2) (1981) 2 NCLR 293; Fred Egbe v. M.D. Yusuf (1992) 6 NWLR (Pt.245) 1 and Attorney-General, Federation v. Attorney-General, Lagos State (2013) 16 NWLR (Pt. 1380) 249 at 319, per Alagoa, JSC. Applying the literal rule of interpretation to Section 3 of the Illiterates Protection Law of Delta State, 2006, the document or letter, which requires a jurat, must have been written at the request of the illiterate person and the jurat is to state that the document "fully and correctly represents" the "instructions" of the illiterate person. The word "instructions" has two meanings as follows: 1. "printed information about how to do, make, assemble, use, or separate something"; and 2. "the relevant information about a legal case given by a client to a solicitor or a solicitor to a barrister". See Encarta

World English Dictionary, page 972. In very plain English, "instructions" means "detailed information on how to do or use something" - Oxford Advanced Learner's English Dictionary page 622. Under criminal procedure, "statement" means "An account of a person's knowledge of a crime, taken by the police during their investigation of the offence" - page 1539 of Black's Law Dictionary, Deluxe Ninth Edition. Exhibit "B" in this case is a statement allegedly made by the appellant when he was a suspect of the offence with which he was later charged and eventually convicted of. Exhibit "B" does not qualify as a "letter" or "document" under Section 3 of the Illiterates Protection Law and it is not a necessary requirement that an illiterate jurat should be inserted therein. One of the requirements for admissibility of an extra-judicial statement made by a suspect, if the statement is a confession, is that it must be free and voluntary. A procedural requirement, non-compliance of which is not fatal to admissibility, is the taking of the suspect before a Superior Police Officer for confirmation of his confessional statement, known as the Judges Rules. See Egboghonome v. The State (1993) 7 NWLR (Pt. 306) 383 and Igago v. The State (1999) 14 NWLR (Pt.637) 1. ?There is evidence on record that the appellant attended primary school. The appellant stated so when he testified under cross-examination, at page 34 of the record of appeal, as follows: "I stopped my education while I was in the primary school. I cannot rember (sic) the class I was in primary school before I stopped going to school. The name of my primary school is Umiaghwa. It is true that Umiaghwa is a name of a village but that is also the name that the villagers call the primary school. I stayed both at Abraka and Agbarho. I did not attend primary school at Abraka. It was at Agbarho that I went to primary school." In any case, the erudite professor of law, Prof. I. E. Sagay, opined that the intention of an Illiterates Protection Law is to protect persons by ensuring that they fully understand their obligations and rights in contractual documents before signing them so that they will not be cheated. The learned professor wrote on page 468 of his book: Nigerian Law of Contract, as follows: "The illiterates protection laws are meant to protect a person illiterate in the language of a contractual document from being cheated if in fact he did not understand the document he has signed." The trial Court, per Hon. Justice Emudain-Owho, was eminently right by holding that: "An illiterate jurat on a document executed by an illiterate is only applicable to contractual documents." I agree with the decision of the trial Court on this issue." Per ADUMEIN, J.C.A. (Pp. 20-24, Paras. E-F) (...read in context)

7. CRIMINAL LAW AND PROCEDURE - SENTENCING: When does a sentence begin to run

"Section 395 of the Criminal Procedure Law, Cap. C22, Laws of Delta State, 2006 provides that: "395. Commencement of imprisonment Where any person is brought to any prison to be imprisoned by virtue

of a warrant of commitment there shall be endorsed on such warrant the day of which such person was arrested by virtue thereof and the imprisonment shall be computed from such day and inclusive thereof." The above provision is clear and unambiguous. The section deals with endorsement of a warrant of commitment to prison and computation of a term of imprisonment. It does not stipulate that a term of sentence cannot commence from the date the Court's verdict is pronounced. In any case, since the appellant was sentenced to imprisonment for life, the issue of computation of term or time of imprisonment does not arise in this case. When a convict is sentenced to imprisonment for life, it means that, irrespective of the age of such a convict at the time of his conviction and/or sentence, he will be confined in a prison for the remainder or rest of his life." Per ADUMEIN, J.C.A. (Pp. 29-30, Paras. E-E) (...read in context)

MOORE ASEIMO ABRAHAM ADUMEIN, J.C.A. (Delivering the Leading Judgment): The appellant was arraigned before the High Court of Delta State, Isiokolo Judicial Division, holden at Isiokolo in Charge No. HCI/4C/2015 charged with the following offence:

STATEMENT OF OFFENCE

Defilement punishable under Section 218 of the Criminal Code Law Cap C21 Vol. 1, Laws of Delta State, 2006.

PARTICULARS OF OFFENCE

JOHNSON AJE (M) on or about the 6th day of September, 2014 at River Road Orhovie in the Isiokolo Judicial Division had unlawful carnal knowledge of one Osaruese Eguakun (f) aged 4 years.

He pleaded not guilty and the case was tried. The prosecution called three witnesses Osaruese Eguakun (PW1 victim of the alleged crime); Precious Eguakun (PW2 father of PW1); and Sgt. Bola Ojo (PW3 a woman police Sergeant, who was the investigating police officer). The prosecution tendered exhibits A, B and C. The appellant testified in his own defence. After the conclusion of evidence and the addresses of counsel, the trial Court

delivered a reserved judgment on the 4th day of May, 2017 whereby the appellant was found guilty and sentenced to life imprisonment.

This appeal is against the said judgment and it is anchored on a notice of appeal, filed on 04/07/2017, containing eleven grounds.

In the appellants brief filed on 20/10/2017, five issues for determination were crystallized from the eleven grounds of appeal as follows:

1. Whether the appellants right to fair hearing was not violated when the trial Court refused the request of appellants new counsel to re-call and cross examine PW3? Distilled from ground 3.
2. Whether the trial Court was right in relying on Exhibit B the confessional statement in spite of the fact that it is inadmissible (the appellant being an illiterate person) and that it lacks credibility? Distilled from grounds 4, 5, and 6.
3. Whether the trial Court was right in convicting the appellant on the basis of Exhibit C, the medical report? Distilled from grounds 1 and 2.
4. Whether the evidence of the prosecutrix (PW1), PW2 and PW3 are sufficiently credible to confirm that it was the appellant that defile PW1? Distilled from grounds 9 and 10.

5. Whether the sentence of life imprisonment imposed by the trial Court and to commence from the date of judgment was right? Distilled from grounds 7 and 8.

The respondent filed its brief on 05/11/2018 and it was deemed as properly filed on 19/11/2018. The respondent raised a lone issue for determination as follows:

Whether in view of the evidence on record the learned trial judge were right in law when they held that the prosecution has proved beyond reasonable doubt that the appellant had unlawful carnal knowledge of the prosecutrix on the 6th day of September, 2014.

Since the issues identified by the appellant are properly tied to his grounds of appeal and they concisely cover the complaints raised, I adopt them for the determination of this appeal. However, Issues 2, 3 and 4 will be treated together under a single issue as follows:

Whether the offence of defilement, with which the appellant was charged, was proved by the prosecution beyond reasonable doubt by admissible and credible evidence.

The above issue will be numbered as Issue 2, while the

appellants original Issue 5 will be re-numbered as Issue 3.

ISSUE NO. 1

Whether the appellants right to fair hearing was not violated when the trial Court refused the request of appellants new counsel to re-call and cross examine PW3? Distilled from ground 3.

Learned counsel stated that one Omotayo Ibrahim Esq. was initially briefed by the appellant to defend him, but on 14/04/2016 the said Omotayo Ibrahim, Esq. applied to withdraw further appearance on the grounds of failure by the appellant to pay his professional fees and bad behaviour displayed by the appellants parents which he can no longer tolerate. He said that, consequently, Kunle Edun, Esq. appeared for the appellant on 21/07/2016 and applied to recall PW3 but the trial Court refused the oral application on the ground:

That such application should be brought formally, stating the grounds for the application to enable the State respond to same.

Learned counsel argued that the trial Court was wrong for the following reasons:

(i) The respondent never formally opposed the application to recall PW3;

(ii) The counsel earlier briefed by the appellant did not conclude his cross-examination of PW3 before he withdrew from the case;
(iii) The same trial Court adjourned the case two times for further cross-examination of PW3 to enable the appellant to get a new lawyer because the appellant could not cross-examine PW3 on exhibits B and C tendered by PW3; and
(iv) There is no provision in the Criminal Procedure Law of Delta State requiring an application to recall a witness to be by way of formal motion.

Counsel cited the cases of Ally v. State (2010) All FWLR (Pt.546) 444 at 453 455, per Ngwuta, JCA (as he was then) and Kejawa v. State (2013) 3 NWLR (Pt. 134) 380 and contended that the application to recall PW3 ought to be granted.

He urged the Court to resolve this issue in favour of the appellant and nullify the entire trial since the refusal by the trial Court to grant the application to recall PW3 was a violation of the appellants constitutional right to fair hearing.

In response, learned counsel for the respondent referred to record of proceedings in the trial Court on

10/03/2015; 14/04/2016 and 16/06/2016 and contended that:
The appellant counsel withdrew from representing the accused at the trial Court and the Court gave him ample time to search for a counsel of his choice to represent him in Court which he failed, refused and neglected to do. The action of the appellant in a case of this magnitude smacks of carelessness and indifference on the part of the appellant.

Learned counsel for the respondent relied on the case of Ogbodu v. Odogha (1967) 1 All NLR 173 and submitted that the power to recall a witness should be exercised with great care and only in exceptional circumstances.

Counsel contended that having regard to the facts and circumstances of this case, the appellants right to fair hearing was not breached.

PW3 was one Bola Ojo a Police Sergeant with Force No. 024045 attached to Abraka Divisional Headquarters and she testified in the trial Court on the 10th day of March, 2016. On that day, she tendered in evidence the statement made on 06/09/2014 by the appellant and it was admitted in evidence as exhibit B. She also tendered a Medical report made on

06/09/2014 by Dr. P.C. Okeru and it was admitted as exhibit C. See pages 25 26 of the record of appeal. After her evidence-in-chief, Omotayo Ibrahim, Esq; learned counsel for the appellant commenced his cross-examination of PW3 and after sometime he stated as follows:
At this stage, I humbly apply for an adjournment to enable the PW3 produce the blood stained cloth because it is very vital to our case.
See page 26 of the record of appeal.

The trial Court ruled on page 27 of the record of appeal as follows:
COURT: The law is very clear in Section 167(d) Evidence Act on the consequence of a failure to produce material evidence. However, I will grant the adjournment so that the defence counsel will have the opportunity to receive the blood stained cloth, whatever it is worth. The matter is adjourned to 14/4/2016 for further hearing.

The record of proceedings on the 14th day of April, 2016 is as follows:
Accused person is present.
E.J. Odogwu (Mrs) for the State.
Omotayo Ibrahim Esq. for the accused.
ODOGWU (MRS): My Lord, the PW3 who is to be further

cross-examined is in Court.

OMOTAYO IBRAHIM: My Lord, I humbly apply to withdraw from this case, the parents of the accused have displayed a behaviour that I can no longer tolerate and in addition to that fact, they have not paid my professional fees.

ACCUSED: I want to get another lawyer, I do not want Mr. Omotayo Ibrahim to represent me anymore.

MRS ODOGWU: My Lord, the PW3 is coming to Court for the second time and at my expense. I urge that Mr. Omotayo Ibrahim should conclude the cross-examination of the PW3, especially as the matter was adjourned on the last adjourned date, for one purpose only, for PW3 to produce the clothing item stained with blood.

COURT: I sympathize with learned counsel for the State who has to bear the financial costs of bringing the PW3 to Court again today, without the matter going on.

However, it is the constitutional right of the accused to be represented by a counsel of his choice.

The matter will be adjourned to a fairly long date to give the accused sufficient time to procure the services of another counsel to take over his defence. However, where the accused is not represented by counsel on

the next adjourned date or is unable to go on with his case, the accused will be compelled to cross examine the witness; PW3 and where he is unable to do so, he will be foreclosed from further cross examining her.

COURT: How many weeks do you need to get a new lawyer?

ACCUSED: I will require one month to get a lawyer.

COURT: In the circumstances, the matter is adjourned to 19/5/2016 for further hearing.

On 19/05/2016, the record of proceedings read thus:

NLC strike, case adjourned to 16/6/2016.

On 16/06/2016, the appellant was in Court but was not represented by a counsel, and the trial Court asked him: where is your lawyer? and the appellant replied that:
I have no lawyer because my brother traveled. I want the case to be transferred.

The application for the case to be transferred was opposed by the learned counsel for the respondent and, in a bench ruling, the trial Court refused the application. PW3 accordingly, was in the witness-box for further cross-examination but the appellant stated as follows:
I have no questions to ask the PW3. All I want is for the matter to be transferred.

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The trial Court then ruled and the matter proceeded as follows:
COURT: The Court is bound by its ruling on the application for transfer and is also funtus officio on that issue.
On the 14/4/2016, the Court ordered that where the accused is unable to go on with his case, by concluding the cross-examination of the PW3, he will be foreclosed from further cross-examing her.
It is pertinent to note that the PW3 who is in the box has informed the Court through the State; Mrs. E.J. Odogwu that she came to Court with the blood stained clothes of the PW1 represented under cross-examination by the previous defence counsel of the accused while cross-examing her on the 14/4/16.
In view of the fact that the accused is not prepared to further cross-examine the PW3, the accused is hereby foreclosed from further examination of the witness.
COURT: State, any re-examination?
Re-examination: Nil
MRS. ODOGWU: My Lord, this is the case for the prosecution.
COURT: The PW3 is discharged from the witness box.
COURT: In view of the fact that the accused is not represented by a legal practitioner, the Court

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hereby orders the Court Clerk to interprete his rights to him under Section 287 of the C.P.L. to wit:-
(a) The right to make a statement without being sworn from the dock, in which case, he will not be liable to cross-examination.
(b)The right not to say anything if he so wishes.
ACCUSED: I do not elect to say anything, because I want the case to be transferred from this Court.
COURT: As I had earlier opined, the Court is functus officio on the issue of transfer and it will not be revisited.
I am minded however, in the interest of justice to grant the accused person an adjournment to enable him reflect on the options available to him under Section 287 on the C.P.L or in the alternative file an appeal against the ruling on the application for transfer.
Where by the next adjourned date, the accused still insists that he will not elect any of the options available to him under Section 287 of C.P.L. and there is no notice of appeal against the ruling, the Court will have no option but to assume that the accused does not intend to say anything in his defence.
The matter is adjourned to 21/7/2016 for further hearing.

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See pages 29 to 31 of the record of the proceedings of 16/06/2016.

On 21/07/2016, Kunle Edun, Esq. appeared for the appellant and applied for an adjournment and the case was accordingly, adjourned to 03/11/2016 for further hearing. On 03/11/2016, Mr. Edun applied for the recall of PW3 by stating as follows:
MR. EDUN: My Lord, when I took over this case, I was of the opinion that the I.P.O., PW3 was still in the witness box under cross-examination.
However, the State informed me this morning that the PW3 had since being discharged.
I hinted at the State Counsel, that I would have wanted that the PW3 be recalled for further cross-examination but the State informed me that she would be opposed to same.

On the response of the State, I told her that I would make the application to Court and if it is refused, I will be prepared to open my defence immediately.
In the circumstances my Lord, I humbly apply to recall PW3.

The trial Court then ruled as thus:
COURT: The application to recall a witness who has been discharged, in my humble view, is not one that can be made orally. Such an application should be

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brought formally, stating the grounds for the application to enable the State respond to same.

Mr. Edun said, after the above ruling, that: My Lord, I am prepared to open my defence and the appellant proceeded to testify in his own defence.
Ground 3 of the appellants grounds of appeal is as follows:
GROUND THREE
The trial Court erred in law when it denied the appellant the opportunity to cross examine the PW3 (IPO) when his new counsel took over the conduct of his defence, thus violating his constitutional right to fair hearing.
PARTICULARS
1. It is on record that one Tayo Ibrahim Esq. conducted the defence of the appellant from the beginning and partially cross examined PW3, when the case was adjourned by the trial Court for continuation of cross examination of PW3. Tayo Ibrahim Esq., subsequently withdrew from the case and never concluded the cross examination of PW3.
2. The appellants new counsel, Kunle Edun Esq., who took over the conduct of the defence ex gratis on the 21st of July, 2016, applied that PW3 be recalled for further cross examination. This application was refused.

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3. It is trite that application for recall can be made orally, and there is no law that makes it mandatory that it be by way of a formal application.
4. That appellant was denied the opportunity to cross examine the PW3 and therefore denied fair hearing in disregard of extant authorities of superior Courts on this score.

The above ground of appeal does not arise from the judgment of the trial Court delivered on the 4th day of May, 2017 which the appellant has appealed against. The law is settled and it is that a ground of appeal must arise and have its roots from the decision or judgment appealed against. See Ogbe v. Asade (2009) 18 NWLR (Pt. 1172) 106; Achonu v. Okuwobi (2017) 14 NWLR (Pt. 1584) 142 and Umma Mohammed & 23 Ors. v. The Minister, Federal Ministry of Environment & 5 Ors. (2018) 16 NWLR (Pt. 1644) 179. Therefore, ground 3 (three) in the appellants grounds of appeal is incompetent and it is liable to be struck out.

The appellant has distilled his Issue 1 from ground three, which I have held to be incompetent. Issue 1 formulated from ground three is incompetent and it is liable to be struck out.

The law is that an issue framed from an incompetent ground of appeal should be struck out. See Idika v. Erisi (1988) 2 NWLR (Pt. 78) 563 and Ime Umanah Jnr. V. Nigerian Deposit Insurance Corporation (2016) 14 NWLR (Pt.1533) 458.
This issue is accordingly struck out for being incompetent.

In case Issue 1, for any reason, is not incompetent, the record of proceedings, summarized earlier in this judgment, shows that the appellant was given adequate opportunity to cross-examine PW3 but he wasted that opportunity by insisting that the learned trial Judge should transfer the case, without advancing a reason for his request.

In the case of Newswatch Communications Limited v. Alhaji Aliyu Ibrahim Atta (2006) 12 NWLR (Pt. 993) 144 at 181 182, per Mahmud Mohammed, JSC (as he then was), the Supreme Court held, concerning the concept of fair hearing as follows:

There is no doubt at all that the principles of fair hearing is fundamental to all Court procedure and proceedings. Like jurisdiction, the absence of it vitiates proceedings however well conducted. See Salu v. Egeibon (1994) 6 NWLR (Pt.348) 23 at 40; Ceekay Traders Ltd. v. G.M. Company Ltd.

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(1992) 2 NWLR (Pt. 222) 132 and Atano v. A.G., Bendel State (1988) 2 NWLR (Pt. 75) 201. Fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. See Ekpeto v. Wanogho (2004) 18 NWLR (Pt. 905) 394 at 411. Fair hearing in accordance with the law also envisages that the Court or tribunal hearing the parties case, should be fair and impartial without it showing any degree of bias against any of the parties. See Nwafor Elike v. Nwakwoala & Ors. (1984) 12 S.C. 301 and Isiyaku Mohammed v. Kano N.A. (1968) 1 All NLR 424.

Therefore, a denial of a party of his right to be heard is a breach of his constitutional right as enshrined in Section 36(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and a breach of natural justice. See Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587 and State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 33.

Where however, a party decided to indulge in delays, as in this case, he cannot be heard complaining of denial of his right to fair hearing.

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See Mohammed v. Kano Native Authority (1968) 1 All NLR 424 and Okoduwa v. State (1988) 2 NWLR (Pt. 73) 333.

An indolent party, also, cannot complain of lack of fair hearing and the Court cannot aid him in such a case. See Vincent Ugo v. Diokpa Ummuna (2018) 2 NWLR (Pt. 1602) 102 at 131, per M. D. Muhammad, JSC.

Without more, I resolve this issue against the appellant.

ISSUE NO. 2

Whether the offence of defilement, with which the appellant was charged, was proved by the prosecution beyond reasonable doubt by admissible and credible evidence.

The substance of the appellants complaint on this issue is that he objected to the admissibility of the purported confessional statement exhibit B and retracted it; that during his evidence-in-chief he denied making exhibit B and under cross examination he denied attending Erho Primary School and stopped at primary five; that he denied working as a slaughterman in an abattoir; in exhibit B written by PW3 there is nothing to confirm any compliance with illiterate jurat as required by Section 3 of the Illiterate Protection Law of Delta State, 2006.

He emphasized the need for documents signed by an illiterate to contain an illiterate jurat.

Learned counsel argued that it was wrong for the trial Court to have held that: An illiterate jurat on a document executed by an illiterate is only applicable to contractual documents.

In urging the Court to hold that the offence was not proved beyond reasonable doubt, learned counsel for the appellant further contended, inter alia, that:

(a) exhibit C a medical report was inadmissible because it was allegedly made by an expert who was not called as a witness and no reason was given for the failure to call him;

(b) there is no evidence on record of the qualification and competence of the maker of exhibit C;

(c) exhibit C was not handed to the police personally but to PW1 a child alleged to be (six) years old;

(d) PW3, not being the maker of exhibit C, was not competent to give answers to queries or questions on it, and the evidence of PW3 on exhibit C was documentary hearsay;

(e) by the content of exhibit C, means that the incident

of alleged defilement could only have happened on the 5th of September, 2014, not 6th of September, 2014; and this contradiction puts a big lie to the evidence of the prosecution witnesses and goes to the root of the charge that no defilement occurred on the 6th of February, 2014 or occurred on any other date;
(f) the evidence adduced by PW1, PW2 and PW3 was not sufficiently credible to confirm that it was the appellant that defiled PW1.

After analysing the evidence adduced by the prosecution, learned counsel contended that the prosecution did not establish the guilt of the appellant beyond reasonable doubt.

While disagreeing with the submissions of the learned counsel for the appellant, learned counsel for the respondent agreed with the view of the trial Court that requirement of illiterate jurat applies to only contractual documents.

Learned counsel for the respondent contended, among other things, that:
(1) the statement in exhibit C that there was also positive history of fecail.1 day after the incident means one after the incident is the 7th day of September, 2014 and not the

5th day of September, 2014 as suggested by learned counsel for the appellant;
(2) under Section 90(2)(a) of the Evidence Act, the Court has discretion to admit as evidence a relevant document even where the maker is available but not called as witness;
(3) the offence was prove beyond reasonable by the prosecution.

The learned counsel for the respondent urged the Court to resolve this issue against the appellant and in favour of the respondent.

I have considered this issue on the basis of the arguments proffered by learned counsel for the parties and the authorities cited and relied on by them. In addition, I have read the record of appeal, including the information filed by the respondent, the proceedings of the trial Court, the totality of evidence on record and the judgment of the trial Court.

Section 3 of the Illiterates Protection of Delta State, Laws of Delta State, 2006 provides as follows:
Any person who shall write any letter or document at the request, on behalf or in the name of an illiterate person shall also write on such letter or other document, his own name as the writer thereof and his

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address, and in so doing shall be equivalent to a statement (a) that he was instructed to write any letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions
The above statutory provision is clear and unambiguous and its ordinary and plain grammatical meaning should be attached to it. It is a settled principle of interpretation of statutes that where the words of a statute are simple and straightforward, the Court should adopt their ordinary grammatical meanings in the interpretation of the statute. See Ahmed v. Kassim (1958) 3 FSC 51; (1958) SCNLR 28; Yerokun v. Adeleke (1960) 5 FSC 126; Nafiu Rabiu v. The State (No. 2) (1981) 2 NCLR 293; Fred Egbe v. M.D. Yusuf (1992) 6 NWLR (Pt.245) 1 and Attorney-General, Federation v. Attorney-General, Lagos State (2013) 16 NWLR (Pt. 1380) 249 at 319, per Alagoa, JSC.
Applying the literal rule of interpretation to Section 3 of the Illiterates Protection Law of Delta State, 2006, the document or letter, which requires a jurat, must have been written at the request of the illiterate person and the jurat is to state

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that the document fully and correctly represents the instructions of the illiterate person.

The word instructions has two meanings as follows:

1. printed information about how to do, make, assemble, use, or separate something; and

2. the relevant information about a legal case given by a client to a solicitor or a solicitor to a barrister.

See Encarta World English Dictionary, page 972. In very plain English, instructions means detailed information on how to do or use something - Oxford Advanced Learners English Dictionary page 622.

Under criminal procedure, statement means An account of a persons knowledge of a crime, taken by the police during their investigation of the offence page 1539 of Blacks Law Dictionary, Deluxe Ninth Edition.

Exhibit B in this case is a statement allegedly made by the appellant when he was a suspect of the offence with which he was later charged and eventually convicted of. Exhibit B

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does not qualify as a letter or document under Section 3 of the Illiterates Protection Law and it is not a necessary requirement that an illiterate jurat should be inserted therein.

One of the requirements for admissibility of an extra-judicial statement made by a suspect, if the statement is a confession, is that it must be free and voluntary. A procedural requirement, non-compliance of which is not fatal to admissibility, is the taking of the suspect before a Superior Police Officer for confirmation of his confessional statement, known as the Judges Rules. See Egboghonome v. The State (1993) 7 NWLR (Pt. 306) 383 and Igago v. The State (1999) 14 NWLR (Pt.637) 1.

There is evidence on record that the appellant attended primary school. The appellant stated so when he testified under cross-examination, at page 34 of the record of appeal, as follows:

I stopped my education while I was in the primary school. I cannot rember (sic) the class I was in primary school before I stopped going to school. The name of my primary school is Umiaghwa. It is true that Umiaghwa is a name of a village but that is also the name that the villagers call the primary school. I

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stayed both at Abraka and Agbarho. I did not attend primary school at Abraka. It was at Agbarho that I went to primary school.

In any case, the erudite professor of law, Prof. I. E. Sagay, opined that the intention of an Illiterates Protection Law is to protect persons by ensuring that they fully understand their obligations and rights in contractual documents before signing them so that they will not be cheated. The learned professor wrote on page 468 of his book: Nigerian Law of Contract, as follows:

The illiterates protection laws are meant to protect a person illiterate in the language of a contractual document from being cheated if in fact he did not understand the document he has signed.

The trial Court, per Hon. Justice Emudain-Owho, was eminently right by holding that:

An illiterate jurat on a document executed by an illiterate is only applicable to contractual documents.

I agree with the decision of the trial Court on this issue.

In this case, the learned trial Judge adequately evaluated the evidence on record and rightly convicted the appellant of the

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offence of unlawful carnal knowledge of the victim Osaruese Eguakun when she was only 4 (four) years.

Exhibit A is titled AFFIDAVIT AS TO SETTLEMENT deposed to by Eguakun Precious the father of the victim on the 15th day of April, 2015. In paragraphs 2 and 3 of the said affidavit, Eguakun Precious deposed as follows:

2. That EGUAKUN OSARUESE (F), four years of age is my daughter.

3. That JOHNSON AJE forcefully had carnal knowledge of my daughter EGUAKUN OSARUESE on the 6th day of September, 2014 and was brought to magistrate Court III, Abraka in Charge No. MAB/40C/2014 and thereafter remanded to prison custody at Sapele Prison.

It is on record that exhibit A was tendered by the appellant when his counsel cross-examined Mr. Eguakun, who testified as PW2. The record of cross-examination of PW2 and the tendering and admission of exhibit A spans pages 23 to 24 of the record of appeal as follows:

CROSS-EXAMINATION BY OMOTAYO

It is true that when the father of the accused came and pleaded with us that the matter be settled as the son

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had admitted the offence, I accepted that the matter be settled.

It is true that at Abraka Magistrate Court, I deposed to an affidavit.

This is the agreement that I deposed to at Abraka Magistrate Court.

OMOTAYO: I seek to tender as a exhibit.

ODOGWU: No objection.

COURT: Affidavit as to settlement is admitted and marked as exhibit A.

P.W.2: I did not see the accused as he was having sexual intercourse with my daughter.

RE-EXAMINATION: Nil.

In his statement to the police exhibit B, the appellant stated, inter alia, as follows:

I know the victim, we live in the same Community. On the 6th day of September 2014 in the evening time, when I was coming from bros Andrew place surname unknown to me, I saw the victim, I called he and she came, I then took her to one uncompleted building and asked her to pull her cloths, which she did, I then sleep on top of her and had unlawful carnal knowledge with her and blood started coming out at her body. as I saw the blood I then told her to go and I myself left. As I was going, one man by name Lucky called me and I went to him, from there he hold me on my trouser that

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his daughter told him that I had unlawful carnal knowledge with his daughter. He then took me to Chairman place and for there, they now carry me to the station Abraka..I know that what I did is bad. Is a hand work of devil.

The ingredients of the offence of defilement were set out by the Supreme Court in the case of Boniface Adonike v. The State (2015) 7 NWLR (Pt. 1458) 237 at 284 285, per Rhodes-Vivour, JSC as follows:
Section 218 supra creates the offence of defilement of a girl under the age of 11 years. To succeed the prosecution must prove beyond reasonable doubt:
(a)that the accused/appellant had sex with the child who was under the age of 11 years.
(b)that there was penetration into the vault of the vagina.
(c)the evidence of the child must be corroborated.
The evidence for defilement is the same as in rape expect that for defilement it is immaterial whether the act was done with or without the consent of the child. This is the well laid down position of the law, that a girl under the age of 11 is a child and so is not capable of consenting to sex. The Court would hold that she did

not consent even if she did consent. A child cannot consent to sex, that is the position of the law.
See also Edwin Ezigbo v. The State (2012) 16 NWLR (Pt. 1326) 318.

In this case, the prosecution proved that the appellant had unlawful sexual intercourse with the victim on or about the 6th day of September, 2014, when the victim was under 11 (eleven) years of age. The prosecution also proved that there was corroboration by the evidence of PW2 and PW3; and even by the admission of the appellant himself.

When the evidence adduced by the prosecution is considered together, the allegation against the appellant was proved beyond reasonable doubt.
For all the reasons given above, I hereby resolve this issue against the appellant.

ISSUE NO. 3

"Whether the sentence of life imprisonment imposed by the trial Court and to commence from the date of judgment, was right? Distilled from grounds 7 and 8.

In this case, after convicting the appellant and hearing the allocutus of learned counsel for the appellant, the trial Court sentenced the appellant as follows:

the accused is hereby sentenced to life

imprisonment. His sentence shall run from today the 4th day of May, 2017.

The complaint in respect of this issue is that the sentence of life imprisonment imposed on the appellant..is harsh, excessive and same should be tampered with by this Court. The second leg of the complaint is that the sentence ought not to commence from the date of delivery of the judgment because it is trite that prison sentence commences ad(sic) is calculated to include the day that an accused person is arrested and detained and that this is in accordance with Section 395 of the Criminal Procedure Law of Delta State, Cap. C22, Laws of Delta State, 2006.

Whilst disagreeing with the submission of learned counsel for the appellant, learned counsel for the respondent referred to Section 381 of the Criminal Code, Cap. C21, Laws of Delta State 2006 and argued that a sentence of imprisonment takes effect from the date it is pronounced.

Section 395 of the Criminal Procedure Law, Cap. C22, Laws of Delta State, 2006 provides that:

395. Commencement of imprisonment

Where any person is brought to any prison to be

imprisoned by virtue of a warrant of commitment there shall be endorsed on such warrant the day of which such person was arrested by virtue thereof and the imprisonment shall be computed from such day and inclusive thereof.

The above provision is clear and unambiguous. The section deals with endorsement of a warrant of commitment to prison and computation of a term of imprisonment. It does not stipulate that a term of sentence cannot commence from the date the Courts verdict is pronounced. In any case, since the appellant was sentenced to imprisonment for life, the issue of computation of term or time of imprisonment does not arise in this case. When a convict is sentenced to imprisonment for life, it means that, irrespective of the age of such a convict at the time of his conviction and/or sentence, he will be confined in a prison for the remainder or rest of his life.

On the other hand, Section 218 of the Criminal Code Law, Cap. C21, Laws of Delta State, 2006 provides thus:

218. Any person who has unlawful carnal knowledge of a girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for life.

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Under Section 218 of the Criminal Code law of Delta State, it is mandatory that a person found guilty of the offence of unlawful carnal knowledge be sentenced to imprisonment for life. The Court has no discretion to impose a lesser sentence. See Joseph Amoshima v. The State (2011) 14 NWLR (Pt. 1268) 530 at 553, per Onnoghen, JSC (as he then was, now CJN) where the Supreme Court stated as follows:

It is settled law also that where a statute prescribes a mandatory sentence in clear terms as in the instant case, the Courts are without jurisdiction to impose anything less than the mandatory sentence as no discretion exists to be exercised in the matter. It is a duty imposed by law.

In page 561 of the said case, His Lordship, Fabiyi, JSC, held as follows:

The appellants counsel should be reminded of the doctrine of separation of powers as enshrined in the 1999 Constitution. The legislature is to enact laws while it is the duty of the judiciary to interpret the

laws as enacted. And where a mandatory sentence is provided as in this matter, same must be pronounced without any reservation. There is no escape route.

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For all the above reasons, I resolve this issue against the appellant.

CONCLUSION

This appeal ought to be dismissed since all the issues have been resolved against the appellant. This appeal is, accordingly, dismissed for lacking in merit.

The judgment of the trial Court is hereby affirmed.

HELEN MORONKEJI OGUNWUMIJU , J.C.A.: I have read the judgment just delivered by my learned brother, MOORE ASEIMO ABRAHAM ADUMEIN JCA. I agree with the conclusions therein that the appeal should be dismissed as lacking in merit. Appeal dismissed.

SAMUEL CHUKWUDUMEBI OSEJI, J.C.A.: I had the privilege of reading in draft the Judgment just delivered by my learned brother, MOORE A.A. ADUMEIN JCA. I am in complete agreement with the reasoning and conclusion contained therein and for the same reasons articulated in the lead judgment which I adopt as mine, I also hold that this appeal lacks merit and it is accordingly dismissed.

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Appearances:

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Appearances

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AND

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