

IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI –ABUJA

HIS LORDSHIP: HON.JUSTICE D.Z. SENCHI

COURT CLERKS: – T. P. SALLAH & ORS

COURT NUMBER: 19

DATE: 23/3/17

FCT/HC/CR/82/2012

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA-----

COMPLAINANT

AND

(1)JUBRIL SABO KEANA

(2)KOSZOIL (NIGERIA LIMITED

}

DEFENDANTS

JUDGMENT

On the 31st May, 2012, the 1st and 2nd Defendants were arraigned before this Court on a one count charge as follows:-

“That you Jubril Sabo Keana being the Chief Executive Officer of Koszoil (Nig) Limited on or about the 12th of September, 2010 in Abuja in the Abuja Judicial Division of the High Court of the Federal Capital Territory did with the knowledge that you had insufficient funds in your account issued to one AkS Universal Service Limited a Union Bank Cheque number 22540495 dated 12th September, 2010 for the sum of N6,720,133.86 which the said cheque when presented for payment within three months of issuance was dishonoured due to insufficient funds in your account and thereby committed an offence

contrary to Section 1(1) (b) of the Dishonoured Cheque (Offences) Act Cap DII LFN 2004 and punishable under section 1(1) (b) (i) of the same Act.”

The charge was read and explained to the Defendants. The 1st Defendant pleaded not guilty to the charge. The 1st Defendant equally pleaded not guilty to the charge on behalf of the 2nd Defendant, the 2nd Defendant being an incorporated entity.

The prosecution commenced trial on the 18th October, 2012 and closed its case on the 18th March, 2013. Five witnesses testified on behalf of the prosecution as PWs1- 5. Eighteen (18) exhibits were tendered and admitted through the prosecution witnesses. The exhibits are as follows:-

- (1) The petition dated 13th December, 2010 to the Economic and Financial Crimes Commission (EFCC) chairman is exhibit 1;
- (2) The statements of the 1st Defendant to the Economic and Financial Crimes Commission (EFCC) are exhibits 2, 2 (a) and 2 (b) respectively;
- (3) The union bank Plc issued to AKS Universal Services Limited dated 12th September, 2010 is exhibit 3;
- (4) The memorandum of understating signed between the 2nd Defendant and Aks Universal services Limited tendered by the defence through PW3 Salisu Aminu Aliyu and was received in evidence as exhibit 4(a)

Through PW4, Mohammed Marafa, a staff of the Economic and Financial Crimes Commission (EFCC), the following documents were admitted in evidence; letter of Abuja Municipal Area Council (AMAC) to the Chairman Economic and Financial Crimes Commission (EFCC) is exhibit 5, letter of contract award dated 14th

August, 2008 is exhibit 6 letter of acceptance dated 21st August, 2008 is exhibit 6 (a); letter of the Defendants dated 23rd May, 2009 to the Chairman, Abuja Municipal Area Council (AMAC) is exhibit 6(b); contract variation (additional works) by Abuja Municipal Area Council (AMAC) to the Defendants dated 31st August, 2009 is exhibit 6(c); request for part payment on construction of 213 nos of fish and meat market dated 16th June, 2010 is exhibit 7; contract variation/additional works (application for payment) dated 1st September, 2009 is exhibit 7(a); letter of the Defendants to Chairman Abuja Municipal Area Council (AMAC) dated 19th April, 2010 is exhibit 8 Re-variation for the proposed fish and meat market at Apo by the Defendants to the Chairman, Abuja Municipal Area Council (AMAC) dated 31st July, 2009 is exhibit 9; Re: revised Bills of completion for proposed fish and meat market by the Defendants dated 31st July, 2009 to the Chairman Abuja Municipal Area Council (AMAC) is exhibit 9(a); Re-construction of 213 open stalls at Apo resettlement project submission of variation/additional works claim by the Defendants to Chairman Abuja Municipal Area Council (AMAC) dated 19th April, 2010 is exhibit 9 (b); payment analysis for the Defendants is exhibit 10; Abuja Municipal Area Council (AMAC) Internal Audit, titled “ interim payment certificates four in numbers are exhibits 11,11(a) 11(b) and 11(c) respectively, letter of Abuja Municipal Area Council (AMAC) to the Secretary, Area Councils Services Secretariat dated 18th October,2010 is exhibit 12; Acknowledgment letter by Union Bank Plc is exhibit 13, letter of Union Bank (Nigeria) plc to Economic and Financial Crimes Commission (EFCC) dated 4th March, 2011 is exhibit 14; mandate card together with boundless of documents of the 2nd Defendant is exhibit 15 and exhibit 16 is the statement of account of the 2nd Defendant. Then exhibit 17 and 18 are the computer generated statement account of the 2nd Defendant and cheque returned unpaid were admitted in evidence

respectively through PW5, a subpoenaed witness, Tanko Mohammed of Union Bank Plc.

At the close of evidence by the prosecution the Defendants through the 1st Defendant testified as PW3 on their behalf. The Defendants further called two more Witness that testified on their behalf as DWs 1 and 2 respectively. Exhibit 19, 20, 21, 22, 23, 23(a) - 23(d) and 24 were received in evidence through the 1st Defendant, DW3, Jubril Sabo Keana.

The brief facts of this case is that by exhibit 6, the 2nd Defendant was awarded a contract for construction of 213 nos open stall at Apo Resettlement, Fish and Meat market by Abuja Municipal Area Council (AMAC). The 2nd Defendant through the 1st Defendant, DW3 accepted the contract vide exhibit 6 (a). The Contract sum was ₦42,600,000.00 and was later reviewed to ₦56,873,472.20 as per exhibit 6(b) and 6(c) respectively. Then PW2 Ali Saidu Ango testified that sometimes in December, 2008 one Engineer Abdullahi Sule introduced the 1st Defendant, DW3 to him with a view of exploring benefitting opportunities in business. According to PW2, they had several discussions with the 1st Defendant pertaining to the contract awarded to the 2nd Defendant. PW2 testified that he requested from the 1st Defendant the contract documents and he presented same before his Co-directors of AKS Universal Services Limited and they all agreed that the contract is a viable one. PW2 stated that the 1st Defendant was asked to draft a proposed Memorandum of Understanding for the study of PW2 and the other Directors of AKS Universal Services Limited. Later, PW2 testified that a Memorandum of Understanding was executed and duly signed by the Directors of the 2nd Defendant and that of the AKS Universal Services Limited. The Memorandum of Understanding is exhibit 4(a). PW2 stated that they agreed in the Memorandum of Understanding between

the 2nd Defendant and AKS Universal Services Limited that AKS Universal Services Limited will fund the contract or project 100% awarded to the 2nd Defendant. PW2 testified that they then released the sum of ₦15,000,000.00 to the Defendants as a takeoff funds to start the project. PW2 further testified that the Defendants made another request of funds and they released the sum of ₦7,000,000.00 to the Defendants for the project bringing the total sum disbursed to ₦22,000,000.00 for a project that needed the sum of ₦24,000,000.00 to complete the entire exercise. PW2 testified that the Defendants then made request of additional funds for the project. PW2 testified that it is at this juncture they told the Defendants that they need to have some discussion and that having expended ₦22,000,000.00 on the project, Abuja Municipal Area Council should make payments over the works done so far. According to PW2, that the 1st Defendant insisted that Abuja Municipal Area Council would not make payment until the project is fully completed. PW2 testified that from the way and manner the 1st Defendant was speaking, they became suspicious and demanded the 1st Defendant to make available to them all correspondences between the 2nd Defendant and Abuja Municipal Area Council. PW2 stated that the 1st Defendant failed in presenting the correspondences. According to PW2, they demanded for the refund of the ₦22,000,000.00 investment put into the project and the 1st Defendant by a letter to AKS Universal Services Limited, promised to refund the amount of ₦22,000,000.00. PW2 testified that the Defendants then paid to them the sum of ₦10,000,000.00 and later made an additional payment of ₦5,000,000.00. PW2 testified that they demanded for the balance of their money and the 1st Defendant told them that he had made payment of ₦5,000,000.00 to Union Bank for a facility granted to him by the Bank to execute project with Abuja Municipal Area Council (AMAC). PW2 stated that they disagreed with the 1st Defendant because it

is contrary to the Memorandum of Understanding executed by the parties. Further, PW2 testified that they demanded to see from the 1st Defendant evidence of the loan facility from Union Bank and the 1st Defendant failed to make them available. PW2 testified that in September, 2010, they made another demand for the balance payment but the Defendants failed to pay the balance. PW2 testified that 1st Defendant later invited him to Abuja from Lagos in respect of the balance payment. PW2 testified that the 1st Defendant then issued to him a cheque to the value of the amount outstanding i.e. ₦6, 700,000.00 and some fraction. The cheque issued by the 2nd Defendant in favour of AKS Universal Services Limited is Exhibit 3. Then PW2 testified that when he presented the cheque on the account of AKS Universal Services Ltd, the cheque, Exhibit 3 was returned unpaid. Then PW2 testified that when he contacted the 1st Defendant, the 1st Defendant advised him to represent the cheque again. PW2 then stated that on the second presentation the cheque was returned and marked “DAR”. PW2 further testified that the 1st Defendant then made an undertaking in writing to pay the balance within 10 days which he eventually failed also. Thus, PW2 testified that they then petitioned the Economic and Financial Crime Commission. The evidence of PW3 is to the same effect with the evidence of PW2.

Then pursuant to the petition, PW1, Uzodinma Kingsley and PW4, Mohammed Marafa, detectives from the Economic and Financial Crime Commission testified in Court. Both witnesses testified to the effect that on the 13th December, 2010 the commission received a petition, alleging issuance of dud cheque against the Defendants. The petition was received in evidence through PW1 as Exhibit I. According to the evidence of PW1, after Exhibit I was received and they were detailed to investigate the allegation, they invited the 1st Defendant and confronted him with the petition. He testified that the 1st Defendant said to him that he needed

assistance in order to execute a contract that was awarded to him by Abuja Municipal Area Council. According to PW1, the 1st Defendant then approached one of the Directors of AKS Universal Services Limited, Mr. Sanusi Aliyu who gave him a loan of ₦6, 720,132.86. PW1 testified that on the due date for repayment, the 1st Defendant issued a cheque and on presentation, the cheque was dishonoured due to insufficient funds in the 2nd Defendant's Account. The PW1 recorded the statements of the 1st Defendant and they were received in evidence as Exhibits 2, 2(a) and 2(b) respectively. According to PW1 their investigation of the alleged issuance of dud cheque took them to Abuja Municipal Area Council and Union Bank to ascertain the authenticity of the contract awarded to the 2nd Defendant and the account of the 2nd Defendant with Union Bank Plc. According to PW4, letters were written to these organizations and they received responses. The documents pertaining to the contract and the bank and the letters of the Economic and Financial Crimes Commission (EFCC) seeking for the relevant information were admitted in evidence through PW4 as exhibits 5-16 respectively. PW4 testified that by exhibits 6-12, he confirmed the contract award to the 2nd Defendant. PW4 further testified that he confirmed that the contract sum have been paid to the contractor, 2nd Defendant by Abuja Municipal Area Council (AMAC). PW4 further testified that in respect of his analysis of the documents received from the bank, Union Bank, he discovered that the 2nd Defendant had no sufficient funds in its accounts to accommodate the cheque of ₦6,700,000.00 issued to A.K.S Universal Services Limited.

PW5, Tanko Mohammed testified pursuant to a subpoena duces tecum ad testificandum on the 18th March, 2013. The statement of account of the 2nd Defendant was admitted in evidence through PW5 as exhibit 17 as well as exhibit 18, cheque returned unpaid. And PW5 when shown exhibit 3, he testified that it

was drawn on exhibit 17 and that exhibit 3 was returned unpaid twice on the 14th September, 2010 and 20th September, 2010. PW5 testified that the reason for returning exhibit 3 was due to insufficient funds as at the date of presentation.

The above is the brief facts of the case of the prosecution. And on the 3rd June, 2014, the Defendants opened their defence by calling three (3) witnesses including the 1st Defendant who testified as DW3. Exhibits 19-24 were admitted in evidence on behalf of the Defendants.

The brief facts of the case of the Defendants is that the 1st Defendant is the Managing Director of the 2nd Defendant. He testified that sometimes in the year 2009 the 2nd Defendant was favoured with a contract by Abuja Municipal Area Council (AMAC) to the tune of N42,600,000.00 DW3 testified that the 2nd Defendant accepted the contract but they were handicapped to do the job due to finance. DW3 testified that he then approached a company, AKS Universal Services Limited through one of its Director Mr. Ali Ango for financing of the contract. According to DW3 he briefed Ali Ango of the Contents of the contract and Ali Ango was agreeable to partner with them and to finance the execution of the contract. DW3 then testified that parties now executed a memorandum of understanding between the 2nd Defendant and AKS Universal Services Limited. He testified that the highlight of memorandum of understanding was that the sum of ₦25,000,000.00 will finance the contract but could also be varied depending on the situation. DW3 stated that AKS Universal Services Limited then advanced to the 2nd Defendant the sum of ₦22, 000,000.00 for the execution of the contract.

He testified further that as expected, the site conditions and costs variations necessitated additional funding. DW3 testified that as the work progress, Abuja Municipal Area Council was making payments on the contract out of which AKS

Universal Services Limited despite the critical point on time, received about N15,000,000.00 payment. He testified that his partners, AKS universal Services Limited stopped funding the project because Abuja Municipal Area Council has stopped payment. According to DW3 the work was stagnant for about 6-7 months and Abuja Municipal Area Council threatened revocation of the contract. DW3 testified that this necessitated the Defendants to approach Union Bank for a soft loan of N5,000,000.00 to complete the contract. He then stated that the bank, part of its conditions was that the 2nd Defendant has to domiciled payments from the contract through an account with them which the Defendants complied. At the completion of the contract, DW3 testified that the outstanding payment from Abuja Municipal Area Council was N17,400,000.00 and for over six (6) months Abuja Municipal Area Council did not pay. DW3 testified that when Abuja Municipal Area Council eventually paid, they paid the sum of N6,700,000.00 and the bank, due to the standing instructions, they took their money upfront and left a balance of N400,000.00 in the account of the 2nd Defendant. DW3 testified that when his partners heard of the payment, according to DW3, he explained to them of the relationship with union bank Plc and that the Bank had taken their money upfront. DW3 testified that he showed to PW2 the documents of payment from Abuja Municipal Area Council and explained to Ali Ango that as soon as payments are made by Abuja Municipal Area Council, Ali Ango, PW2 will be informed accordingly. DW3 testified that Ali Ango insisted that DW3 must issue to him a post dated cheque. DW3 in the presence of his brother in-laws issued the post-dated cheques to Ali Ango for their outstanding balance and that Ali Ango will be informed when to present the cheques. DW3 testified that Ali Ango, PW2 did not keep to his undertaking and he presented the cheques without keeping in touch with him.

According to DW3, it was when the cheque was returned unpaid that PW2 got in touch with him and they exchanged hot words. DW3 testified that after about one week of the episode, Ali Ango called him and told him that he is in Abuja. DW3 stated that he then invited PW2 to his house as usual but this time, PW2 refused the invitation. DW3 testified that he then met PW2 in his hotel and PW2 confronted him with a letter they had written to Abuja Municipal Area Council introducing themselves as his partners and that they are ready to complete the job and that all subsequent payment be made directly to them. DW3 testified that PW2 asked him to write a letter agreeing with them and requesting Abuja Municipal Area Council to pay to them subsequent payments directly to them regarding the contract. DW3 testified that he then wrote the letter and gave PW2 domiciling subsequent payments to them. DW3 concluded his testimony by saying that AKS Universal Services Limited and Ali Ango never got back to him and the next thing was an invitation by Economic and Financial Crimes Commission (EFCC).

The evidence of DWs1 and 2, Mathew Elayo and Hassan Aboki Usman testified to the same effect. However DW1 testified that the 1st Defendant pleaded with Ali Ango, PW2 that payment would be made as soon as Abuja Municipal Area Council makes payment. DW1 testified that Ali angu insisted that the 1st Defendant must issue to him a post dated cheque. According to DW1, the 1st Defendant issued to Ali Ango the cheque contingent on the fact when Abuja Municipal Area Council pays and then the 1st Defendant will instruct Ali angu when to present the cheque for payment. According to DW1, that Ali Ango was comfortable with this arrangement and Ali Ango also gave them a commitment that he will not present the cheque until the 1st Defendant informs him.

On the 7th March, 2016, the Defendants closed their case. On the 8th December, 2016 parties in this case adopted their final written addresses. The case was then adjourned to 6th March, 2017 for judgment.

In the final written address of the prosecution the learned prosecuting Counsel distilled a sole issue for determination as follows:-

“Whether the prosecution has proved the essential elements of the ingredients of the offence alleged against the Accused persons beyond reasonable doubt as required by section 135 of the Evidence Act, 2011 (as amended)”

In arguing the sole issue for determination the learned prosecuting Counsel submitted that from the totality of evidence adduced at trial and the exhibits tendered in Court, the prosecution has proved its case against the Defendants as required by law.

He then submitted at paragraphs 2.1- 2.3 of the final written address that where the essential ingredients of the offence have been proved or established by the prosecution, as done in this case, the charge is proved beyond reasonable doubt as against proof beyond all iota of doubt or proof to the hilt. He relied on the case of ***NWATURUOCHA V STATE, (2011) 6 NWLR (pt1242) page 170, ALABI V THE STATE, (1993)7 NWLR (pt307), IORTIM V STATE(1997) 2 NWLR(pt490) page 711 at 732 paragraphs G-H, KALU V STATE, (1998) 13 NWLR (pt 337)page 456 at 457, MICHAEL V STATE, (2008)13 NWLR (pt 1104) page 361 at 384.***

Then at paragraphs 2.4-3.8 of the final written address, the learned prosecution submitted to the effect that the charge against the two Defendants is for issuance of dud cheque contrary to section 1(1) (b) of the Dishonoured Cheques (Offence) Act

and punishable under section 1 (1) (b) (i) and (ii) of the same Act. The prosecution stated that the elements that constitute the offence or the ingredients of the offence of issuance of dud cheque are:-

- (1) That the Defendant obtained credit for himself,
- (2) That the cheque was presented within three months of issuance thereon; and
- (3) That on presentation, the cheque was dishonoured on the ground that there was no sufficient fund standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn.

The prosecution relied on the case of ***ABEKE V THE STATE, (2007)9 (pt1040) page 411.***

To establish the ingredients of the offence, the learned prosecuting Counsel referred me to the petition, exhibit 1 and the evidence of PWs1 and 2 as well as exhibit s 2,2(a) and 2(b) the statements of the 1st Defendant to the investigating officer i.e PWs1 and 4. The learned prosecuting Counsel also referred me to the cross examination of PW1 wherein he stated that the Defendants had returned the sum of N650,000.00 in favour of the nominal complainant through Economic and Financial Crimes Commission (EFCC) as part of the N6,720,132.86 for which a dud cheque was issued. The learned prosecution also referred me to the evidence of PW2, a Director of AKS Universal Services Limited who gave full account of the business transaction and relied on contract documents exhibits 6 and 6 9a) and the memorandum of understanding executed by the AKS Universal Services Limited and the Defendant which will serve as a guide in terms of executing the project. The prosecution submitted that PW2 testified that in line with the memorandum of understanding, exhibit 4 clause 21 that AKS Universal Services

Limited will provided all funds to finance the project 100%, the sum of N22,000,000.00 was disbursed to the Defendants for a project that needed N24,000,000.00 to complete. According to the learned prosecution, PW2 testified that it was when the 1st Defendant made a request for the 3rd disbursement of fund that suspicion arose and they inquired from the 1st Defendant how come Abuja Municipal Area Council has not made any payment having expended the sum of N22, 000,000.00 for a project that needed N24, 000,000.00 to complete. The learned prosecution submitted that it was at this stage that PW2 demanded from the Defendants all correspondences between the 2nd Defendant and Abuja Municipal Area Council which the Defendants failed to produce. The learned prosecution submitted that PW2 then requested for the refund of their investment. The learned Counsel then submitted that PW2 in his evidence testified that the 1st Defendant refunded the sum of N10,000,000.00 and made additional refund of N5,000,000.00. The prosecution further submitted that PW2 gave evidence on his invitation to Abuja by the 1st Defendant and on getting to Abuja met the 1st Defendant absent and he waited and when the 1st Defendant returned, the 1st Defendant issued to a cheque, exhibit 3 to the value of the outstanding and the cheque, exhibit 3 was dishonoured twice on presentation on the account of AKS Universal Services Limited.

The learned prosecuting Counsel submitted that PW2 never coerced the 1st Defendant in issuing the cheque, exhibit 3.

The learned prosecution also submitted that by the evidence of PW2 the 1st Defendant had received payment to the tune of N42,000,000.00 out of N56,000,000.00 with some fraction from the reviewed contract sum before the 1st Defendant issued exhibit 3. The learned prosecuting Counsel then submitted that

from the evidence adduced by PWs2,3 and 5, it has been proved that exhibit 3 was presented firstly for payment on 14th September, 2010 and represented at instruction of the 1st Defendant on the 20th September, 2010 within three (3) months of issuance through clearing and that there was no sufficient money in the account of the 2nd Defendant to cover the value of the cheque. He submitted that the 1st Defendant, the Managing Director of the 2nd Defendant, by the evidence of PW4, the 1st Defendant has the mandate to sign and issue cheques of the 2nd Defendant. The learned prosecution also relied on exhibits 21 and 22.

At paragraphs 3.9 and 4.0, the final written address of the prosecution, the learned prosecuting Counsel submitted that by the evidence of PWs1,2,3,4 and 5 and the documents tendered and admitted in evidence before the Court, the Defendants intentionally issued a cheque to the nominal complainant knowing fully well that there was no money in that account neither was he expecting any money into the account having been over N42,000,000.00 by Abuja Municipal Area Council before he issued the cheque. Learned prosecution submitted that the vital evidence given by the prosecution witnesses nos1-5 were not in any way discredited by way of cross examination. The learned prosecution further stated that exhibits 21 and 22 were made to Abuja Municipal Area Council in a desperate bid by the nominal complainant to recover their money from a third party. The prosecution submitted that exhibit 21 was made 10days after the cheque has been presented twice and DW4 failed to honour his undertaking to pay them the balance of their investment. The learned prosecution then submitted that the fact that the 1st Defendant undertook to pay the value on the face of the exhibit 3 to PW2 was not controverted or challenged under cross examination and should be deemed proven.

At paragraphs 4.1 – 4.4 of the final written address, the learned prosecution submitted to the effect that it is not in contention and indeed under cross examination DW3 issued the dud cheque, exhibit 3. Then the learned prosecution submitted that the submission of the defence at paragraphs 2.11 and 4.8 of their final written address amounts to Counsel giving evidence in his address. The learned prosecution submitted that the Economic and Financial Crimes Commission (EFCC) Act 2002 does not empower its operatives to recover any debt and therefore they cannot be turned into debt recovery agent.

Further, the learned prosecution submitted that the evidence by the defence that the cheque was issued under threat is an afterthought and it is immaterial in this case. He contended that the 1st Defendant failed to prove how PW2 threatened him and that the evidence of DWS1, 2 and 3 are full of contradictions. The learned prosecution submitted that DW3, the 1st Defendant issued exhibit 3 when he knew the account has no funds but that he issued exhibit 3 when PW2 insisted and that he also informed PW2 that the cheque will constitute evidence of the balance of their outstanding money with him. The learned prosecution stated that DW3, the 1st Defendant stated that as soon as payment are made by Abuja Municipal Area Council, he will inform him to do the needful. The learned prosecuting Counsel contended that this piece of evidence was never discredited under cross examination.

In conclusion, the learned prosecution urged me to hold that the prosecution has proved all the ingredients of the offence of dud cheque agent the Defendants and that the Defendants be found guilty as charged.

The learned Counsel for the 1st and 2nd Defendants also filed final written address in this case. In the final written address, learned Counsel formulated two issues for determination as follows:

- (1) Whether having regard to the totality of the evidence adduced, the prosecution has established a case against the accused persons beyond reasonable doubt to secure a conviction?
- (2) Whether the prosecution has been able to prove that the act of the Defendants was with the intention to defraud or a business transaction which terms of engagement and agreement was not strictly adhered to by the nominal complainant.

At paragraph 4.1, the learned Counsel stated that for the purpose of convenience, the two issues for determination would be jointly argued.

Then at paragraphs 4.2- 4.5 of the final written address, the learned Counsel for the Defendants submitted that it is elementary principle of law that the burden of proof in criminal cases is always on the prosecution unlike in civil cases where the burden shifts.

He referred to section 139 (1) of the Evidence Act 2011 (as amended) and the cases of *ODEN V FRN, (2005) INCC 303 at pages 327-328, OLORUNTOSIN V STATE, (2008) 3 NCC page 610 At 631-632 and KIRI V STATE, (1992) 4 NWLR (pt233) page 12.*

At paragraphs 4.6 -4.27 of the final written address of the Defendant's, learned Counsel submitted to the effect and relating the instant case with the requirement of proof beyond reasonable doubt, he submitted that the prosecution failed to establish the shift of the Defendants beyond reasonable doubt in connection with

the offence of issuing a dud cheque or dishonoured cheque. Learned Counsel then referred me to the definition of a dishonoured cheque under section 1(a) and (b) of the Dishonoured Cheque (Offence) Act, Cap 123 LFN and punishable under section 1(b) (i) of the same Act.

Learned Counsel then submitted that by virtue of section 1(3) of the same Act, the offence of issuance of dishonoured cheque is not a strict liability offence. According to the learned Counsel that it involves two constituent elements: i.e issuing of the cheque and knowledge that the cheque would be dishonoured on the grounds that there was no funds in the account. He submitted that actus reus and mens rea must co- exist. Thus, learned Counsel contended that a cursory look at section 1 of the dishonoured cheques (offences) Act, for a cheque to be termed dishonoured, it must be a cheque when presented for payment not later than three months after the date of the cheque is dishonoured on the grounds that no funds or insufficient funds were standing to the credit on which the cheque was drawn. Hence, learned Counsel argued that for a cheque to be treated as dishonoured, it must be presented not later than three months from the date on the cheque.

In the instant case, learned Counsel submitted that by the evidence before the Court, at the time the cheque in question was issued, both parties knew as a matter of fact that the credit on which the cheque was drawn was lacking in funds. He relied on exhibits 22,12,21 paragraphs 2.7 -2.9 and the evidence of PW2 to the effect that the cheque be issued on the grounds that both of them reasonably believed that the account will be funded shortly thereafter from the said project which PW2 later took over.

He contended that PW2 having accepted exhibits 12,21,22,23 and 24, he cannot approbate and reprobate and that PW2 has no moral justification to raise the issue of dud cheque any more.

Further, learned Counsel argued that the evidence before the Court on record, the date on the cheque and the date it was presented was less than three months contemplated by law. He stated that the date on the cheque is 12th September, 2010 while the date it was presented was 16th September, 2010, an interval of three days and he relied on exhibit 3.

Learned Counsel for the Defendants submitted that due to curiosity of the nominal complainant, the 2nd Defendant and by their mutual agreement issued a letter of domiciliation of payment in respect of the transaction for which the cheque was issued to be paid to AKS Universal Services Limited which letter is dated 22nd September, 2010, a period of ten (10) days after the cheque was issued and presented before it is returned unpaid with the inscription "DAR" represent on 16th September, 2010.

Learned Counsel also submitted that even if the money for which the cheque was issued in expectation of payment to the Defendant's account is to be paid, learned Counsel submitted that it would have not been paid to the Defendant's account in view of the letter of domiciliation to the nominal complainant's account. He also stated that the nominal complainant vide a letter dated 21st September, 2011 to the Chairman Abuja Municipal Area Council requested for payment of the outstanding balance for which the cheque was issued to them. The learned Counsel then contended that it is on record that at the time the cheque was issued, the sum of N13,000,000.00 was still outstanding to be paid which the cheque was drawn but

for the outstanding works as per exhibit 12 which PW2 by exhibit 21 accepted to complete and collect the outstanding balance.

Thus, learned Counsel submitted that from the facts and evidence, at the time the Defendants issued the cheques, he has reasonable grounds to believe and did believe in fact that it would be honoured if presented for payment within the period specified by law.

At paragraphs 4.26-4.35 of the Defendants' final written address, learned Counsel submitted that PW2 is not a witness of truth. According to Counsel that PW2 testified that when he presented the cheque and it was dishonoured wherein he reported DW3 to operatives of Economic and Financial Crimes Commission (EFCC) for prosecution.

Learned Counsel submitted that inconsistencies exist in the testimony of PW2. Learned Counsel submitted that PW2 coerced the 3rd Defendant to issue him with a post- dated cheque to cover his outstanding balance with a actual agreement not to present it to the bank until he receives instructions from the 3rd Defendant informing him that the account has been credited. Learned Counsel referred me to the evidence of DW3, Jibril Sabo Keana and the evidence of DWs1 and 2 which collaborated the evidence of DW4 as to how PW2 coerced the 1st Defendant into issuing the cheque which evidence of DWs1, 2 and 3 have not been challenged by cross examination.

Learned Counsel further stated that the evidence of PW2 that when the cheque was dishonoured he reported the Defendants to Economic and Financial Crimes Commission (EFCC) is unsubstantiated and an after thought.

According to learned Counsel PW2 contrived to becloud the real issue in controversy which is the mutual agreement that subsequent payments due to the Defendants in respect of the contract be made to AKS Universal Services Limited. Further, learned Counsel submitted that PW2 personally wrote to the Chairman Abuja Municipal Area Council seeking his approval to complete the project and collect the outstanding balance of N13,000,000.00 and learned Counsel referred me to exhibits 21 and 22 which prosecution vehemently opposed despite the facts that this exhibit were authored by PW2 on behalf of AKS Universal Services Limited.

Then at paragraphs 4.36 -4.49 of the final written address, learned Counsel for the Defendants submitted to the effect that from the contents of exhibits 21 and 22, at the time DW3 issued exhibit 3 to PW2, both parties knew that there was no money in the account. He therefore submitted that section 1(3) of the Act be evoked in favour of the Defendants. He also referred me to the case of *OKEKI V A, G. BENDEL (1986) 2 NWLR (pt 24) page 658 and ABEKE V STATE, (2007) 9 NWLR (pt 1040) page 4(1) at 532 paragraphs G-H.*

Further, learned Counsel stated that exhibits 21 and 22 are more illuminations as to what transpired between the 1st Defendant and PW2 before exhibit 3, the dishonoured cheque was issued. He then submitted that documentary evidence serves as a hanger to assess oral evidence and he relied on the case of **U.K EJE V UKEJE, (2014) 38 WRN page 1 at 22-23 lines 45-4**

In conclusion, learned Counsel submitted that the evidence of PWs1, 3, 4 and 5 did not add any credibility to the evidence of the prosecution.

He submitted that these witnesses were not physically present when the cheque was issued. They were not privy to the agreement and the circumstances surrounding the issuance of the cheque. He then referred me to the evidence of PW3 under cross examination to the effect that he was not there when the 1st Defendant issued PW2 with the cheque.

Finally, learned Counsel submitted that the prosecution failed to prove the essential ingredients of the offence the Defendants were charged and he therefore urged me to discharge and acquit the Defendants.

To resolve the contending issues in this case both the prosecution and the defence Counsel formulated issues for determination. The issue distilled by the learned prosecuting Counsel is apt and I adopt same to resolve the issues and determine this case. The issue is:-

“Whether the prosecution has proved the essential elements of the ingredients of the offence alleged against the Accused persons beyond reasonable doubt as required by section 135 of the Evidence Act, 2011 (As amended).”

However, before I proceed to consider the above issue, it appears both the prosecution and the defence Counsel referred to the 1st Defendant as DW4. Both Counsel may be right. However, the position on record is that on the 3rd June, 2014 DW2 testified and the case was then adjourned to the 22nd September, 2014 for continuation of defence. On the 22nd September, 2014 the Defendants’ Counsel, one Hussein Musa informed the Court that 2 witnesses had so far testified and that they have two more witnesses to call including the 1st Defendant. He however could not proceed with the case wherein he applied for an adjournment and the

application was refused. I then ordered that DW3 proceed to the witness box for his testimony. At that stage the Counsel withdrew his services on behalf of the Defendants. In other words, on record, there is no DW3 that testified on 22nd September, 2014. And the case was adjourned to enable the Defendants to secure the services of another Counsel. Then on the 26th November, 2014 the 1st Defendant testified as DW3 and not DW4. Thus, in this context, wherever DW4 appears it is in reference to DW3, the 1st Defendant, Jubril Sabo Keana.

Having said the above, the one Count charge against the Defendants is for the offence of issuance of dud cheques pursuant to (offences) Act Cap D11 LFN, 2004 and punishable under section 1(1) (b) (i) of the same Act. Section 1 (a) and (b) provides:-

“(1) Any person who

- (a) Obtains or induces the delivery of anything capable of being stolen either to himself or to any other person; or*
- (b) (b) Obtains credit for himself or any other person, by means of a cheque that, when presented for payment not later than three months after the date of the cheque, is dishonoured on the grounds that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn, shall be guilty of an offence and on conviction shall*
 - (i) In the case of an individual be sentenced to imprisonment for two years, without the option of a fine;*

- (ii) *In the case of a body corporate, be sentenced to a fine of not less than N500.00”.*

Further section 1 (2) (a) and (b) and 3 of the Act provides:-

- (2) For the purposes of sub-section (i) of this section.
- (a) The reference to anything capable of being stolen shall be deemed to include a reference to money and every other description of property, things in action and other intangible property.
- (b) A person who draws a cheque which is dishonoured on the ground stated in the subsection and which was issued in settlement or purported settlement of any obligation under enforceable contract entered into between the drawer of the cheque and the person to whom the cheque was issued, shall be deemed to have obtained credit for himself by means of the cheque, notwithstanding that at the time when the contract was entered into, the manner in which the obligation would be settled was not specified.
- (3) A person shall not be guilty of an offence under this section if he provides to the satisfaction of the Court that when he issued that cheque he had reasonable grounds for believing and did believe in fact, that it would be honoured if presented for payment within the period specified in sub-section (1) of this section.

For the prosecution to secure a conviction of the Defendants pursuant to section 1 (1)(b) (i) and (ii) of the dishonoured (offences) Acts, LFN 2004, the Supreme Court of Nigeria, in the case of ***BOLAWLE ABEKE V THE STATE(supra)*** laid down the essential elements or ingredients of the offence to be established against the accused person(s). At page 437 paragraphs C-D, the Supreme Court held:-

“From the above, the duty on the prosecution is to prove:-

- (a) That Appellant obtained credit by herself.*
- (b) That the cheque was presented within three months of the date thereon;*
- (c) That on presentation the cheque was dishonoured on the grounds that there was no sufficient funds or insufficient funds standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn.”*

The above ingredients or elements of the offence of issuing dud cheque must be proved by the prosecution against the Defendants beyond reasonable doubt. Section 135 (1), (2) and (3) of the Evidence Act, 2011 (As amended) provides:-

“(1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it, whether the commission of such Act is or is not directly in issue in the action.

(3) If the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on the Defendant.”

See also section 36 (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and the cases of *ALABI V THE STATE, (1993) 7 NWLR (pt307)*

page 511 at 531 paragraph A-C, SOLOLA V THE STATE, 92005)0 5 SC (pt1) page 135 AND BELLO IBRAHIM V THE STATE, (2014) LPELR 23291 (CA). Thus, the burden of proof in criminal cases or trial, whether the evidence is direct or circumstantial, the prosecution have the task to establish the guilt of the accused beyond reasonable doubt and the onus in that regard never shifts. See *JAMES AFOLABI V THE STATE,(2016) LPELR 40300 (sc) and ARUNA V STATE (1990) 6 NWLR (pt155) page 125.*

In the instant case, the star witness for the prosecution is PW2, Ali Saidu Ango, a Director of AKS Universal Services Limited. PW2 testified as follows:-

“Sometimes in December, 2008, Alhaji Jubril, the 1st Defendant was introduced to me by Engineer Abdullahi sule with the sole aim of exploring opportunities of doing benefitting business. I gave the 1st Defendant audience to present his proposal which he did during the interacting session. I find the business proposition attractive and confirmed to him that through a company we ran with my friends, AKS Universal Services Limited to partner with him to execute the project. At that stage i told him i need to present a business proposal to my co-directors which he agreed. I then took the proposal to my co-directors given to me by the 1st Defendant. We reviewed it and we came to a consensus that the business is viable.”

PW2 testified further that pursuant to the discussion he had with the 1st Defendant, a memorandum of understanding was executed between the 2nd Defendant and AKS Universal Services Limited.

The memorandum of understanding is exhibit 4(a). Then PW2 testified that based on exhibit 4(a) the 1st Defendant made a request for funds to execute the project wherein AKS Universal Services disbursed to the 2nd Defendant the sum of N22,000,000.00. PW2 testified that the initial contract sum was N38,000,000.00 and only the sum of N24,000,000.00 was estimated to complete the project and by exhibit 4(a) they were to fund the project 100%. PW2 testified that after disbursing the sum of N22,000,000.00 and the 1st Defendant made request of additional funds, he said as follows:-

“At this point we told him that we need to have some discussion. We also expected that having expended the sum of N22,000,000.00, Abuja Municipal Area Council (AMAC) would make payment over the work done so far.” PW2 testified that they became suspicious of the 1st Defendant and they demanded for all correspondences between Abuja Municipal Area Council (AMAC) and the 2nd Defendant which the 1st Defendant, being its Managing Director failed to furnish. At this stage, PW2 said: -

“Then we demanded the refund of our investments of which in a letter written to us, the 1st Defendant committed to refund us the entire N22,000,000.00 invested. First, he released the sum of N10,000,000.00 and made additional payment of N5,000,000.00.”

PW2 testified also that when we demanded for the balance, the 1st Defendant told him that he had to make payment of N5,000,000.00 to Union Bank for a facility granted to him by the bank and PW2 objected to the payment as it was contrary to exhibit 4(a). PW2 further testified that in September, 2010 he further made a demand for the payment of the balance from the Defendants and the 1st Defendant told him that Abuja Municipal Area Council (AMAC) had made payment to the 2nd

Defendant but yet to be credited in the account of the 2nd Defendant. PW2 could not receive the outstanding balance payment and he then testified that the 1st Defendant invited him to Abuja and he arrived at the residence of the 1st Defendant at 9:00am and the 1st Defendant was absent. PW2 testified that he waited until sunset when the wife of the 1st Defendant returned from office and she invited him to the compound and he politely declined.

Then after the 1st Defendant returned and invited PW2 into his house, PW2 testified as follows:-

“Then the 1st Defendant offered me a cheque to the value of the amount outstanding.”

He testified further:-

“The 1st Defendant is the sole signatory and the amount is about N6,700,000.00 and some fraction thereabout.” The cheque is exhibit 3. PW2 then testified as follows:-

“Later I presented the cheque on the account of AKS Universal Services Limited with Oceanic Bank Plc. The cheque was returned unpaid. Then I informed the 1st Defendant of the position of the cheque and he advised that I should represent the cheque the second time. On the second presentation the cheque was returned and marked “DAR”.

PW2 then stated that he requested for another meeting with the 1st Defendant and the 1st Defendant then committed in writing that he would within 10days pay the value of cheque which he failed. PW2 testified thus:-

“We then came to the conclusion that there is intention of the 1st Defendant to defraud us and accordingly we petitioned Economic and Financial Crimes Commission (EFCC).”

The petition to the Economic and Financial Crimes Commission (EFCC) is exhibit 1. The above is the summary testimonies of PW2. PWS1 and 4 are the investigating officers from the Economic and Financial Crimes Commission (EFCC). PW1 in his testimony, testified that when he confronted the 1st Defendant with the petition, exhibit 1, PW1 testified as follows:- “ The 1st Defendant said he needed financial assistance in order to execute contract that was given to him by Abuja Municipal Area Council (AMAC). And by the evidence of PW4, Mohammed Marafa, he confirmed the authenticity of the contract awarded to the 2nd Defendant by Abuja Municipal Area Council (AMAC) and the various contract variations. The contract documents are exhibits 6,6 (a), 6 (b), 6(c), 7 and 7 (a) respectively. The statements of the 1st Defendant exhibit 2 also confirmed the award of the contract by Abuja Municipal Area Council (AMAC) and the agreement of the 2nd Defendant and AKS Universal Services Limited as per exhibit 4(a). Then PW4 in his evidence testified that he confirmed that the contract sum awarded to the Defendants had been paid by Abuja Municipal Area Council (AMAC) to the Defendant. PW4 also testified that by exhibit 16, the statement of account of the 2nd Defendant, there was insufficient funds to accommodate the value of the cheque, exhibit 3. PW5, Tanko Mohammed, a banker also testified that by exhibit 17, the cheque, exhibit 3 was returned unpaid twice i.e 14th September, 2010 and 20th September, 2010 due to insufficient funds as at the date of presentation of the cheque, exhibit 3.

Now from the evidence of the prosecution witnesses, have the prosecution led credible evidence to establish the elements or ingredients of the offence of issuing dud cheque against the 1st and 2nd Defendants?

The first ingredient of the offence is that the Accused person obtained credit by himself.

To establish the ingredient, the prosecution in this case must present credible evidence, facts or surrounding circumstances that are devoid of sentiment, speculation or parochialism. The evidential burden is satisfied if a reasonable man is of the view that from the totality of the evidence before the Court, the Accused person committed the offence.

Now in the instant case, I have virtually re-produced the evidence of PW2 in this case. The evidence of PWs1, 3, 4 and 5, as rightly submitted by the learned Counsel for the Defendants at paragraph 4.47 of his final written address is evidence by witnesses that were not properly present when the cheque was issued. However, PWs1 and 4 testified to the roles they played in their respective investigation. I have also perused paragraph 3.6 of the final written address of the learned prosecuting Counsel submitted that exhibits 10 and 12 corroborated the testimony of PW4 and she referred me to paragraph 2 of exhibit 12.

Now I have looked at exhibits 10 and 12. The documents are public documents and firstly, exhibit 10 is not dated and not signed. And in the case of ***DR. OKEZIE VICTOR IKPEAZU V OBASI UBA EKEAGBARA & ORS, (2016) LPELR 40847***, the Court of Appeal, Abuja Division delivered on 18th August, 2016 held: -

“The importance of signature and the need to append signature on legal documents or any document at all cannot be underestimated for,

as held in ADEFASIN V DAYEKH, (2007) 11 NWLR (pt 1040) 89 citing with approval the decision in TSALIBAWA V HABIB, (1991) 2 NWLR (pt 174) page 461 at 480 – 481, a person’s signature, written names or mark on a document, not under seal, signifies an authentication of that document that the person holds himself out as bound or responsible for the contents of such a document. It is the signature and the name of the person that links the document to the maker. Where this is lacking, the document is fundamentally defective and therefore of no use for all purposes.”

See also ***OKAFOR V NWEKE, (2007) 10 NWLR (pt 1043) page 521*** and ***ALHAJI LATEEF GBADAMOSI V CHIEF ALFRED BIALA, (2014) LPELR 24389 (CA)***.

In the instant case, exhibit 10 did not bear the attributes of an admissible evidence. Another point of importance is that exhibit 10 is certified as a true copy by the Economic and Financial Crimes Commission. This also applies to exhibits 6 – 12 and 19 all tendered and admitted through prosecution witnesses.

It is important to reproduce the relevant provisions of the law dealing with admissibility of public documents. Section 104 of the Evidence Act, 2011 (as amended): -

“(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is true copy of such document or part of it as the case maybe.

(2) The certificate mentioned in Subsection (1) of this Section shall be dated and subscribed by such officer authorised by law to make use of a seal, and such copies so certified shall be called certified true copies.

(3) An officer who, by the Ordinary Course of his official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this Section.”

And Section 105 of the Evidence Act also provides;

“Copies of documents certified in accordance with Section 104 may be produced in proof of the contents of the Public documents or parts of the documents of which they purport to be copies.”

Now the documents marked as exhibits 6 – 12 and 19 were sent to the Economic and Financial Crimes Commission pursuant to letter of investigation activities, exhibit 4. Then by exhibit 5, the Head of Administration on behalf of the Chairman, Abuja Municipal Area Council forwarded to the Commission documents requested as per exhibit 4 for its investigation activities. Thus, in relation to admissibility of public documents, the prosecution cannot run away from fulfilling the requirements of Section 104 and 105 of the Evidence Act, 2011 (as amended).

In the case of ***MALLAM DAUDA AHMADU SABON FEGI V ALHAJI SALEH IBRAHIM BIYE, (2014) LPELR 24003***, the Court of Appeal, Kaduna Division held as follows: -

*“In **TABIK INVESTMENT LTD V GUARANTY TRUST BANK PLC (Supra)**, the Supreme Court stated emphatically that payment of*

legal fees and evidence of same was an integral part of the certification process and it cannot be waived and none can be exempted from paying the legal fees. Mukhtar, JSC (as she then was) made the point thus: - “The fact that it sets out conditions that must be satisfied before a public document is admitted in evidence, requires that such conditions must be met. The argument that the payment of legal fees required in Section 111(1) of the Evidence Act... would be by private or members of the public who are applying for such certified true copies of the public document, and not payable by government departments as this case, holds no water.”

The Court of Appeal further relying on the case of **TABIK INVESTMENT V GTBANK PLC**, where the Supreme Court further held: -

“It is clear that the Section has not made any exemption from the payment of legal fees by any person who requires to secure a certified true copy of any public document in custody of a public officer including members of the police force. If there are exemptions, the Section or any Section related thereto should have specifically provided for such exemption.”

In the instant case, payment of legal fees being an integral part of certification of public documents, on the face of the documents i.e. exhibits 6 – 12 and including exhibits 19, 20, 21 and 22 tendered and admitted through DW3, Jubril Saba Keana did not satisfied the requirement of the old Section 111(1) of the Evidence Act now Section 104(1), (2) and (3) and indeed Section 105 of the Evidence Act, 2011 (as amended). Exhibits 6, 6(a), 6(b), 6(c), 7, 7(a), 8, 9, 9(a), 9(b), 10, 11, 11(a), 11(b) and 12, clearly on the face of these exhibits, legal fees have not been paid for their

certification. In respect of exhibits 19 and 20, on the face of the two exhibits, I can see some writing in red ink showing fees of N500 and Receipt No. 6164128 dated 4th March, 2016 in which a deposit slip of Aso Savings & Loans Plc of the High Court of the Federal Capital Territory (Revenue Account) have been attached or exhibited separately on the two exhibits i.e. 19 and 20.

I may not have problem with the legal fees paid in respect of exhibits 19 and 20. However, a close perusal of Section 104 (1), (2) and (3) of the Evidence Act, 2011 (as amended), did exhibits 6 – 12, 19 20, 21 and 22 comply with the intendment of the legislature as envisaged by Sections 104 (1), (2) and (3) of the Act? Section 104 (1) in its plain and simple wordings or grammatical meaning says, “every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy of such document or part of it as the case maybe.” In the instant case, exhibits 6, 6(a), 6(b), 6(c), 7, 7(a), 8, 9, 9(a), 9(b), 10, 11, 11(a), 11(b) and 12 are documents emanating from Abuja Municipal Area Council, (AMAC) and therefore the documents are in their custody. Thus, if the Economic and Financial Crimes Commission or its agents including the Counsel for the Defendants require these documents in this proceedings, they are to apply to Abuja Municipal Area Council on payment of prescribed legal fees, then an officer of Abuja Municipal Area Council whose duty it is to issue, will issue certified true copies and his name, rank or official title and date shall be subscribed thereto. In the instant case, the certification were done by the agents of the Economic and Financial Crimes Commission which is not envisaged by Section 104 (1) of the Evidence Act. The fact that the agents of the Economic and Financial Crimes Commission wrote a letter to the Chairman, Abuja Municipal Area Council

pertaining to their investigation activities, exhibit 4 and the Abuja Municipal Area Council by exhibit 5 attached documents in reply to exhibit 4, and the attachments were not certified by Abuja Municipal Area Council, it does not lie in the mouth of the prosecuting agents to now certify the said attachments as certified true copies. This is not the intendment of Section 104 of the Evidence Act in my humble opinion. My understanding of Section 104 (1) of the Evidence Act is that the prosecuting agents would apply to Abuja Municipal Area Council on payment of prescribed legal fees and then the officer designated for that purpose by Abuja Municipal Area Council shall issue certified true copies of the documents required by the prosecuting agents. This, the prosecution failed to do and in total contravention of Section 104 (1) of the Evidence Act. Also, the intentment of section 104 of the Evidence Act is to ensure authenticity of the documents certified that they are from proper custody.

Further, in respect of exhibits 19, 20, 21 and 22 purportedly certified by one B. I. Kontogora, a registrar of the High Court of Justice of the Federal Capital Territory; this also contravenes the true meaning and intendment of Section 104(1) of the Evidence Act. The Federal Capital Territory High Court is not in custody of these exhibits prior to the proceedings of 7th March, 2016 when the documents were admitted in evidence. However, as from the 7th March, 2016 when the two documents were admitted in evidence, it forms part of the record of the Court and any person as at 7th March, 2016, has a right to inspect and he shall be given, on payment of prescribed fees, a certified true copy or copies of the documents. In the instant case, the certification of the these documents i.e. exhibits 19, 20, 21 and 22 by the said Registrar was improper and it does not accord with the true intendment of Section 104(1) of the Evidence Act.

Thus, therefore, having found that exhibits 6, 6(a), 6(b), 6(c), 7, 7(a), 8, 9, 9(a), 9(b), 10, 11, 11(a), 11(b), 12, 19, 21 and 22 were admitted in evidence contrary to Sections 104 (1), (2) and (3) and Section 105 of the Evidence Act, 2011 (as amended), the Court have enormous powers to expunge inadmissible evidence. In the case of **BREDERO NIGERIA LIMITED V SHYANTOR NIGERIA LIMITED & ORS, (2016) LPELR 40205**, the Court of Appeal, Abuja Division in determine the duty of the Court to expunge inadmissible evidence in an appeal emanating from the Federal Capital Territory High Court presided by one D. Z. Senchi, J, in upholding the decision of the trial Court held: -

“It is settled law that the Court can expunge an inadmissible document admitted with or without objection”. See **NIPC LTD V THOMPSON ORGANIZATION LTD, (1966) 1 NLR 99 at 104** where Lewis, JSC stated the law as follows: -

“It is of course the duty of Counsel to object to inadmissible evidence and the duty of trial Court any way to refuse to admit inadmissible evidence, but if notwithstanding this evidence is admitted still through oversight or otherwise then it is the duty of the Court when it comes to give judgement to treat the inadmissible evidence as if it had never been admitted.”

The duty to expunge inadmissible evidence can even be exercised on appeal by an appellate Court. See **SABIRJYU SHITTU V OTUNBA OYEWOLE FASHAWE, (2005) 7 SCNJ 337, ONOCHIE V ODOGWU, (2006) 2 SCNJ 96** and **DAGACI OF DERE & 68 ORS V THE DAGACI OF DERE & ORS, (2006) 1 SCNJ 16**.

Thus, in view of the trite law as stated above, exhibits 6, 6(a), 6(b), 6(c), 7, 7(a), 8, 9, 9(a), 9(b), 10, 11, 11(a), 11(b), 12, 19-22, I hold the view that the exhibits being

inadmissible but wrongly admitted, the exhibits are hereby expunged and evidence relating to same is as if it never existed in the records of this case.

Now, having put the records as it were in this case, the evidence of PW2, exhibits 2, and 4(a) are critical in determining whether the prosecution have proved the first essential ingredient of the offence. By exhibits 2, the statement of the 1st Defendant to the team of investigators, he did not leave any person in doubt as to the fact that the 2nd Defendant, Koszoils Nigeria Limited, of which he is the Managing Director had secured a contract from Abuja Municipal Area Council (AMAC). In both the statement of the 1st Defendant and the evidence of PW2, the 1st Defendant have no financial competence to fund the execution of the contract. Thus, after being introduced to PW2 by Engineer Abdullahi Sule, PW2 studied the contract documents and found that the contract is beneficial to both parties. Pursuant to this, parties i.e Koszoil Nigeria Limited and AKS Service Limited executed a memorandum of understanding to fund the project or contract.

Now the memorandum of understanding exhibit 4(a) set out the obligations of each party. Paragraphs 7 and 8 of exhibit 4(a) states:-

“(7) Koszoil agrees to work on this business opportunity with AKS and conversely, AKS agrees to work on this business opportunity with Koszoil.

“(8)Koszoils and AKS have agreed and it is binding to share the net profit accruing after the execution of the above project at a ratio of 40% and 60% to each party namely Koszoils and AkS respectively.

Further, paragraph 21 of exhibit 4, AKS undertakes as follows:-

“ Provide all funds to finance and carry out all activities towards the successful completion of the project, and may be reviewed from time to time.”

Exhibit 4(a) the memorandum of understanding is the document that binds the partners in this beneficial transaction. The 2nd Defendant and AKS Universal Services Limited are therefore bound by the contents of exhibit 4(a).

See *MADAM MUIBAT AJINUKE OLUDE V MR. S.A ADEESO, (2015 LPELR 25587 (CA), Ibadan Division delivered on 5th August, 2015 in suit no CA/1/221/2007, OKONKWO V CCB (NIG) PLC (2003) 8 NWLR (pt822) page 382, U.B.N LTD V OZIGY, (1994) 3 NWLR (pt339) page 385 and AMEDE V U.B.A (2006) 8 NWLR (pt 1090) page 623 at 659-660.*

In the instant case therefore, the 2nd Defendant got the contract. AKS Universal Services Limited will fund the execution of the contract 100% which by paragraph 21 of exhibit 4(a) may be reviewed. Further, the net profit accruing shall be shared at a ratio of 40% and 60%. And a close look at exhibit 4(a) paragraph 5, the 2nd Defendant and AKS Universal Services Limited are partners in executing the project. Hence in the entire contents of exhibit 4(a) the memorandum of understanding, nowhere it is stated that AKS universal Services Limited will advance a loan or credit to the Defendants or that the Defendant's obtained credit from AKS Universal Services limited.

In fact, it is PW1 in his testimony that he said as follows:-

“The Accused/Defendant said he needed financial assistance in order to execute contract that was given to him by Abuja Municipal Area Council. He approached one of the Directors of

AKS Universal Service Limited, Mr. Sanusi Aliyu. The said Sanusi gave him the sum of ₦6,720,132.86. Then on the due date for repayment of the loan, the Accused/ Defendant issued a Union Bank Cheque in favour of AKS Universal Service Limited for that sum he loaned.”

The evidence of PW1 cannot vary, add, subtract or contradict the contents of exhibit 4(a). In the case of ***SHETIMA SULEIMAN V ABUBAKAR USMAN LAGA, (2013) LPELR, 23223***, Court of Appeal, Jos Division held: -

“The law is now trite that contents of a document cannot be varied or altered by oral evidence.”

See also Section 125 of the Evidence Act, 2011 (as amended), ***M. AJOLUGBO V MRS O. A AINA, (2016) LPELR 40352 (CA)***, Lagos Division in suit NO. CA/L/362/2014.

Now apart from the unacceptable oral evidence of PW1 to contradict, vary or add to the contents of exhibit 4(a) I have closely watched the demeanour of PW1 while testifying in the witness boxes especially, his evidence during cross examination. PW1 when asked whether the financial assistance requested by the 1st Defendant was verbal or reduced into writing. He answered that it was both verbal and in writing. And when he was asked further reducing into writing means embodying the request into a memorandum of understanding? PW1 answered: “I cannot remember.” And throughout the question and answer session, PW1 was always saying, “I cannot remember.”

I believe if the defence Counsel had asked PW1 his name in the course of cross-examination, he would have answered- “ *i can't remember my name* ”

PW1 was very evasive in giving answers to virtually the questions put forward to him by the learned Counsel for the Defendants. He clearly demonstrated that he is not a witness on oath to say the truth but his testimony appears influenced by certain considerations that are best known to him. The conclusion i therefore arrived on PW1 evidence is that he is not a witness to be relied on and so I hold.

Thus, from the evidence of PW2, exhibits 2 and 4(a), the Defendants never requested for a loan of N6,720,133.86 from AKS Universal Services Limited. Such a loan is only a figment imagination of PW1 and as i said earlier, his oral evidence cannot vary, add, subtract or delete the contents of exhibit 4(a), the memorandum of understanding that regulates the obligations of the parties in this beneficial partnership. Hence therefore, i hold the view that by exhibit 4(a), the 2nd Defendant and indeed AKS Universal Services Limited entered into a beneficial partnership to execute a contract awarded to the 2nd Defendant and AKS Universal services Limited is to fund the contract and i so hold. I further hold the view that the sum of N22,000,000.00 provided to the 2nd Defendant for the execution of the contract was not a loan and i so hold.

Accordingly, i hold the view that the prosecution failed to established the first ingredient of the offence that the Defendants obtained a credit and i so hold.

The next ingredients for the prosecution to establish are:-

- (1) That the cheque was presented within three months of the date thereon;
- (2) That on presentation, the cheque was dishonoured on the grounds that there was no sufficient funds or insufficient funds standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn.

I will consider the two together. Firstly, the learned Counsel for Defendants had submitted at paragraphs 4.15-4.19 of his final written address to the effect that a cheque to be termed dishonoured, it must be presented not later than three months from the date on the cheque.

I do not subscribed to this line of argument and it is misleading. The Supreme Court, in the case of **BOLANLE ABEKE V THE STATE**, (*supra*) in considering section 1(i) (b) of the dishonoured (offences) Act interpreted presenting the cheque not later than three (3) months after the date of the cheque to mean that the cheque must have been presented within three (3) months after the date of the cheque. And by the evidence of PWs2,4 and 5 and the date on exhibit 3, the cheque was presented within three (3) months.

Now to properly establish the two elements of the offence, the Supreme Court in the same case of **ABEKE V THE STATE**, (*supra*) laid down the conditions as follows:-

“To convict an Accused person on the provision of section 1(i) (b) of dishonoured cheque (Offences) Act, the prosecution must prove that the accused had mens rea and actus reus. Mens rea means guilty mind. And actus reus means a guilty act. In cases of strict liability, mens rea comes before actus reus. In otherwords, the Accused develops the guilt mind before the guilty act. The guilty mind instigates the guilty act or flows into the guilty act. The period of time between the two cannot be determined in vacuo but in relation to the factual situation in each case dictated by the stated of criminality of the accused at the material time. There are instances where the mens

rea is automatically followed by the actus reus. The above element of proximity apart, there could be instances of spontaneity too.”

In the instant case, applying the principles in the case of **ABEKE V THE STATE** (*supra*), did the prosecution prove mens rea and actus reus against the Defendants. Actus reus means the guilty act. In other words, by the act of the 1st Defendant in issuing exhibit 3, it is clear that actus reus of the Defendants have been established. However, the most important and crucial element is establishing the mens rea of the accused person. In other words, the accused person must have conceived the plan in his mind to issue the cheque with the full knowledge that he does not have sufficient funds to meet the value of the cheque. The prosecution must therefore prove mens rea with credible evidence.

In the instant case, PWs 2, 4 and 5 gave evidence. PW4 testified that in the course of his investigation, he discovered as a fact that the contract sum has been paid to the contractor. PW4 also testified that in the course of his investigation he discovered that there were insufficient funds to accommodate the value of exhibit 3. PW2 also testified that he presented the cheque, exhibit 3 twice and it was returned unpaid. And PW5 Tanko Mohammed, an officer of the bank tendered in evidence exhibit 17, the statement of account of the 2nd Defendant and testified that exhibit 3 was drawn on exhibit 17 and it was returned due to insufficient funds in the account of the 2nd Defendant.

The evidence of the Defendants, on the other hand as given by DWs 1, 2 and 3 is to the effect that the 2nd Defendant was awaiting payment from Abuja Municipal Area Council (AMAC) and exhibit 3 was issued to PW2 on his insistence.

DW3 testified that when the job was practically completed and he was expecting payment of N17,400,000 from Abuja Municipal Area Council, Abuja Municipal Area Council only paid N6,700,000.00 and based on their agreement with Union Bank, the Bank took their money upfront and he was barely left with N400,000. This development, according to DW3 did not go well with his partners. DW3 testified that he explained to PW2 Ali Ango the position and also showed him some payment vouchers of the N6,700,000 and the payment to Union Bank but PW2 failed to understand and insisted that the payment ought to have come to them. DW3 further testified that PW2 then said to him that the least he can do is for DW3 to give him post-dated cheque. DW3 then testified as follows: -

“I assure him as soon as payments are made by Abuja Municipal Area Council I will inform him to do the needful.”

DW3 testified further; “then to my greatest surprise he did not keep to his side of the undertaking and he presented the cheque without keeping in touch with me. It was after the cheque was returned that he got in touch with me and we exchanged hot words.”

DW3 gave evidence that after about one week, PW2 called him that he is in Abuja and DW3 then visited PW2 in his hotel. Then DW3 testified as follows: -

“He then confronted me with a letter they had written directly to Abuja Municipal Area Council without my consent introducing themselves as my partners and be allowed to complete the job and any subsequent payment be made directly to them. He gave me a photocopy of the letter. He also demanded that I do a letter agreeing with them and requesting Abuja Municipal Area Council to pay them

all subsequent payments directly to them regarding the contract. I oblige them and I gave them the letter domiciling all subsequent payments to them.”

The evidence of DW1 supports the testimony of DW3 to the effect that DW3 issued exhibit 3 to PW2 but not to be presented until PW2 informed DW3 to do so. Also exhibit 2, the statement of the 1st Defendant to the Economic and Financial Crimes Commission wherein he stated thus: -

“The cheque issued to AKS Universal Services Limited; the cheque in question was not intended even to be issued in the first place but for the fact that Mr. Ali, one of the Directors of the Company AKS turned my house into an impossible place.”

Exhibit 2, the statement of the 1st Defendant explained in details how PW2 blocked the gate of his house with his car and was attracting a lot of crowd. In the statement of the 1st Defendant, exhibit 2, DW3 explained that to avoid chaos in his house, he obliged PW2 with the cheque.

Now a perusal of the testimonies of DW3 and his statement, exhibit 2 to the Economic and Financial Crimes Commission and the evidence of the DW1 and 2 as regards the issuance of exhibit 3 to PW2, the prosecution failed to cross examine the defence witnesses on this vital evidence. And the effect of failure to cross examine a witness on vital evidence was considered in the case of **GAJI V PAYE, (2003) 5 SC 53**, the Supreme Court held: -

“It has been said that the effect of failure to cross examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness.”

In the case of **MOHAMMED MAIDABO V STATE, (2016) LPELR 40245**, the Court of Appeal, Sokoto Division held as follows: -

“PW6 Corporal Sani Yusuf investigated the case. He visited the victim. He interviewed the accused. He cautioned him. The accused volunteered a statement which he read over to him. The statement was tendered and admitted as exhibit 2. The English translation was admitted as exhibit 2(a). This witness was not cross examined by the learned Counsel for the Accused, Sanusi Samaila who was present in Court. It is trite law that this means the evidence of the witness has been accepted by the defence.”

In the instant case, the Economic and Financial Crimes Commission obtained the statement of the 1st Defendant. it was tendered in evidence as exhibit 2. And DWS1, 2 and 3 also testified giving credence to the statement of the 1st Defendant that culminated into the 1st Defendant issuing exhibit 3, the cheque to PW2. The prosecution failed to cross examine the witnesses on this vital fact to the effect that the 1st Defendant was coerced into issuing the cheque and also PW2 was not to present the cheque until the 1st Defendant was informed. Thus, therefore, I hold the view that exhibit 3 was issued to PW2 pending the time the 1st Defendant inform PW2 that the account of the 2nd Defendant is funded and I so hold.

In the instant case therefore, at the time the 1st Defendant issued exhibit 3, he was under the reasonable ground of believing that he will receive payment of the outstanding balance of the reviewed contract sum from Abuja Municipal Area Council and then he would inform PW2 to present the cheque.

Further, PW2, the purported star witness of the prosecution appears to be too economical with the truth. In other words, I have closely watched him in the witness box while testifying. In PW2's testimony under cross examination as to whether he had written a letter to the Chairman, Abuja Municipal Area Council to pay the contract sum directly to them. He denied. In PW2's words, he testified as follows: -

"I did not write a letter to Abuja Municipal Area Council on the 21st September, 2011."

Then the learned Counsel for the Defendants confronted him with the photocopy of the letter and PW2 testified as follows: -

"The letter I am holding was written and signed by me and addressed to the Abuja Municipal Area Council that all outstanding payments be made to AKS Universal Services Limited. The letter is dated 21st September, 2011 and signed by me."

The evidence of PW2 elicited under cross examination also supports the position of the Defendants to the effect that payment due to the 2nd Defendant from Abuja Municipal Area Council be domiciled and paid directly to AKS Universal Services Limited. The evidence of PW2 clearly contradicts his evidence in-chief when he testified thus: -

"We then came to the conclusion that there is intention of the 1st Defendant to defraud us and accordingly we petitioned the Economic and Financial Crimes Commission."

The PW2 failed to inform the Court about the letter dated 21st September, 2011. Thus, as I said before, I have watched PW2 in the witness box and I have closely

observed his demeanour including his evidence during cross examination. The witnesses PWs 1 and 2 are not witnesses of truth.

Thus, clearly from the testimonies of PW2, in particular his admission of the contents of the letter dated 21st September, 2011 in which he requested Abuja Municipal Area Council (AMAC) to pay into the account of AKS Universal Services Limited the contract sum outstanding and due to the 2nd Defendant, and the refusal of the prosecution to tender in evidence the said letter and or its objection to its admissibility, I agree with the learned Counsel for the Defendants that section 167 (d) of the Evidence Act 2011 (as amended) is hereby evoked. And i also agree with the submissions of the learned Counsel at paragraphs 2.7, 2.8, 2.9 and 2.10 of the final written address to the effect that PW2 pressured the 1st Defendant to issue exhibit 3 and by the letter dated 22nd September, 2010 and 21st September, 2010 in which all subsequent payments due to the 2nd Defendant from Abuja Municipal Area Council (AMAC) had now been domiciled to AKS Universal Services Limited, the presentation of exhibit 3 by PW2 was done in bad faith. And the reason why i agree with the position of the learned Counsel for the Defendants at paragraphs 2.7- 2.10 of his final written address is that by exhibit 4(a), the memorandum of understanding, paragraph 22 states:-

“AKS will undertake to; provide the partnership representative to the project who shall have the right to be at the project sites at all times, enquire into the status of material, project and finance management profile.”

By this provision in exhibit 4(a), it appears AKS Universal services Limited have access to all information pertaining to the project and that was the more reason it requested domiciliation of subsequent payments on the contract to AKS account.

Lest before i forget, PW4, in his testimony under cross examination by the defence stated:-*“I am part of the investigation team.”* He testified further,*” when the 1st Defendant was arrested and taken to Economic and Financial Crimes Commission (EFCC), i did not take part in his interrogation.* I am aware the 1st Defendant made statements to the operatives of the Economic and Financial Crimes Commission (EFCC). I am not privy to the contents of the 1st Defendant’s statements.” The evidence of PW4 under cross examination is crystal clear that PWs1 and 4, the operatives of the Economic and Financial Crimes Commission (EFCC) never investigated this case at all and if they did, it was a shoddy investigation.

Thus, from the evidence adduced by the prosecution and that of the defence, the prosecution failed to establish mens rea of the Defendants in the whole transaction leading to the issuance of exhibit 3. The evidence of the defence witnesses, i.e DWs1 and 3 and indeed the evidence of PW2 under cross examination supports the case of the Defendants that the Defendants have no guilty mind and at the time exhibit 3 was issued, they had reasonable believe that funds would come from Abuja Municipal Area Council (AMAC) and then PW2 can now present exhibit 3. And by section 1(3) of the dishonoured cheque (Offences) Act, it protects the Defendants. The section provides as follows:-

- (3) A person shall not be guilty of an offence under this section if he provides to the satisfaction of the Court that when he issued that cheque he had reasonable grounds for believing and did believe in fact, that it would be honoured if presented for payment within the period specified in sub- section (1) of this section.

In conclusion, the prosecution failed to prove the 2nd and 3rd elements of the offence which the Defendants are charged in this case. Hence therefore, the sole

issue distilled for determination by the prosecution is hereby resolved in favour of the Defendants. Accordingly the Defendants are hereby discharged and acquitted for the offence charged.

HON. JUSTICE D.Z. SENCHI
(PRESIDING JUDGE)
23/03/17

Parties: - 1st Defendant present and represent the 2nd Defendant.

Complainant/prosecution:- Absent.

D.O Ariku:- With me is D.D Agundu for the Defendant.

Ariku:- I commend this Court and its judgment.

Signed
Judge
23/03/17