

**IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA**

SUIT NO. FHC/ABJ/CS/708/2014

**IN THE MATTER OF APPLICATION FOR ENFORCEMENT OF RIGHT TO
FAIR HEARING BROUGHT UNDER THE FUNDAMENTAL RIGHTS
(ENFORCEMENT PROCEDURE) RULES, 2009**

BETWEEN:

OLISA AGBAKOBA APPLICANT

AND

1 THE CHIEF OF ARMY STAFF	}	RESPONDENTS
2 BRIGADIER-GENERAL B.T. NDIOMU [Commander, Army Headquarters Garrison, Mogadishu Cantonment, Asokoro, Abuja.]		
3 ATTORNEY GENERAL OF THE FEDERATION		

IN RE:

- 1 CORPORAL JASPER BRAIDOLOR (96NA/42/6235)
 - 2 CORPORAL DAVID MUSA (96NA/ 43/ 10277)
 - 3 LANCE CORPORAL FRIDAY ONU (05NA/ 57/ 3451)
 - 4 LANCE CORPORAL YUSUF SHUAIBU (09NA/ 64/ 4905)
 - 5 LANCE CORPORAL IGONMU EMMANUEL (09NA/ 62/ 1648)
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 - 7 PRIVATE ANDREW UGBEDE (09NA/ 64/ 4214)
 - 8 PRIVATE NURUDEEN AHMED (10NA/ 65/ 8344)
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 - 11 PRIVATE AMADI CHUKWUDI (13NA/ 69/ 2907)
 - 12 PRIVATE ALLAN LINUS (13NA/ 69/ 2898)
- [Nigerian Soldiers convicted and sentenced to death by
Army General-Court Martial on 16th September, 2014]**

ORIGINATING MOTION

BROUGHT UNDER:

- 1 Section 1 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)**
 - 2 Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)**
 - 3 Order II of the Fundamental Rights (Enforcement Procedure) Rules 2009**
 - 4 Sections 46(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)**
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TAKE NOTICE that this Honourable Court will be moved on the day of 2014, at the hour of 9 O'clock in the forenoon or so soon thereafter as Counsel may be heard on behalf of the Applicant in terms of the reliefs set out in the Statement accompanying this Application.

AND TAKE FURTHER NOTICE that at the hearing of this Application, the Applicant will use own Affidavit.

DATED THE DAY OF2014

.....
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Jude Ehiedu
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APPLICANT'S ADDRESS WITHIN JURISDICTION

**Olisa Agbakoba & Associates
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FOR SERVICE ON:

- 1 1ST RESPONDENT**
The Chief of Army Staff
Defence Headquarters
Plot 1092, Mohammadu Buhari Way,
Area 7, Garki,
Abuja, F.C.T.

- 2 2ND RESPONDENT**
BRIGADIER-GENERAL B.T. NDIOMU
Commander, Army Headquarters Garrison,
Mogadishu Cantonment,
Asokoro, Abuja, F.C.T.

- 3 3RD RESPONDENT**
Attorney General of the Federation
Federal Ministry of Justice
Shehu Shagari Way
Central Area, Abuja, F.C.T.

**IN THE FEDERAL HIGH COURT OF NIGERIA
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**[Nigerian Soldiers convicted and sentenced to death by Army
General-Court Martial on 16th September, 2014]**

**AFFIDAVIT IN SUPPORT OF APPLICATION
FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS**

I, **OLISA AGBAKOBA**, Christian, Nigerian, and Legal Practitioner of Maritime Complex, 34 Creek Road, Apapa, Lagos do hereby solemnly make oath and state as follows:

- 1 I am the Applicant in this Application for the enforcement of fundamental rights to fair hearing on behalf of Nigerian soldiers who were convicted in a decision of the Nigerian Army General Court Martial made on 16th September, 2014.
- 2 The facts herein are within my personal knowledge except where otherwise stated.
- 3 I am a tax payer, a voter and a lawyer with over 35 years' experience in legal practice. I am involved in the advocacy for democracy, Rule of Law and Constitutionalism in Nigeria. I was President of the Civil Liberties Organisation (CLO) at foundation in 1987; Convener, United Action for Democracy (UAD); and Senior Counsel, Human Rights Law Service (HURILAWS). I hold National Honour Award in the Rank of **Officer of the Order of the Niger (OON)**.
- 4 I am a Senior Advocate of Nigeria (SAN) and a Life Bencher. I was President of the Nigeria Bar Association from 2006 to 2008. On 14th September, 1998, I swore to an oath before the Chief Justice of Nigeria (CJN) at my conferment with the rank of SAN, "to support and uphold the Constitution of the Federal Republic of Nigeria".
- 5 The 1st Respondent is the Head of Nigerian Army, one of the Nigerian Armed Forces having statutory obligation to defend the Federal Republic of Nigeria.

- 6 The 2nd Respondent is the Commander, Army Headquarters Garrison, Mogadishu Cantonment, Asokoro, Abuja; the officer who convened the General Court Martial that convicted certain soldiers in a verdict dated 16th September, 2014.
- 7 The 3rd Respondent is the Chief Law Officer of the Federation and the custodian of public rights.
- 8 I followed in the dailies the events concerned the alleged mutiny in Division 7 of Nigerian Army in Maiduguri by some soldiers including the following soldiers:

- 1 CORPORAL JASPER BRAIDOLOR (96NA/42/6235);
- 2 CORPORAL DAVID MUSA (96NA/ 43/ 10277);
- 3 LANCE CORPORAL FRIDAY ONU (05NA/ 57/ 3451);
- 4 LANCE CORPORAL YUSUF SHUAIBU (09NA/ 64/ 4905);
- 5 LANCE CORPORAL IGONMU EMMANUEL (09NA/ 62/ 1648);
- 6 LANCE CORPORAL STEPHEN CLEMENT (03NA/53/316);
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- 10 PRIVATE ALAO SAMUEL (13NA/ 69/ 2898);
- 11 PRIVATE AMADI CHUKWUDI (13NA/ 69/ 2907); and
- 12 PRIVATE ALLAN LINUS (13NA/ 69/ 2898).

- 9 I also made personal enquiries through our Human Rights Officer in Maiduguri, Collins Okeke, who informed me and I very believe him that the alleged mutiny arose in the following circumstances:

- (a) Soldiers stationed at the 7 Division of Nigerian Army in Maiduguri who are combating the Boko Haram insurgents have become demoralised as a result of poor welfare package and insufficient equipment.
- (b) The soldiers were unhappy that their allowances were not paid as and when due and it was not sufficient for them.

Some of them have overstayed on the roadblock more than the rule required because of the insufficiency of personnel.

- © The soldiers have witnessed several of their colleagues killed by the insurgents and they have called for air strike to displace the book haram to no avail.
 - (d) On 14th May 2014, some soldiers were ambushed and killed by the insurgents on their way back to Maidiguri from Chibok where they had gone to combat the insurgents. The arrival of the dead bodies of the slain soldiers at the Maimalari Barracks in Maiduguri coincided with the visit to the Barracks by the then GOC of the Division, Major-General Ahmed Mohammed.
 - (e) In the demoralizing atmosphere coupled with the agonizing emotions of sighting the dead bodies of their slain colleagues, some soldiers fired sporadic shots in the air and at the vehicle conveying the GOC amidst complaints that the officers were responsible their poor welfare and the avoidable loss of their colleagues.
- 10 I am aware that following the incident of the alleged mutiny, the 2nd Respondent on June 26, 2014 convened a 9-man General-Court Martial to try 18 soldiers who allegedly participated in the incident which took place in Maimalari Barracks on 14th May, 2014 for offences of mutiny, criminal conspiracy to commit mutiny, attempted murder, disobedience to particular orders, false accusation and insubordinate behaviour.
- 11 I am aware that the Court Martial was made of the following officers who were all appointed by the 2nd Defendant, Brigadier-General D.T. Ndiomu, Commander, Army Headquarters Garrison, Mogadishu Cantonment, Asokoro Abuja:
- (1) Brigadier-General C.C. Okonkwo – President;
 - (2) Colonel T.S. Nurseman – Judge Advocate;
 - (3) Colonel T.O. Olowomeye – Member;
 - (4) Colonel I.G. Lassa – Member;

- (5) Colonel J.K. Feboke – Member;
 - (6) Lieutenant-Colonel C.R. Nnebeife – Member;
 - (7) Major I. Yusuf – Member;
 - (8) Major T.A. Yakubu - Member
 - (9) Major A.E. Martins – Waiting Member
- 12 I am aware also that the convening officer, the 2nd Respondent, appointed Lieutenant-Colonel A.A. Audu and Lieutenant-Colonel Ukpe Upke as to prosecute the accused soldiers for the above stated offences.
- 13 I am also aware that the Court Martial referred to above commenced proceedings at the Defence Headquarters on July 6, 2014 and on 16th September, 2014 convicted the soldiers named in paragraph 8 above of the offences charged and sentenced them to death by firing squad.
- 14 I reviewed the legal framework creating the court martial and I discern that the power to convene a court martial is incongruous with the Constitutional provision on fair hearing.
- 15 I depose to this Affidavit in good faith and in accordance with the provisions of the Oaths Act.

.....
Deponent

Sworn to at the Federal High Court Registry, Lagos.

This day of 2014.

BEFORE ME

COMMISSIONER FOR OATHS

**IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT LAGOS**

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**IN THE MATTER OF APPLICATION FOR ENFORCEMENT OF RIGHT TO
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BETWEEN:

OLISA AGBAKOBA APPLICANT

AND

1 THE CHIEF OF ARMY STAFF	}	RESPONDENTS
2 BRIGADIER-GENERAL B.T. NDIOMU [Commander, Army Headquarters Garrison, Mogadisu Cantonment, Asokoro, Abuja.]		
3 ATTORNEY GENERAL OF THE FEDERATION		

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- [Nigerian Soldiers convicted and sentenced to death by Army
General-Court Martial on 16th September, 2014]**

**STATEMENT PURSUANT TO ORDER II RULE 3 OF THE FUNDAMENTAL
RIGHTS (ENFORCEMENT PROCEDURE) RULES 2009**

A APPLICANT'S NAME:

Olisa Agbakoba

B Applicant's Description:

The Applicant is a Nigerian citizen, a Legal Practitioner in the rank of Senior Advocate of Nigeria (SAN); a distinguished Nigerian with a National Honour in the rank of Officer of Order of the Niger (OON). The Applicant is a known human rights advocate and Senior Counsel, Human Rights Law Service (Hurilaws).

C RELIEFS APPLICANT SEEKS:

- (1) A DECLARATION** that the convening and composition of Army General Court Martial which convicted and sentenced 12 soldiers to death by firing squad for various offences on 16th September, 2014 is contrary to Section 36(1) of the Constitution of the Nigeria, 1999.
- (2) A DECLARATION** that the decision of the Nigerian Army General Court Martial presided over by Brigadier-General C.C. Okonkwo delivered at the Army Headquarters in Abuja on 16th September, 2014 whereby 12 soldiers were sentenced to death by firing squad violated the right to fair hearing of the convicted soldiers whose names are set out above.
- (3) A DECLARATION** that Section 133(3)(4) & (5) of the Armed Forces Act dealing with the convening authority of Court Martial is inconsistent with Section 36(1) of the Constitution and therefore null and void.
- (4) AN ORDER** setting aside the decision of the Court Martial made on 16th September, 2014
- (4) FURTHER OR OTHER RELIEFS** as the Honourable Court deems fit in the circumstance.

D GROUNDS FOR SEEKING RELIEF:

- (1) Section 36 (1) of the Constitution guarantees to every citizen the right fair hearing by a court or tribunal constituted in such a manner as to secure its independence and impartiality.
- (2) Section 133(3)(4) & (5) of the Armed Forces Act empowers a convening (Army) Officer to appoint the President and other members of the Court Martial, including the Judge Advocate in such a manner that cannot secure the independence and impartiality of the Court Martial and therefore offends the principle natural justice.
- (3) The effect of Section 133(3)(4) & (5) of the Armed Forces Act is to make the Army the investigator, prosecutor and the judge contrary to the rules of natural justice as stipulated in Section 36 (1) of the Constitution.
- (4) The 2nd Respondent, who convened the General Court Martial is a party interested; he appointed all 9 members of the Court Martial, including the President, Brigadier-General C.C. Okonkwo, two waiting members, a judge advocate, two prosecuting officers and investigators contrary to the principle of natural justice and section 36(1) of the 1999 Constitution.

DATED THE DAY OF2014

.....
Babatunde Ogunbamila
Jude Ehiedu
Chike Okafor
Falodun Arifayan
Human Rights Law Service (Hurilaws)
Applicant's Counsel
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APPLICANT'S ADDRESS WITHIN JURISDICTION

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The Chief of Army Staff
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- 2 2ND RESPONDENT**
BRIGADIER-GENERAL B.T. NDIOMU
Commander, Army Headquarters Garrison,
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Asokoro, Abuja, F.C.T.

- 3 3RD RESPONDENT**
Attorney General of the Federation
Federal Ministry of Justice
Shehu Shagari Way
Central Area, Abuja, F.C.T.

IN THE FEDERAL HIGH COURT OF NIGERIA

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1 THE CHIEF OF ARMY STAFF
2 BRIGADIER-GENERAL B.T. NDIOMU
[Commander, Army Headquarters Garrison, Mogadisu
Cantonment, Asokoro, Abuja.] } **RESPONDENTS**
3 ATTORNEY GENERAL OF THE FEDERATION

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- 2 CORPORAL DAVID MUSA (96NA/ 43/ 10277)
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**[Nigerian Soldiers convicted and sentenced to death by Army
General-Court Martial on 16th September, 2014]**

APPLICANT'S WRITTEN ADDRESS
IN SUPPORT OF APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS

1.0 INTRODUCTION

1.1 This is an Application for enforcement of fundamental right to fair hearing brought on behalf of 12 soldiers who were sentenced to death by firing squad for various offences by Nigerian Army General Court Martial in a verdict rendered by Brigadier-General C.C. Okonkwo in Abuja on 16th September, 2014.

1.2 The names and ranks of the convicted soldiers are:

Corporal Jasper Braidolor (96NA/42/6235)

Corporal David Musa (96NA/ 43/ 10277)

Lance Corporal Friday Onu (05NA/ 57/ 3451)

Lance Corporal Yusuf Shuaibu (09NA/ 64/ 4905)

Lance Corporal Igonmu Emmanuel (09NA/ 62/ 1648)

Lance Corporal Stephen Clement (03NA/53/316)

Private Andrew Ugbede (09NA/ 64/ 4214)

Private Nurudeen Ahmed (10NA/ 65/ 8344)

Private Ifeanyi Alukhagbe (10NA/ 65/ 7084)

Private Alao Samuel (13NA/ 69/ 2898)

Private Amadi Chukwudi (13NA/ 69/ 2907)

Private Allan Linus (13NA/ 69/ 2898)

1.3 The Application is brought by Olisa Agbakoba, Senior Advocate of Nigeria (SAN) and human rights advocate on behalf of the convicted soldiers as recognised under the Fundamental Rights (Enforcement Procedure) Rules 2009. The Application is brought pursuant to Section 1 of the Constitution; Section 36(1) of the Constitution; Order II of the Fundamental Rights (Enforcement Procedure) Rules, 2009; and Sections 36(1) and 46(1) of the Constitution.

1.4 The Application is supported by 15-para Affidavit of Facts deposed by the Applicant. The grounds upon which the Applicant's Fundamental Rights are requested to be enforced are set out in the supporting Statement.

2.0 RELEVANT FACTS AS CONTAINED IN AFFIDAVIT OF OLISA AGBAKOBA

- 2.1 Soldiers stationed at the 7 Division of Nigerian Army in Maiduguri who are combating the Boko Haram insurgents have become demoralised as a result of poor welfare package and insufficient equipment. The soldiers were unhappy that their allowances were not paid as and when due and it was not sufficient for them. Some of them have overstayed on the roadblock more than the rule required because of the insufficiency of personnel. The soldiers have witnessed several of their colleagues killed by the insurgents and they have called for air strikes to displace the insurgents to no avail.
- 2.2 On 14th May 2014, some soldiers were ambushed and killed by the insurgents on their way back to Maiduguri from Chibok where they had gone to combat the insurgents. The arrival of the dead bodies of the slain soldiers at the Maimalari Barracks in Maiduguri coincided with the visit to the Barracks by the then GOC of the Division, Major-General Ahmed Mohammed.
- 2.3 In this demoralizing atmosphere coupled with the agonizing emotion of sighting the dead bodies of their slain colleagues, some soldiers fired sporadic shots in the air and at the vehicle conveying the GOC amidst complaints that the officers were responsible their poor welfare and the avoidable loss of their colleagues.
- 2.4 Following the incident of the alleged mutiny, the 2nd Respondent on June 26, 2014 convened a 9-man General-Court Martial to try 18 soldiers who allegedly participated in the incident which took place in Maimalari Barracks on 14th May, 2014 for offences of mutiny, criminal conspiracy to commit mutiny, attempted murder, disobedience to particular orders, false accusation and insubordinate behaviour.
- 2.5 The Court Martial was constituted of the following officers who were all appointed by the 2nd Defendant: Brigadier-General C.C. Okonkwo (President); Colonel T.S. Nurseman (Judge Advocate); Colonel T.O. Olowomeye (Member); Colonel I.G. Lassa (Member); Colonel J.K. Feboke (Member); Lieutenant-Colonel

C.R. Nnebeife (Member); Major I. Yusuf (Member); Major T.A. Yakubu (Member); and Major A.E. Martins (Waiting Member).

- 2.6 The convening officer, the 2nd Respondent, appointed Lieutenant-Colonel A.A. Audu and Lieutenant-Colonel Ukpe Upke to prosecute the accused soldiers for the above stated offences. The Court Martial commenced proceedings at the Defence Headquarters on July 6, 2014 and on September, 2014 convicted 13 of the 18 soldiers of the offences charged and sentenced them to death by firing squad. Amongst the 13 convicted soldiers 12 were sentenced to death by firing squad. This Application is brought on behalf of these twelve condemned soldiers.
- 2.7 The entire process leading to the decision of the Court Martial against the soldiers violates their rights to fair hearing as guaranteed by Section 36(1) of the Constitution because the Court Martial was not constituted in such manner as to secure its independence and impartiality. This flows from the legal framework for investigating offences and constitution of Court Martials under the Armed Forces Act.

3.0 ISSUES FOR DETERMINATION

- 3.1 The Applicant submits that from the facts stated above, the following issues arise for consideration and determination:

1 Whether the manner of composition of the Court Martial which tried and convicted the soldiers named in this Application and the decisions reached against the soldiers did not violate their right to fair hearing and if it did, will the decision of the Court Martial stand?

2 Whether Section 133(3)(4) & (5) of the Armed Forces Act which makes the Army the investigator, prosecutor and the judge is not inconsistent with Section 36 (1) of the Constitution and the rules of natural justice.

3.2 We shall argue the two issues together because they are interwoven. The argument on how the composition of the Court Martial violates the convicted soldiers' right to fair hearing necessarily involves analysis of the legal framework pursuant to which the Court Martial was constituted.

4.0 ARGUMENT

LEGAL FRAMEWORK FOR CONSTITUTION OF COURT MARTIAL

4.1 **Section 133 of the Armed Forces Act** dealing with the composition and constitution of Court Martial provides that the President and other members of the Court Martial, including the Judge Advocate shall be appointed by the convening officer, in this case, the 2nd Respondent. For ease of reference, the relevant provisions of the Act (subsections 3, 4 & 5) provide thus:

Section 133

- (3) *The President of a court-martial shall be appointed by order of the convening officer ...*
- (4) *The members of a court-martial, other than the President, shall be appointed by order of the convening officer or in such other manner as may be prescribed.*
- (5) *A convening officer shall appoint a judge advocate for every court-martial. (underlining ours for emphasis)*

4.2 It is clear from the provisions of Section 133(3)(4) & (5) set out above that a single officer, the convening officer (the 2nd Respondent in this case), is the person having the responsibility of appointing all the members of Court Martial. Such a legal framework, we submit, cannot guarantee fair hearing to persons tried thereunder because it puts a question mark on the independence of the Court Martial. Having set out the legal framework, we will now examine the factual instances of fair hearing violations in this case.

Evidence of Fair Hearing Violations

4.3 The Affidavit evidence before the Court shows clearly that the Court Martial breached the convicted soldiers' right to fair hearing in view of the composition of the Court Martial, and the active involvement of the Army in the process leading to the investigation and decisions reached against the convicted soldiers, particularly through the 2nd Respondent.

4.4 At paragraphs **10, 11 & 12** of the Applicant's Affidavit, it is clearly stated that:

10 ... following the incident of the alleged mutiny, the 2nd Respondent on June 26, 2014 convened a 9-man General-Court Martial to try 18 soldiers who allegedly participated in the incident which took place in Maimalari Barracks on 14th May, 2014 for offences of mutiny, criminal conspiracy to commit mutiny, attempted murder, disobedience to particular orders, false accusation and insubordinate behaviour.

11 ... the Court Martial was made of the following officers who were all appointed by the 2nd Defendant, Brigadier-General D.T. Ndiomu, Commander, Army Headquarters Garrison, Mogadishu Cantonment, Asokoro Abuja:

- (1) Brigadier-General C.C. Okonkwo – President;*
- (2) Colonel T.S. Nurseman – Judge Advocate;*
- (3) Colonel T.O. Olowomeye – Member;*
- (4) Colonel I.G. Lassa – Member;*
- (5) Colonel J.K. Feboke – Member;*
- (6) Lieutenant-Colonel C.R. Nnebeife – Member;*
- (7) Major I. Yusuf – Member;*

(8) Major T.A. Yakubu - Member

(9) Major A.E. Martins – Waiting Member

12 ... the convening officer, the 2nd Respondent, also appointed Lieutenant-Colonel A.A. Audu and Lieutenant-Colonel Ukpe Upke as to prosecute the accused soldiers for the above stated offences.

LEGAL ARGUMENT

- 4.5 The above evidence shows that the Army Nigerian, against whom the alleged offences were committed, was the complainant, the investigator, the prosecutor, and even the judges! The offences were allegedly committed against Major-General Ahmadu Mohammed, Commanding Officer, 7 Division Nigerian Army in Maiduguri, Bornu State. The same Commanding Officer, Major-General Ahmadu Mohammed, investigated the allegations against the convicted soldiers pursuant to Section 123 of the Armed Forces Act. Under Section 123 of the Armed Forces Act, the power to investigate alleged offences is vested in the Commanding Officer.
- 4.6 Apart from the fact that the Army is all-in-all in the proceedings leading to the conviction and sentencing of the soldiers, the role played by the 2nd Respondent, raises questions as to the independence of the Court Martial.
- 4.7 The charges against the soldiers were initiated and concluded by the Army acting in various capacities, and the process leading to the decision against the soldiers did not guarantee the fairness and impartiality of the Respondents, in that the whole process from complaint to decision, was carried out by the same set of persons, all of which are officers of the Nigerian Army. The roles played by the Army in the proceedings leading to the conviction of the soldiers can be explained as follows:

Investigation – Investigations were was carried out by Major-General Ahmadu Mohammed, Commanding Officer, 7 Division Nigerian Army, the principal person against whom the alleged offences were committed, in the exercise of the powers conferred on him under **Section 123 of the Armed Forces Act**. He was

the Army officer against whom gun shots were allegedly fired by the soldier whilst being conveyed in his officer car at the Maimalari Barracks, Maiduguri.

Prosecution – The two prosecutors, Lieutenant-Colonel A.A. Audu and Lieutenant-Colonel Ukpe Upke, were appointed by the 2nd Respondent to prosecute the soldiers for the offences investigated by the Commanding Officer, the primary complainant.

Hearings – The same 2nd Respondent, as the Convening Officer, single-handedly appointed the President and all other members of the Court Martial, including the Judge Advocate who held the proceedings, all of whom are Army Officers under the Command of the Commanding Officer, Major-General Ahmadu Mohammed (the primary complainant).

Decision - The ultimate decision against the soldiers was reached by the 2nd Respondent who acted through his appointee members of the Court Martial.

- 4.8 It is submitted with respect that the above scenario constitutes a grave violation of the right to fair hearing of the soldiers subjected to the proceedings of the Court Martial. Broadly, a scenario where the Army is the complainant, the investigator, the prosecutor and the judge constitutes a breach of right to fair hearing. Unarguably, the arrangement which allows one person, incidentally an interested party, to single-handedly appoint all the members of the Court Martial cannot guarantee the independence of such a judicial or quasi-judicial panel or tribunal. What is more, the investigator in this case, Major-General Ahmadu Mohammed, is the primary Complainant. Such entire process cannot guarantee fair hearing or secure the independence of the Court Martial.
- 4.9 The Respondents may argue that there are provisions in the **Armed Forces Act** to ensure fair hearing and that the provisions were complied with in the instant case. This argument is untenable because the test of fair hearing is not to be found in statute law, for example the Armed Forces Act. We submit that

the test of fair hearing is an objective one. The objective test is prescribed by Section 36 (1) of the Constitution. Such statutory justification, if canvassed by Respondents, cannot stand in view of the firm position of the Supreme Court in the **L.P.D.C. v. Fawehinmi [1985] 2 NWLR (Pt. 7) 300** that:

"... it is relevant to state that the provisions of Section 33 (1) [now section 36 (1)] of the constitution may be infringed-

(i) .

(ii) .

(iii) By a tribunal duly constituted pursuant to the provisions of a law validly enacted BUT adopting a procedure which falls short of the "fair hearing" requirements of the subsection ... " (See pages 373-374 at paragraphs F-A)

4.10 The facts of this case are *im pari materia* with that in the **L.P.D.C. v. Fawehinmi (supra)** where the Attorney General of the Federation played a dominant role as investigator, prosecutor and Judge in the Legal Practitioner's Disciplinary Committee. The Supreme Court ruled that the composition of the panel violated Chief Gani Fawehinmi's fundamental right to fair hearing. The Supreme Court doubted whether the disciplinary procedure provided by the then Legal Practitioners Act could ever fairly try disciplinary cases against lawyers. At page 391, Para F, Oputa, JSC stated as follows:

"I seriously doubt if any legal practitioner can be successfully proceeded against under the 1975 Act without dangerously infringing rantly encroaching upon the sacred principle- natural jus I And the earlier this amendment is made, the better for t legal profession in this era of war against indiscipline"

This led to the amendment of the Legal Practitioners Act. The Nigerian Bar Association now acts as investigators and the Body of Benchers as Judges.

4.11 On the authority of **Fawehinmi's case**, we submit that legal framework under the Armed Forces Act by which the Army is the investigator, prosecutor and the judge does not guarantee fair hearing.

4.12 It is clear that in the composition of the Court Martial, the 2nd Respondent failed to observe the strict requirement of Section 36(1) that the Court Martial shall be "**constituted in such manner as to secure its independence and impartiality**". The Court Martial in this instance cannot be said to have been independent from the 2nd Respondent. Again, we submit that the composition violates natural justice principle of **nemo iudex in causa sua**, which disallows a person from being a judge in his own cause or matter. The Army cannot be a judge in its own case.

4.13 It may also be argued by the Respondents that the 2nd Respondent was not a member of the Court Martial thereby giving the impression that the panel independent from the 2nd Respondent. This cannot be the case because the law is *qui facit per alium, facit per se*, which means "he who acts through another is deemed in law to do it himself". By necessary legal implication, the 2nd Respondent who appointed all the members of the Court Martial acted through the Court Martial to decide the rights of the soldiers. See paragraph 9 of the Affidavit which shows that the 2nd Respondent is an interested party. The complaints of the soldiers which led to the alleged mutiny were directed at the Army authorities which the 2nd Respondent represents.

4.14 We crave Your Lordship's indulgence to present analysis of Section 36 (1) as follows;

*"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a **fair hearing** within a reasonable time by a Court or other Tribunal established by law and constituted in such a manner as to **secure its independence and impartiality**"*

4.15 It is proper to consider the active elements of Section 36(1), which are (i) "**secure**", (ii) "**independence**", & (iii) "**impartiality**". This is important because any determination of a body or tribunal of the rights of a person in such a manner that cannot **secure** the **independence** and **impartiality** of the tribunal will constitute a violation of the person's right to fair

hearing. The **Blacks Law Dictionary, 6th Edition**, defines these words as follows:

"Secure" – "not exposed to danger, safe, strong, stable or firm ..."

"Independence" - "the state or condition of being free from dependence, subjection or control..."

"Impartiality" - favouring neither, disinterested, treating all alike; unbiased; equitable; fair and just"

4.16 In determining compliance with the requirement of Section 36(1), it is of no moment whether the body is judicial tribunal or quasi-judicial tribunal or known by any nomenclature. What is important is the body is vested with power make determination of rights on issues or a dispute. Once this is the case, the law requires strict compliance with the rules of fair hearing. In the **Fawehinmi case at Page 387, Paras F-H**, the Supreme Court posited that:

'The debate over what constitutes a judicial tribunal, quasi-judicial tribunal, a domestic tribunal, a tribunal simpliciter, etc, will certainly go on as an academic exercise; but once a body of persons by whatever name called are vested with authority to hear and determine particular issues or disputes such body will be required to carry out its function with that fairness and impartiality which the rules of natural justice dictate

The Court also held at **Page 305** that:

"The words fair hearing in Section 33 of the '79 Constitution (now S.36 of '99) has been employed to express all the requirements at common law for the observation of the rules of natural justice in the determination of the civil rights and obligation of the citizen"

4.19 In the present case, the Applicant's grievance is that the complainant, investigator, prosecutor and Judge in the matter against the convicted soldiers, was one and the same person, i.e the Nigeria Army acting through its officers. **See paragraphs 10, 11, & 12 of the Applicant's Affidavit.** We submit that the

case of **Fawehinmi** is *impari materia* with the Applicant's case. In both cases, the complaint was about the composition of a panel in a manner that failed to meet the threshold or standard of impartiality and independence set by Section 36 (1) of the Constitution.

4.20 For emphasis, the Applicant respectfully submits that Section 36 (1) of the Constitution is the only yardstick for the observance of fair hearing in the determination of the civil rights of any person. As stated in **Fawehinmi's** case, all decision making bodies are bound by Section 36(1) of the Constitution, it is irrelevant whether the decision making body is a judicial, quasi-judicial or even a Court Martial as in this case. If the composition of the Court Martial falls short of the independence and impartiality requirements of Section 36 (1), it is fatal.

4.21 Your Lordship will note that the complainant, investigator, prosecutors and adjudicators are in truth the Nigerian Army in this case. All involved in the process were related by military service and are all officers of the Nigerian Army, or persons subject to the control, management and direction of the 1st Respondent. The Court Martial is only a Panel of the Army with no independence as to secure its impartiality. In fact, the decision of the Court Martial has to be transmitted to the 1st Respondent for confirmation. See **Sections 148(1) and 152(1)(a) of the Armed Forces Act**. Members of the Court Martial are answerable to the primary complainant (Major-General Ahmadu Mohammed, the Commanding Officer of the 7 Division), the 2nd Respondent and the Army as a body. We emphasize that the law is *qui facit per alium tacit per se* i.e. he who does a thing by another, does it himself. Therefore, Court Martial, being an ad-hoc panel of the Army under the 1st Respondent, lacked the capacity to be impartial or unbiased and therefore failed the objective test set by Section 36(1) of the Constitution.

4.22 The Appellants will rely on **L.P.D.C. v. Fawehinmi (supra)** on the need not to be judge in your own cause:

"It is settled law that a person cannot be a judge in his own cause. This is the principle of natural law of considerable

antiquity. The person to decide the rights and obligations of two contending parties should not himself be a party to the lis. Where the judge is also a party to the lis, he violates the sacred maxim of NEMO JUDEX IN CAUSA SUA. Whether one of the judges, or all of them, has been an accuser is a question of fact"

4.23 We submit that the question of fact whether the Army, through its various officers, is the complainant, the investigator and the judges all rolled into one has been fully answered by the positive evidence of the Applicant.

4.24 It is trite that any law inconsistent with the Constitution is void to the extent of such inconsistency. In paragraph 4.1 above, we set out the provisions of **Section 133(3)(4) & (5) of the Armed Forces Act** dealing with the composition and constitution of Court Martial. Under the provisions, the President and other members of a Court Martial, including the Judge Advocate are appointed by one officer designated as the convening officer. We submit that this arrangement conflicts with Section 36(1) of the Constitution because the independence of such a Court martial cannot be secured against the convening officer who appointed all the members, including the President.

4.25 Based on our submissions above, this Honourable Court is respectfully urged to hold that:

1. the manner of composition of the Court Martial which tried and convicted the soldiers named in this Application and the decisions reached against the soldiers violate their right to fair hearing; and
2. Section 133(3)(4) & (5) of the Armed Forces Act which makes the Army the investigator, prosecutor and the judge is inconsistent with Section 36 (1) of the Constitution and therefore null and void.

IS THE DECISION OF THE COURT MARTIAL SUBJECT TO JURISDICTION OF THIS COURT?

4.26 In the most likely event that Your Lordship holds that the proceedings of the Court Martial violates the right to fair hearing of the soldiers named in this Application, we submit that Your

Lordship is empowered to set aside the decision having been reached in violation of constitutional provisions on fundamental right. This is the position of the Supreme Court in **F.R.N. v. Ifegwu [2003] 15 NWLR (Pt. 842) 133.**

- 4.27 In that case, the Respondent was one of six accused persons arraigned and tried before the Failed Banks Tribunal, Lagos constituted under the Failed Banks (Recovery of Debts) and Financial Malpractice in Bank Decree, 1994 Lagos. The Tribunal convicted the Respondent on the two counts and sentenced him to years of imprisonment. He appealed to the Special Appeal Tribunal which allowed the appeal on sentence by substituting for each of counts 1 and 10, N100,000.00 fine or 2 years in prison. Thus the Respondent came to the end of the road as far as the appellate process was concerned under section 5 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree which gave him a right of appeal. It was obvious that the right of appeal was no longer available to the Respondent. The Respondent filed an originating summons in the Federal High Court to enforce his fundamental right. 1999.
- 4.28 The sum total of the complaint was, that the Failed Banks Tribunal and the Special Appeal Tribunal which heard the case acted in breach of the fundamental rights of the respondent guaranteed under Section 33(8) of the 1979 Constitution then applicable. One of the reliefs sought by the Respondent was an order setting aside the conviction and sentence. The Supreme Court held that the Federal High Court has the jurisdiction to entertain the matter and grant the Respondents prayers. At page 199, **paras F-G, Ayoola, JSC** stated thus:

"Where the jurisdiction of the High Court is invoked under sub-section (1) of section 46 of the 1999 Constitution ... for redress for alleged contravention or likely contravention of the Fundamental Human Rights Provision of the Constitution, the jurisdiction that the High Court exercises is a special jurisdiction and not a general supervisory jurisdiction or a general power of judicial review. When an agency of state by its acts or omission contravenes the fundamental right of a citizen, the right of the citizen to seek redress is not excluded merely

because the act is manifested by a decision of a tribunal, whether declared final or otherwise. (underlining for emphasis)

4.29 In the light of the Supreme Court decision in **F.R.N. v. Ifegwu (supra)**, we urge the Court to set aside the decision of the Court Martial having been reached in breach of the fundamental right of the soldiers.

5.0 CONCLUSION

5.1 We urge the court to grant the reliefs sought in this Application.

Dated the day of2014.

.....
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