# In The Supreme Court of Nigeria

On Friday, the 7th day of March 2008

**Before Their Lordships**

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| Niki Tobi | ..... | Justice, Supreme Court |
| Sunday Akinola Akintan | ..... | Justice, Supreme Court |
| Mahmud Mohammed | ..... | Justice, Supreme Court |
| Ikechi Francis Ogbuagu | ..... | Justice, Supreme Court |
| Francis Fedode Tabai | ..... | Justice, Supreme Court |

S.C. 204/2004

## Between

Major Bello Magaji ..... Appellant

## And

The Nigerian Army ..... Respondent

**Judgement of the Court**
Delivered by
Niki Tobi, JSC

This appeal involves the beastly, barbaric and bizarre offence of sodomy. A more common place name is homosexual or homosexuality. It is against the appellant, former Major Bello Magaji. He wore Staff No. N/6604 in the Army.

The victims are Emmanuel Enega (PW1), Joseph Unigbe (PW2), Mohammed Abubakar and Isaac John. Emmanuel Enega was 17 when he gave evidence before the General Court Martial. He was a student of the Army Cantonment Boys Secondary School, Ojo. Augustine Oscar Ayewa was the errand boy of Major Magaji. He made the first contacts. He contacted Joseph Unigbe for the business. Joseph called Ayewa, Oscar, and so I will call him Oscar too. Oscar told Joseph to have his bath as he wanted him to go out with him. Joseph needed the company of his friend Emmanuel and he asked him to join in the outing. There are two Josephs, Joseph, the Prosecution Witness No. 2 and Joseph, one of the errand boys of Magaji.

The common evidence of Emmanuel and Joseph is that they were asked to drink a bottle each of small stout which intoxicated them; it was in their state of intoxication that the appellant performed the dirty act of sodomy on Emmanuel, and others.

Perhaps it is better to hear from the mouths of Emmanuel and Joseph to appreciate the ordeal or pain they went through. Emmanuel as PW1, said in his evidence in-chief at pages 23 and 24 of the Record, and I will quote the evidence in very large parts:

"When I went inside, I saw Joseph with Oga Magaji. Then Oga asked me my name, and then I told him my Joseph (sic) said yes so he asked Joseph if he knew me and Joseph said yes so he said I should go inside and sit down. Then when we went inside, I saw Mohammed and he said it has been long he was inside, he overslept. Then I asked Joseph the time they came there. Joseph said it has been long, that Mohammed took a bottle of Gulder that's why he went asleep. By then, Sam came in, brought a bottle of small stout and gave me to drink, but I said I didn't want to drink because I was not used to it, but he said if I don't drink it I

wouldn't work for Oga, he will not accept me. Then he opened the small stout for me. I took a little out of it and it was bitter, I couldn't take it, so I gave it to Joseph Unigbe who took the rest. After 5 minutes my eyes were turning me Joseph said me and Mohammed should go inside the bedroom to take a bath so that our eyes will stop turning us we accepted took our bath and when we wanted to put our cloths on, Joseph brought out one Army singlet, shirt andnicker, and a night gown and he said we should put them on we asked him why. He said we could not go home that patrol will hold us, that we had to sleep till the following day so we accepted and put them on. Then he showed us the guest room that we should go inside that that is where we were going to sleep. All of us went inside the guest room, suddenly, Joseph went outside saying he was going to collect something from the sitting room. When he went out, just immediately he went out then Maj. Magaji came inside the room. When he came inside, because I and Mohammed were sleeping on the bed he sat on the bed and asked us what we were discussing, we said nothing. It was then he removed his singlet and removed Mohammed's own and started romancing Mohammed's body and used my hand and put it on his tommy and said that I should be romancing his tommy, After that he off his nicker and off Mohammed's nicker and he sexed Mohammed through the anus. Then Mohammed shouted that this wasn't what Joseph told him that he was coming to do there. Then Oga stood up and Mohammed went out. Before Mohammed went out, he told Mohammed to bring a white container. When Mohammed brought the container the container was filled with cream, so he used the cream to rob our pains; I and Mohammed and then Mohammed went out then Oga wanted to use me too. He turned me upside down and used his penis and put it into my anus then, I shouted that I can't take it that is not what Joseph told me too then he said I should go out."

Joseph, in his evidence in-chief, said at page 28 of the Record:

"There was a day, it was on a Friday evening, I was standing in my area, then Oscar called me and said that I should go and take bathe that he will take me to somewhere. I thought that it was joking matter because I use to fear that boy before, but I took my bathe. After taking my bathe, he gave me transport fare to go to camp 1, at the offrs' mess. He said he was coming to meet me there. He told me that he, was taking me there to go and do a contract of ridges not knowing that he was taking me there to go and do another thing when we enter Maj.Magaji's house, they gave me small stout to drink. I said no that I have not tried it before. They said I should try it that it is only a bottle of small stout. When I drank it, it was bitter so I told them I can't finish it but they urged me to finish it. After finished drinking my eyes started turning me. Then the offr told me to go into his bedroom and lie down so that my eyes will steady. I went inside and lay on the bed. In the night the offr came into the room and started romancing my body so I was thinking within me, ah, this man is a senior offr, how can he be doing a thing like this but I was afraid to speak out so he told me to lie down on the floor and turn my back, then I refused I told him I can't do that, so he brought a container of cream and said I should be robbing the cream on his penis. After sometime, I told him I had to be going because it was getting late in the night. He said I shouldn't worry that I should go and bath. After my bath he gave me ₦1500.00k and said I should give Oscar ₦500.00k for bringing me. Then when I came out I gave Oscar N500.00k and it remained ₦1000.00k. Out of the ₦1000.00k Oscar collected ₦100.00k and it remained ₦900.00k. From the ₦900.00k, I bought things paid small small credit I was owing and bought school uniform for myself."

The following evidence came out under cross-examination of Joseph at page 29 of the Record:

"Ques: Wait, you said you were sleeping and Mohammed came and woke you up that he has finished the job?

Ans: Yes sir.

Ques: What job did he tell you that he has finished?

Ans: He said that the man has already sexed them.

Ques: What do you mean by sex them? What did he say?

Ans: He said the man give him a cream to rub on his penis and put his penis in his anus to sex him

Ques: What do you mean sex him?

Ans: He put a cream in his penis and put in his anus.

Ques: And did what?

Ans: And sleep with him

Ques: What do you mean sleep with him?

Ans: Sex him."

The General Court Martial convicted the appellant and sentenced him to seven years. His appeal to the Court of Appeal was dismissed. He has come to the Supreme Court. Briefs were filed and exchanged. Appellant formulated five issues for determination:

"1. Whether the Court Martial convened by Brigadier-General P. N. Aziza was competent, having regards to the fact that there was no prior investigation of the charge against the Appellant in the manner prescribed by law and that the Appellant was not under his command (Grounds 1&2).

2. Whether the lower court was right when it held that the prosecution witnesses testified on oath (Grounds 3&4).

3. Whether the lower court was right when (upheld the conviction of the Appellant for the offence of sodomy as created under Section 81(1) (a) of the Decree (Grounds 5, 6 &7).

4. Whether the lower court was right when it upheld the admissibility of the purported statement of the Appellant which was alleged to have been obtained under Duress and was tendered from the bar. (Grounds 8 &. 9).

5. Whether having regard to the Records of Proceedings of the Court Martial the lower court was right when it came to the conclusion that the Appellant was given a fair hearing (Grounds 10, 11 & 12.) "

The respondent adopted the above five issues.

Learned counsel for the appellant, Mr. Robert Clarke, Senior Advocate of Nigeria, citing *Madukolu v. Nkemdilim (1962) 1 All NLR 587,* submitted on Issue No 1 that the Court Martial convened by Brigadier-General P. N. Aziza for the trial of the appellant lacked competence and therefore had no jurisdiction, as there was no prior investigation of the charge against him in the manner prescribed by taw. He referred to *sections 123 and 124 of the Armed Forces Decree, 1993* and the cases of *Agusiobo v. Onyekwelu (2003) 14 NWLR (Pt. 839) 34*; *Kallamu v. Gurin(2003) 16 NWLR (Pt. 847) 493; Eimskip Ltd, v. Exquisite Ind. Ltd. (2003) 4 NWLR (Pt. 809) 88; NAF v. Obiosa (2003) 1 SCNJ 343* and *Emuze v. Vice-Chancellor. University of Benin (2002) 10 NWLR (Pt. 828) 378* on the use of the word "shall" and jurisdiction of the court.

He submitted on Issue No. 2 that the Court of Appeal was wrong in holding that the prosecution witnesses testified on oath. He contended that the reproduction of Form D2 without more is no proof that the prosecution witnesses were duly sworn, as the Form was not completed with relevant information and particulars as to the names of the witnesses, and whether they were sworn on the Holy Bible or the Holy Quoran. He submitted that the findings of the Court of Appeal are perverse. He cited section *138(2) and (5)* of the *Decree* and *Agusiobo v. Onvekwelu (supra);Kallamu v. Gurin (supra); Eimskip Ltd, v. Exquisite Ind. Ltd, (supra); Ojong v. Duke (2002) 14 NWLR (Pt. 841) 581 and Owoyemiv. Adekoya (2003) 18 NWLR (Pt. 852) 307.*

On Issue No. 3, learned Senior Advocate submitted that the Court of Appeal was not right in upholding the conviction of the appellant, for the offence of sodomy. He contended that the offence was not proved by the prosecution. Pointing out that Mohammed Abubakar and Isaac Jonah, did not testify at the trial, learned Senior Advocate argued that the charge ought to have failed in the General Court Martial. He cited *The Criminal Law and Procedure of the Six Southern States of Nigeria paragraphs 1685, page 633, sections 81 and 214* of the *Decree, section 179(5)* of the *Evidence Act* and the following cases: *Okoyomon v. The State (1973) 8 NSCC 9; NAF v. Obiosa (2003) 4 NWLR (Pt. 870) 233 and Alaukwu v. State (1956-84) Vol. 10 Digest of Supreme Court Cases 63.*

On Issue No. 4, learned Senior Advocate submitted that the Court of Appeal was wrong in upholding the decision of the General Court Martial admitting the pre-trial statement of the appellant, Exhibit 1. He urged the court not to attach any evidential weight to the exhibit. He cited sections 192 and 193 of the Evidence Act and the following cases: *Famakinwa v.Unibadan (1992) 7 NWLR (Pt. 255) 608*; *Anatogu v. Iweka (1995) 8 NWLR (Pt. 415) 547; Iyanda v. Laniba (2003) 8 NWLR (Pt. 810) 267; Edoha v. Attorney-General, Akwa Ibom Slate (1996) 1 NWLR (Pt. 425) 488)*; *Ajayi v. Fisher (1956) 1 NSCC 82* and *Trade Bank Pic v. Charmi (2003) 13 NWLR (Pt. 836) 158.*

Learned Senior Advocate submitted on Issue No. 5 that the Court of Appeal was wrong in holding that the appellant was given a fair hearing by the Court Martial. Citing *Garba v. University of Maiduguri (1986) 1 NSCC Vol 17 page 245; Mohammed Kano NA (1968) 1 All NLR 424*; *Kotoye v. CBN (1989) 1 NWLR (Pt. 98) 419; Unibiz (Nig) Ltd, v. CBC I. Ltd. (2003) 6 NWLR (Pt. 816) 402*; *Agoju v. Adiche (2003) 2 NWLR (Pt. 805) 509,* counsel submitted that the appellant's right to fair hearing was breached on the following grounds:

(i) that the General Court Martial descended into the arena by virtually taking over the case of the prosecution and thereby interfered with the course of the proceedings;

(ii) that the General Court Martial in allowing the prosecution to tender Exhibit 1 from the Bar denied the appellant the right of cross-examination;

(iii) that the confirmation of the verdict of the General Court Martial only four days thereafter by the confirming officer foreclosed the appellant's right to petition against the said verdict within the three months period allowed under section 149(1) of the Decree.

He urged the court to allow the appeal.

Learned counsel for the respondent, Mallam Jimoh Adamu, Assistant Chief Legal Officer, Federal Ministry of Justice, Abuja, submitted on Issue No. 1 that Brigadier-General P. N. Aziza, as Commander, Lagos Garrison Command, was qualified to convene the General Court Martial to try the appellant and therefore competent to do so. He cited *section 131 of the Armed Forces Decree, 1993* and the case of *NAF v. Obiosa 3 MJSC 78*. He argued that the case of *Madukolu v. Nkemdilim (supra)* cited by learned Senior Advocate for the appellant was not applicable. He said that an investigation was duly conducted in the case, thus satisfying the mandatory provision of sections 123, 124, 128 and 131(1) (d) of the Decree.

Taking Issue No 2, learned counsel submitted that the witnesses for the prosecution were all put on oath before they testified in accordance with the Rules of Procedure, 1972. Citing the case of *Odu'a investment Co. Ltd, v. Talabi (1997) 10 NWLR (Pt. 523) 1*, learned counsel submitted that courts should not follow technicalities but do justice.

On Issue No. 3, learned counsel called in aid the evidence of PW1, PW2 and PW3 and submitted that the prosecution proved penetration. He also cited Oxford Advanced Learners Dictionary for the definition of penetration. He distinguished the case of *Okoyomo v. The State* (supra) from the facts of this case. He argued that sodomy is not among the offences in which corroboration is required. He relied on the pre-trial statement of the appellant.

Taking Issue No. 4, learned counsel submitted that the Court of Appeal was correct in upholding the submission of the respondent on *Exhibit 1*. Assuming, without conceding that *Exhibit 1*was wrongly admitted, counsel contended that the error by itself cannot ground a reversal of the entire case. He cited *Abadom v. State (1997) 1 NWLR 1,* Even if *Exhibit 1* is not acted upon, the appellant did not present any cogent evidence in defence, learned counsel argued.

On Issue No. 5, learned counsel submitted that the appellant was given fair hearing. He contended that the questions asked by the court were merely aimed at clearing ambiguities which arose in the course of examination in-chief He did not see the application of the case of *Amachree v. Nigerian Army (2003) 3 NWLR (Pt. 807) 255* cited by counsel for the appellant. He also relied on *Rule 56(1)* of the *Rules of Procedure (Army) 1972*. He pointed out that the answers bear no relevance to the case of the prosecution. Counsel argued that the rule of fair hearing is not a technical one which can only be raised where there is genuine and deliberate contravention or denial of the Constitution. He cited *Onigbo v. Una (2002) Vol. 12 MJSC 14* He urged the court to dismiss the appeal.

Let me take the first issue on the alleged failure of the prosecution to investigate the charge against the appellant. Sections 123 and 124 of the Decree are relevant. They provide:

"123. Before an allegation against a person subject to service law under this Decree (in this section referred to as the 'accused') that he has committed an offence under a provision of this Decree is further proceeded with, the allegation shall be reported, in the form of a charge, to the commanding officer of the accused and the commanding officer shall investigate the charge in the prescribed manner.

124 (1) After investigation, a charge against an officer below the rank of Lieutenant-Colonel or its equivalent or against a warrant or petty officer may, if an authority has power under the provisions of this Part and Part XIII of this Decree to deal with it summarily, be so dealt with by that authority (in this Decree referred to as 'the appropriate superior authority') in accordance with those provisions."

Section 123 provides for an investigation of an offence against a person subject to service law. Section 124(1) provides for dealing with the offence summarily in appropriate cases after investigation. This applies in respect of offences against an officer below the rank of Lieutenant-Colonel or its equivalent or a warrant or petty officer.

In an apparent reaction to the submission of learned Senior Advocate for the appellant, the Court of Appeal said at pages 406 and 407 of the Record:

"However, it would appear on a cursory look at the Record of Proceedings, that the prosecution indeed tendered a detailed report of investigation which the court admitted and markedExhibit 1. The Appellant's case was duly investigated by the General Court Martial."

I find it difficult to disagree with the Court of Appeal. I have seen Exhibit 1 and I arrive at the same conclusion. In my humble view, the appellant did not show in what way the provisions of sections 123 and 124 were not complied with. Learned counsel relied on the often cited case of *Madukolu v. Nkemdilim (supra)* on jurisdiction. With respect, the case does not apply. The General Court Martial that convicted the appellant was properly constituted "as regards numbers and qualifications of the members". No member of the General Court Martial was disqualified. The offence was within the jurisdiction of the General Court Martial. The case came before the General Court Martial by due process of law, and after complying with investigation, a condition precedent to the exercise of the jurisdiction of the General Court Martial. The issue accordingly fails.

The second issue is in respect of taking of oath The Court of Appeal said at pages 407 and 408 on the issue and I quote the court *in externso:*

"The Argument of the Appellant is that his conviction was secured by the lower Court Martial based on the unsworn testimony of the prosecution witnesses. How correct is the Appellant's Claim? I have taken a cursory look at the Record of Proceedings. It indicates that the witnesses were all put on oath before they

testified. *Rule 92* of the *Procedure Rules Military Court Martial Rules, 1972,* requires that the Record of proceedings of a Court Martial be recorded in accordance with the appropriate form set out in Schedule 16(6). The Rules provide that the testimony of sworn prosecution witnesses shall be recorded in the following manner:

The witnesses for the prosecution are called and ..... being duly sworn....."

I agree with the learned Counsel for the Respondent that this format once used as was done in the instant case; it is sufficient proof that the witnesses were duly sworn and it is needless to insist on a verbatim recording of the proceedings whereby, the prosecution witnesses were actually put on oath.

Furthermore, from the record of proceedings on page 15 there are still further indications showing that the prosecution witnesses were put on oath before they testified. In his opening address the prosecution has this to say;

'We shall, in establishing the case against the accused as required by *S.135 and 156 of the Evidence Act,* lead evidence which will consist of documentary evidence and testimony of witness, who will give evidence on oath without wasting much of the Courts' time ...'

Again, on page 29 of the Record of proceedings, the following dialogue took place between the prosecutions and PW4:

'Ques: Now Oscar, remember you are on oath, tell us truthfully, did you see Mohammed Abubakar on that day?

Ans: I saw Mohammed Abubakar.'

In the light of above opening address and dialogue between the prosecution and PW4, it is clear as day light that the witnesses for the prosecution were duly sworn to testify on oath. I therefore have to resolve this issue against the Appellant."

I am not in a position to improve on the above. The Court of Appeal got the point very well. I have, in obedience to learned Senior Advocate, looked at the Forms he referred to at paragraphs 5-6, page 7 of the brief, and I come to the inescapable conclusion that they do not help the case of the appellant. The General Court Martial, in my view, complied with the provision of section 138 of the Decree. An appellant is bound by the Record of Appeal. He cannot go outside the Record and canvass lo an appellate court what he thinks is in favour of his case, which is not in the Record. The Record clearly shows that the witnesses duly took that oath. The Court of Appeal was very clear on that and I must go along with the court.

That takes me to Issue No. 3 on the proof of the offence of sodomy. Section 81 of the Decree provides in part;

“against the order of nature, or ..... is guilty of an offence under this section”

The Armed Forces Decree does not define carnal knowledge. *Section 6 of the Criminal Code Act* defines carnal knowledge or the term carnal connection. The term implies that the offence, so far as regards that element of it, is complete upon penetration. While carnal knowledge is an old legal euphemism for sexual intercourse with a woman, it acquires a different meaning in section 81. The section 81 meaning comes to light when taken along with the proximate words "against the order of nature". The order of nature is carnal knowledge with the female sex. Carnal knowledge with the male sex is against the order of nature and here, nature should mean God and not just the generic universe that exists independently of mankind or people. It is possible I am wrong in my superlative extension of the expression. As that will not spoil the merits of the judgment, I live it at that.

Where there is a hole or an opening, there will be the possibility of penetration; penetration being the ability to make a way or way into or through. While the common usage of the word means putting of the

male organ into the female sex organ when having sex, it has a more notorious meaning and that is the meaning in section 81.

The natural function of anus is the hole through which solid food waste leaves the bowels and not a penis penetration. That is against the order of nature, and again, that is what section 81 legislates against. I had earlier produced part of the evidence of Emmanuel and Joseph. Emmanuel was a victim of the offence. Let me repeat the exercise but this time limited to a short extract. Emmanuel said at page 24 of the Record:

"He turned me upside down and used his penis and put it into my anus then, I shouted that I can't take it that it is not what Joseph told me ....."

Joseph in his evidence in-chief and under cross-examination told the General Court Martial that Mohammed told him that

"he has finished the job. He said that the man has already sexed him."

Appellant in his pre-trial statement said:

"... I had some passes with them short of sexual intercourse ... they massaged me. I have to state that on the day in question the massage they did to me included my private parts and I had romances with them. We were naked."

It is clear from the pre-trial statement of the appellant that he admitted what was convenient for him to admit. He admitted the naked romance which Emmanuel and Joseph confirmed in their evidence. Does the appellant want this court to believe that the whole matter ended in a romance, particularly in the context of a willing Emmanuel? The evidence of appellant agrees with that of Joseph as it affects Joseph in the romance. Unlike Emmanuel, Joseph was unwilling and the appellant released him with a gift of ₦1,500.00.

I should pause here to say that the evidence of Joseph is clear hearsay. I thought learned Senior Advocate will make the point. I am surprised that he did not. Mohammed woke up Joseph from sleep and told him that "he has finished the job." That, in my view, is clear hearsay evidence which is inadmissible.

The hearsay evidence of Joseph notwithstanding, the evidence of Emmanuel clearly proves the offence of sodomy. That apart, the evidence of the appellant creates a circumstance which leads to the conclusion that he committed the offence of sodomy. He said he "had some passes with" the victims. He said they massaged him. He said the massage included his private part, which I identify as the penis. He said he had romances with them naked. Where did all these amorous activities lead the appellant to? Should I believe that they did not lead the appellant to commit the offence of sodomy on a willing Emmanuel, I ask again"? While they may be incapable of rousing the feelings of an ordinary man in the street, they will certainly rouse the feelings of a homosexual or gay sodomite. The available evidence pin down the appellant as one. There is the adage that an ostrich which buries its head in the sand forgets that the rest of the body is exposed to any willing eye to see and watch.

Apart from the direct evidence of Emmanuel, there is enough circumstantial evidence justifying the conviction and sentence of the appellant. After all, a court or tribunal can convict on strong circumstantial evidence which lead to the commission of the offence. See *Chewmoh v. State (1986) 2 NWLR (Pt. 22) 331; Adio v. State (1986) 2 NWLR (Pt. 24) 581; Ikomi v. State (1986) 3 NWLR (Pt. 28) 340; Iyaro v. State (1988) 1 NWLR (Pt. 69) 256; Ojegbe v. State (1988) 1 NWLR (Pt. 71) 414; Atano v. Attorney-General Bendel State (1988) 2 NWLR (Pt. 75) 201;Shazali v. State (1988) 5 NWLR (Pt. 93) 164; Gabriel v. State (1989) 5 NWLR (Pt. 122) 457.*

Learned Senior Advocate submitted that as Mohammed Abubakar and Isaac Jonah did not testify at the trial, the allegation against the appellant in respect of them have been abandoned. I do not see how this submission helps the appellant. If an accused person is charged with committing an offence against two or more persons, he could be convicted and sentenced in respect of committing the offence against one person; and the conviction and subsequent sentence stand. Our adjectival law does not require that the prosecution must prove the commission of the offence against all the victims before the accused could be

convicted. Sodomy is not one offence where corroboration is statutorily required. Even if it was to be so, the pre-trial statement of the appellant would have gone a long way, if not all the way.

The next issue is in respect of the admissibility of the pre-trial statement. I think I have touched it by the last foregoing sentence. Let me go into it in more detail. *Rule 57* of the *Rules of Procedure (Army) 1972, MM; 1972* provides that a written statement which is admissible in accordance with the provisions of the Criminal Justice Act, 1967, as modified by the Court Martial Evidence Regulation 1967, shall be handed to the court by the prosecutor or the accused as the case may be, without being produced by a witness. Learned Senior Advocate would appear to have forgotten to consider the above rule. If he had done so, he would not have raised the issue.

The impression is given by both counsels that *Exhibit 1* is *a* confessional statement. With respect, it is not. A confessional statement unequivocally confesses to the commission of the offence charged. The offence is sodomy. Appellant did not confess in *Exhibit 1* that he committed the offence. All he said is that he romanced the victims and they romanced him in return. Mere romance without penetration through the anus is not sodomy. Therefore the issue of voluntariness of *Exhibit 1* raised by learned Senior Advocate for the appellant and the corresponding submission of counsel for the respondent do not arise. Assuming that I am wrong (and I do not think so) there is clear evidence outside Exhibit 1 justifying the conviction and sentence of the appellant. And here, the evidence of Emmanuel readily comes out to the fore.

And that takes me to the last issue on fair hearing; Learned Senior Advocate has seriously canvassed in this court that the appeal should be allowed because the General Court Martial took over the prosecution and thereby interfered with the course of the proceedings. He took time to count the number of questions the General Court Martial asked PW2, PW3 and PW4.

It is straight and strict law that tribunals, or courts of law, by their special place in the adjudicatory process, should not condescend to the nitty-gritty of the dispute or flirt with the evidence in a way to compromise its independent and unbiased position in the truth searching process. A tribunal or court is expected to hold the balance in an egalitarian way so that the parties and persons present in court will not accuse the body of bias. This is the real essence of our adversary system of the administration of justice as opposed to the inquisitorial system of the French prototype.

The above position of the law is good as long as it is the general principle of law. For a conduct of a trial tribunal or court to affect its decision in respect of interference, an appellate court must be satisfied that there was bias or likelihood of bias. In considering this, an appellate court will have a very close look at the questions asked by the tribunal or court to see whether they affected the live issues in the dispute and the live issues here mean issues which will inevitably give rise to the decision of the tribunal or court one way or the other. Therefore if a tribunal or court asked, say, a thousand questions, which are peripheral, and in the opinion of an appellate court, do not go to the root and foundation of the matter, it cannot allow an appeal on that ground. In such a situation, an appellate court can only take the conduct of the tribunal or court as noisy and lousy, which has no effect on the conviction.

Emmanuel was the star witness, so to say. He gave evidence as PW1. The court did not ask him any question. Learned Senior Advocate did not say that the court asked Emmanuel any question. He said that the court asked PW2 one question, PW3 fifteen questions and PW4 ten questions. The questions counsel complained of in the brief were mainly on the money appellant gave the victims as they related to the offence of sodomy.

I do not think the evidence of PW2, PW3 and PW4 are that material to the conviction of the appellant. I made the point that the evidence of PW2, as it affects the commission of the offence on Mohammed, is hearsay. PW3 lived with the appellant. PW4 lived at Block 05/14, Ojo Cantonment. They did not give evidence of the commission of the offence of sodomy and so questions heaped on them really go to no issue.

I do not think the issue of fair hearing canvassed by learned Senior Advocate will be of any assistance to the appellant. In the case of *Orugbo v. Una (2002) 16 NWLR (Pt. 792) 175* cited by counsel for the respondent, I said at page 211 and 212 of the Report:

"It has become a fashion for litigants to resort to their right to fair hearing on appeal as if it is a magic wand to cure all their inadequacies at the trial court But it is not so and it cannot be so. The fair hearing constitutional provision is designed for both parties in the litigation, in the interest of fair play and justice. The courts must not give a burden to the provision which it cannot carry or shoulder. I see that in this appeal. Fair hearing is not a cut-and-dry principle which parties can, in the abstract, always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court. Only the facts of the case can influence and determine the application or applicability of the principle. The principle of fair hearing is helpless or completely dead outside the facts of the case."

I see no reason to depart from the above. The facts of the case in this appeal do not support the invocation of the principle of fair hearing in favour of the appellant because I do not see where the appellant's right to fair hearing was violated or contravened.

I think I have taken half the issues raised by learned Senior Advocate. What the appellant decided to do was to dare nature in his craze for immoral amorphous satisfaction. By his conduct, the appellant re-ordered God's creation. Has he got the power to do that? No. No human being, whether in the military or not, has the power to re-order God's creation. After all, we are not talking of fighting a war. By his conduct, the appellant has brought shame to himself. Although a bit of the dent is on the Army, I am not prepared to hold that Force guilty of the conduct of the appellant. The Army did not ask him to commit this heinous and atrocious offence. He is a terrible criminal. And he is alone, clearly alone.

This case clearly brings to the open the problem of poverty in our society: not just poverty but abject poverty. It is in evidence that the victims were hired by money. Parents should try as much as they can to provide for the needs of their children. And when I say this, I am not unaware or oblivious of the fact that some children are not satisfied even if their parents supply all their needs because of their insatiable growing and glowing gluttony for more and more, like Oliver Twist of literary fame.

In sum, I do not see the slightest merit in this appeal. I dismiss it and affirm the conviction and sentence of the General Court Martial.

**Judgment Delivered by**
Sunday Akinola Akintan, JSC

The appellant was a Commissioned Officer in the Nigeria Army and held the rank of Major. He was arraigned before the General Court Marital (hereinafter referred to as GCM) on 6$^{th}$February, 1997 on a charge of sodomy contrary to *section 81(l) (a) of the Armed Forces Decree 1993*. The particulars of the offence are that he sometime in 1996 had carnal knowledge of the following 4 men: Mohammed Abubakar; Joseph Umaigbe; Emmanuel Ilagoh and Isaac Jonah against the order of nature. He pleaded not guilty to the charge and evidence was led by the prosecution in support of the charge.

Each of the four men gave evidence of their experience with the appellant. At the close of the prosecution's case, the appellant did not lead any evidence in his defence. Rather, his counsel informed the General Court Marital that the accused was resting his case on that of the prosecution. The appellant was eventually convicted as charged and a seven year sentence was passed on him.

The appellant's matter was thereafter referred to the confirming officer as required under the said Armed Forces Decree. The confirming officer reduced the 7 year term imposed on the appellant to 5 years. The appellant was dissatisfied with his conviction and sentence. He therefore filed an appeal to the Court of Appeal which dismissed his said appeal. The present appeal is from the judgment of the Court of Appeal Lagos Division which dismissed his said appeal.

The parties filed their respective brief of argument in this court. The appellant formulated five issues in the appellant's brief. The main appellant's compliant seriously canvassed in this court are mainly on technicalities. They include that the officer who empanelled the General Court Marital that tried him was not his commanding officer as also required by law; and that there was no proper investigations before his arraignment as required by the enabling law. Each of these issues was adequately treated in the leading judgment written by my learned brother, Niki Tobi,JSC, the draft of which I have read. I therefore do not intend to go over them as doing so would amount to unnecessary repetition. All I need to say is that I entirely agree with his reasoning and conclusion which I also adopt. I will, however, like to add that the offence for which the appellant was convicted is an unusual, abnormal and unbelievable one. Again, the appellant did not offer any defence at his trial and all that he is now raising in this appeal ought to have been taken up as an objection before entering his plea. The parties would have joined issues on each point and heard before a ruling was made on every issue so raised. But raising them first at the appellate level would be futile since no proper foundation evidence was laid at the trial upon which the appellate court could come to a conclusion that a breach had been committed, Again merely resting his case on that of the prosecution amounts to nothing less than admission of the evidence led by the prosecution.

In conclusion, therefore, for the reasons given above and the fuller reasons given in the leading judgment, I hold that there is totally no merit in the appeal and I accordingly dismiss it.

**Judgment Delivered by**
Mahmud Mohammed, JSC

The Appellant in this appeal was a Major in the Nigerian Army. He was arraigned before the General Court Martial (G.C.M.) for short, on a charge of sodomy contrary to *Section 81(l) (a) of the Armed Forces Decree No. 105 of 1993*. The particulars of the offence were that some time in 1996, he had carnal knowledge of Mohammed Abubakar, Joseph Unigbe, Emmanuel Ilagoh and Isaac Jonah against the order of nature. He pleaded not guilty to the charge. In order to prove its case against the Appellant, the prosecution called a total of four witnesses before closing its case. The Appellant who was also represented by Counsel, elected not to give evidence or call witnesses in his defence. His learned Counsel informed the General Court Martial that the Appellant was resting his case on the case as presented by the prosecution against him. At the conclusion of the proceedings at the trial, the Appellant was found guilty as charged and sentenced to seven (7) years imprisonment. This sentence was later reduced to (5) five years imprisonment by the Confirming Authority.

Aggrieved with his conviction and sentence by the General Court Martial, the Appellant appealed to the Court of Appeal, Lagos Division which after hearing the appeal affirmed the conviction and sentence on the Appellant. It is against this decision of the Court of Appeal that the Appellant is now before this Court on a final appeal. Five (5) issues were raised by the Appellant in his brief of argument which issues were adopted by the Respondent. These issues are –

"1. Whether the Court Martial convened by Brigadier-General P. N. Aziza was competent, having regards to the facts that there was no prior investigation of the charge against the Appellant in the manner prescribed by law and that the Appellant was not under his Command (Grounds 1 & 2).

2. Whether the lower Court was right when it held that the prosecution witnesses testified on Oath (Grounds 3 & 4).

3. Whether the lower Court was right when it upheld the conviction of the Appellant for the offence of sodomy as created under Section 81(l)(a) of the Decree (Grounds 5, 6 & 7).

4. Whether the lower Court was right when it upheld the admissibility of the purported statement of the Appellant which was alleged to have been obtained under duress and was tendered from the bar (Grounds 8 & 9).

5. Whether having regard to the Records of proceedings of the Court Martial the lower Court was right when it came to the conclusion that the Appellant was given a fair hearing (Grounds 10, 11 & 12).

Looking at these issues as formulated from the 12 grounds of appeal filed by the Appellant, it is not difficult to see that the main issue for determination in this appeal is issue 3 which is whether the Court below was right in upholding the conviction of the Appellant for the offence of sodomy as created under *Section 81(l) (a) of the Armed Forces Decree 1993*. Taking into consideration that the Appellant was represented by Counsel throughout the proceedings of the General Court Martial before which no complaint of denial of fair hearing was made on his behalf, shows quite clearly that the issue is now being raised only in struggling to find something to hand on at the hearing. The fact that at the conclusion of his own trial, the Appellant elected not to go into the witness box to refute all the evidence given against him by the victims of the crime against which he was charged, must be regarded to have left his fate to the General Court Martial. Since he had decided not to place any fact before the trial General Court Martial other than those facts which the prosecution placed on record in support of its case against him, the Appellant had decided to keep to himself in the exercise of his right under the law, his own side of the story in any possible rebuttal of those very serious allegations made against him.

The law is well settled that an accused person, who decided to rest his case on the case as presented against him by the prosecution, is exposing himself to gamble and risk. This is because if the case is such that even if all the prosecution witnesses are believed, yet the offence as charged is still not proved, there it may be permissible for an accused person to rest his case on the case of the prosecution. However, Counsel will be taking a big risk, as in the present case, where the issues of fact will have to be decided in favour of the accused person, before his defence will succeed. See the cases of *Nwede v. The State (1985) 3 N.W.L.R. (Pt. 13) 444; Ali & Anor. v. The State (1988) 1 N.W.L.R. (Pt. 68)1***.** Very unfortunately for the Appellant, the nature and quality of evidence led against him including the insertion of his penis into the anus of one of the victims of 'the charge against him, is overwhelming in proving all the ingredients of the offence of sodomy.

It is with these few comments on issue 3, that I say, I entirely agree with my learned brother Niki Tobi, JSC that there is no merit at all in this appeal. The appeal is hereby dismissed. The conviction and sentence of the Appellant are hereby affirmed.

**Judgment Delivered by**
Ikechi Francis Ogbuagu, JSC

This is an appeal against the Judgment of the Court of Appeal, Lagos Division (hereinafter called "the court below") delivered on 30th June, 2004, affirming the conviction and sentence of the Appellant by the General Court Martial (hereinafter referred to simply as ("GCM") on 6th February, 1997.

Dissatisfied with the said Judgment, the Appellant has appealed to this Court on twelve (12) Grounds of Appeal. In his Brief of Argument, five (5) issues have been formulated which have been adopted by the Respondent in their Brief. They read as follows:

"1. Whether the Court Martial convened by Brigadier-General P.N. AZIZA was competent, having regards to the facts that there was no prior investigation of the charge against the Appellant in the manner prescribed by Law and that the Appellant was not under his command. (Grounds 1&2)

2. Whether the lower court was right when it held that the prosecution witnesses testified on oath (Grounds 3 & 4).

3. Whether the lower court was right when it upheld the conviction of the Appellant for the offence of sodomy as created under *Section 81(1)(a) of the Decree* (Grounds 5, 6 & 7).

4. Whether the lower court was right when it upheld the admissibility of the purported statement of the Appellant which was alleged to have been obtained under duress and was tendered from the bar. (Grounds 8&9)

5. Whether having regard to the Records of Proceedings of the Court Martial the lower court was right when it came to the conclusion that the Appellant was given a fair hearing. (Grounds 10, 11 & 12) ".

When this appeal came up for hearing on 13th December, 2007, in accordance with the Rules of this Court, the learned counsel for the parties, adopted their respective Briefs of Argument. While the Appellant's learned counsel - Clarke, Esqr, (SAN) urged the Court to allow the appeal, Adamu, Esq, - learned counsel for the Respondent, submitted that issue of penetration is not relevant, That the law provides offence against course of nature. That there was a Review Authority and that the Appellant did not petition against the said confirmation. He finally urged the court to dismiss the appeal. Thereafter, Judgment was reserved till to-day.

The facts briefly stated are that the Appellant - a Major in the Nigeria Army, was arraigned before the GCM on a charge of Sodomy contrary to *Section 81((1) (a) of the Armed Forces Decree No. 105,1993*. The particulars of the offence are stated to be that he (on a date not stated) in 1996 had carnal knowledge of Mohammed Abubakar, Joseph Umaigbe, Emmanuel llagoh and Isaac Jonah against the order of nature. After pleading "Not Guilty" to the charge (see Form C-Arraignment at page 11 of the Record**s),** the prosecution, called four (4) witnesses in proof of its case. The Appellant was represented. The Appellant did not testify or call evidence/witnesses) in defence, but rested his case on that of the prosecution.

I note that this fact of the defence resting its case on that of the prosecution was never mentioned in the Appellant's Brief. I will therefore, later in this Judgment, deal with the effect or consequences of an accused person, relying/resting on the case of the prosecution and not calling a defence or testifying in his defence. However, at the end of proceedings, the GCM, convicted and sentenced the Appellant, to seven (7) years imprisonment which was commuted to five (5) years by the confirming Authority.

Dissatisfied with the said conviction and sentence, the Appellant, appealed to the court below which affirmed the said decision, hence the instant appeal to this Court. I will deal with the said issues briefly.

Issue 1:

It is surprising to me that it is contended in the Appellant's Brief that:

"the Court Martial convened by Brigadier-General P.N. Aziza for the trial of the Appellant lacked competence and therefore had no jurisdiction in that there was no prior investigationof the charge against him in the manner prescribed by law and that the said Brigadier-General had no power to make the order convening the Court Martial as the Appellant was not serving under his command".

I say surprised because, firstly, there is no evidence in the Records, that the Appellant or his counsel ever raised any objection either before or after the charge was read to the Appellant and he pleaded to it as to the competence of the GCM and the jurisdiction in respect of the charge. It is settled that any objection to a charge for any formal defect on the face thereof or for any perceived irregularity relating say to procedure, shall be taken immediately after the charge has been read over to the accused and not later. See *Section 167 of the Criminal Procedure Act* and the cases of *Okaroh v. The State (1990) 1 NWLR (Pt.125) 128 @ 136 - 137; (1990) 1 SCNJ. 124* and *John Agbo v. The State (2006) 6 NWLR (Pt.977) 545 @ 577-578*: *(2006) 1 SCNJ. 332 @ 356*: *(2006) 1 S.C. (PtII) 73*; *(2006)2SCM81; (2006) 135 LRCN 808: (2006) All FWLR (Pt.309) 1380; (2006) 4 JNSC (Pt.13) 253; (2006) Vol. 6 QCLR 48* and *(2007) 10 WRN 95*. The word is"shall" and this means that it is mandatory.

Secondly, there are the statutory provisions in Sections *123, 124*, (also reproduced in the Appellant's Brief at page 3), *128 and 131 (1) of the Armed Forces Decree/Act 1993* (as amended) hereinafter called "the Act") which read as follows:

"123 Before an allegation against a person subject to service law under this Decree (in this section referred to as the "accused") that he has committed an offence under a provision of this Decree is further proceeded with, the allegation shall be reported, in the form of a charge, to the commanding officer of the accused and the commanding officer, shall investigate the charge in the prescribed manner".

124 (1) After investigation, a charge against an officer below the rank of Lieutenant-Colonel or its equivalent or against a warrant or petty officer may, if an authority has power under the provisions of this Part and Part xiii of this Decree to deal with it summarily, be so dealt with by that authority (in this Decree referred to as "the appropriate superior authority") in accordance with those provisions.

[The underlining mine]

It is stated in the Appellant's Brief that the Appellant, does not deny that the charge against him was investigated before the Court Martial was convened. That the contention is that the investigation was not in the manner prescribed under the provisions of the said two sections. That this is because of the internment of the said Sections, That what is envisaged where there is an allegation of an offence against a person subject to the Act, are (not is) as follows:

"(i) The allegation shall be reported, in the form of a charge to the commanding officer of the Accused officer;

(ii) The commanding officer shall investigate the charge in the prescribed manner;

(iii) After the investigation the commanding officer may further proceed with the allegation against the Accused officer by convening a court martial".

It is not in dispute that Brigadier-General P.M. Aziza was the Commander of the Lagos Garrison Command. Section 128 (1) of the Act, provides that the following persons may act as appropriate superior authority to a person charged with an offence:

"(a) The Commander officer and

(b) Any officer of the rank of Brigadier or above or officer of corresponding rank or those directed to so act under whose command the person is for the time being".

The above provision is clear and unambiqous. P.M. Aziza, was a Brigadier-General and the Appellant was under his Garrison Command and by virtue of the provision of Section 131 (1) (d) of the Act, he was qualified and competent, to convene the GCM. In the case of *O.T. Onyeukwu v. The State (2000) 12 NWLR (Pt.681) 256 @ 266* C.A. also cited and relied on in the Respondent's Brief. It was held that by virtue of Section 131(2) of the Act, a GCM, may be convened by:

"(a) the President, or

(b) the Chief of Defence Staff; or

(c) the Service Chiefs; or

(d) a General Officer Commanding or corresponding command ; or

(e) a Brigadier Commander or corresponding command".

In the case of *Nigeria Air Force v. Ex SQN Leader A. Obiosa (2003)* (not 2000 as appears in the Respondent's Brief) *1 SONJ.343: Vol. 3 MJSC. 78* @ 80 referred to in both Briefs of the parties, it is conceded in the Appellant's Brief at page 6 thus;

"that as was held by the lower court (i.e. the court below) that "the power of an officer of Brigadier General Aziza's rank to convene a Court Martial has been settled in the case of *NAF v.Obiosa (2003) 1 SCNJ. 343* by Ejiwunmi, JSC",

See also the case of *Nigeria Air Force v. Ex Wing Commander LD. James (2002) 18 NWLR (Pt.798) 295 @ 317-318* - per Onu, *JSC (2002)12 SCNJ.379 and (2002)12S.C. (Pt.1) 1*

Regrettably with respect, in spite of all these clear statutory provisions, the decisions of this Court which still subsist and is still binding on the parties and this Court and the said concession by the learned counsel for the Appellant, it is submitted that it is not in all cases, that such an officer, can convene a GCM. That it is only after a full compliance with the provisions of Section 123 of the Act that the Accused Officer's Commanding Officer, shall further proceed to convene a GCM as provided by Section 124(1) of the Act. It is further submitted that there was a defect in the competence of the GCM convened by Brigadier-General Aziza as, according to the learned counsel to the Appellant, the case, was not initiated by due process and that a mandatory requirement of the law, was not fulfilled. With profound humility and respect to Clarke, Esqr., (SAN), learned counsel for the Appellant, I do not agree with him. I reject the said argument in view of his said concession above stated. It must be noted that Ojo Cantonment in which location, the offence was said to have been committed, is within the Lagos Garrison Command as found as a fact by the court below, and this fact, has not been faulted by the Appellant in this Court.

I note that in the Respondent's Brief, the statement of the court below at page 1379 of the Records that,

"There is no disputing the fact that the Appellant was not directly under the Command of Brigadier General Aziza the convening Officer of the Court Martial that tried the Appellant ...".

has been faulted as erroneous and incorrect by the learned counsel for the Respondent who also urged this Court,

"to hold that their lordships of the Court of Appeal erred in that direction and therefore enter an appropriate verdict of the appellant been under the command (sic) of the convened authority", (sic)

I also note that there is no Cross-appeal or Respondent's Notice in this regard by the Respondent. However, this said holding by the court below, has not detracted from the fact (which the Respondent's learned counsel, deliberately or inadvertently did not also reproduce), that immediately after that sentence or holding, the following appear inter alia;

"However, he (meaning Brigadier General Aziza) is empowered under S.131 (1) (d) of the AFD 1993 (as amended) to convene the Court Martial to try the Appellant. Moreover, the offence was committed in Ojo Cantonment of the Lagos Garrison. The power of an officer of Brigadier General Aziza's rank to convene a Court Martial has been stated in the case of*N.A.F v. Obiosa (2003) 1 SCNJ. 343* by Ejiwunmi, JSC, as follows ....."

I therefore, see nothing wrong in an ordinary slip/Comment which in any case, was immediately corrected/remedied by the subsequent finding of fact and anchored on the law or statute and the decided authority by this Court, I urge learned counsel who prepare Briefs, to patiently read the whole finding of a fact and holding of a court and not to pick the sentence that is convenient to him/them before launching an attack such as the one complained of in the Respondent's Brief.

As regard the complaint that there was no investigation, I or one may ask, how come that the Appellant, made a Statement which was recorded and later marked Exhibit 1? I note at page 31/38 of the Records, that during the re-examination of the P.W.4, the prosecution applied that the Judge Advocate read the first three (3) pages of the Statement of the Appellant together with the questions and answers therein. This was done and the prosecution closed its case. Thereafter, the following appear:

"Def: Having considered critically the case of for the prosecution, we have decided to rest our case on that of the prosecution sir; therefore we should read our address first".

At pages 39 to 43 of the Records, appear the written address of the Defence. However, the following appear at the same pages 31/38 of the Records;

"Pros: May I stand down the witness sir. We wish to make a humble application. My Lords, this application is brought pursuant to R 57 RP (A) 1972 and *S.192* of the *Evidence Act* (Read) the portions. Therefore, we apply that the statement offr- (sic) be tendered by us and accepted in evidence by you. The investigator of the case is not around and the DMI certified the copy".

Def: (Objection but overruled)

I take it that DMI means Director Military Intelligence. There is the statement above that the Investigator of the case was not around. Even if he was present only to tender Exhibit 1, by virtue of Section 192 of the Evidence Act, he could not have been cross-examined by the defence. What is more, Exhibit 1 was certified by an Officer of that Command. As earlier stated by me in this Judgment, the Appellant never testified, but rested his case on that of the prosecution which included Exhibit 1. In the address of the defence counsel, no word was said about Exhibit 1 - see pages 42/49 to 43/50 of the Records, The Appellant, never, as I stated earlier in this Judgment, went into the witness box to say that he did not make any statement to any of their officers in-charge or that his case, was never investigated by anybody. He is not a junior officer but a Major. It is now firmly settled that an accused person who rests his case on that of the prosecution, has taken a gamble and/or a risk. He has thereby, shut himself out and will have himself to blame. This is because, he does not wish to place any fact before the trial court other than those which the prosecution, has presented in evidence. It also signifies that he does not wish to explain any fact or rebut any allegation made against him. See the English case of The *Queen v.Singh (1962) 2 WLR 238 @ 243-245* and our local cases of *Nwede v. The State (1985) 3 NWLR (Pt 13) 444 @ 455*; *Ali & anor .v. The State (1988) 1 NWLR (Pt.68) 1 @ 12, (1988) 1 SCNJ. 17@ 18.* I therefore, hold that the Appellant's case, was duly investigated as stated by the Respondent.

In conclusion, with respect, I find no substance or merit in this issue. I dismiss the same.

Issue 2:

I have no hesitation in rejecting, with respect, the submission in the Appellant's Brief that the conviction of the Appellant was based on the unsworn testimonies of prosecution witnesses. First, assuming that this is correct (it is not), there is no evidence that the defence ever objected to such procedure. Thus it consented to each of the said witnesses giving their evidence not on oath. Secondly, the submission/argument is completely misconceived. At page 15/22 of the Records, the following appear:

"Evidence

We shall, in establishing the case against the accused as required by *S. 135 and 136 (sic) of evidence Act,* lead evidence which will consist of documentary evidence and testimony of witness (sic) who will give evidence on oath**,** without wasting much of the Court's time, we apply to call our first witness, Mr. Emmanuel Enega".

In the course of the evidence of PW4 - Augustine Ayewa alias Oscar in-chief, after he stated at page 29/36 of the Records thus,"..... That is all I can remember about the September issue", the following immediately appear.

**"**Ques: Now Oscar, remember you are on oath, tell us truthfully, did you see Mohammed Abubakar on that day?

Ans: I saw Mohammed Abubakar".

From the above, can it be seriously and/or honestly, said that there is, a doubt that the said prosecution witnesses, testified on oath? I or one may ask. I think not. I am satisfied and I so hold, that the complaint,

with respect, is baseless and unfounded. I reject the same. In fact, the court below, at pages 380 and 381 of the Records, painfully and thoroughly, dealt with this issue - perGaladima, JCA, stated inter alia, at page 380 as follows:

"..... I have taken a cursory look at the Record of Proceedings it indicates that the witnesses were all put on oath before they testified....."

His Lordship referred to *Rule 92* of the *Procedure Rules Military Court Martial Rules, 1972* to *Schedule 14(6)* which provide that the testimony of sworn prosecution witnesses shall be recorded in the following manner –

"The witnesses for the prosecution are called and ..... being duly sworn ....."

and stated as follows:

"I agree with the learned Counsel for the Respondent that this format once used as was done in the instant case, it is sufficient proof that the witnesses were duly sworn and it is needless to insist on a verbatim recording of the proceedings whereby, the prosecution witnesses were actually put on oath".

I agree.

At page 381 thereof, His Lordship, concluded thus:

"In the light of above opening address and dialogue between the Prosecution and PW4, it is clear as day light that the witnesses for the prosecution were duly sworn to testify on oath. I therefore have to resolve this issue against the Appellant".

I too, resolve this issue against the Appellant as my answer to the same is rendered in the Affirmative/Positive.

**Issue 3:**

This issue was also raised in the third issue of the Appellant in the court below although differently couched;

*Section 81(1) of the Act* provides inter alia, as follows:

"A person subject to service law under this Decree who (a) has carnal knowledge of a person against the order of nature,
or

(b) not relevant

(c) - do -

Is guilty of an offence under this section:

In the Oxford Advanced Learner's Dictionary at page 1130, Sodomy is defined as

"a sexual act in which a man puts his Penis in sb's (meaning somebody's) especially another man's, Anus".

[The underlining mine]

What is the evidence of the PW1 - a victim? At page 17/24 of the Records, P.W1 testified inter alia, as follows:

"By then, Sam came in, brought a bottle of small stout and gave me to drink, but I said I didn't want to drink because I was not used to it, but he said if I don't drink it I wouldn't work forOga, he will not accept me. Then he opened the small stout for me. I took a little out of it and it was bitter, I couldn't take it, so I gave it to Joseph Unigbe who took the rest. After 5minutes my eyes were turning me Joseph said me and Mohammed should go inside the bedroom to take a bath so that our eyes will stop turning us we accepted took our bath and when we wanted to put our cloths on, Joseph brought out one Army singlet, shirt and nicker, and a night gown and he said we should put them on we asked him why. He said we could not go home that patrol will hold us, that we had to sleep till the following day so we accepted and put them on. Then he showed us the guest room that we should go inside that that is where we were going to sleep. All of us went inside the guest room, suddenly, Joseph went outside saying he was going to collect something from the sitting room. When he went out, just immediately he went out then Maj Magaji came inside the room".

P.W.1 continued in his said evidence-in-chief.

"When he came inside, because I and Mohammed were sleeping on the bed he sat on the bed and asked us what we were discussing, we said nothing. It was then he removed his singlet and removed Mohammed's own and started romancing Mohammed's body and used my hand put on his tommy and said that I should be romancing his tommy. After that he off hisnicker and off Mohammed's nicker and he sexed Mohammed through the anus. Then Mohammed shouted that this wasn't what Joseph told him that he was coming to do there. ThenOga stood up and Mohammed went out. Before Mohammed went out' he told Mohammed to bring a white container. When Mohammed brought the container the container was filled with cream, so he used the cream to rob our pains; I and Mohammed, then Mohammed went out, then Oga wanted to use me too. He turned me upside down and used his penis and put it into my anus then. I shouted that I can't take it that is not what Joseph told me too then he said I should go out. When I went out into the sitting room, I met Mohammed and Joseph they were quarrelling, so I too joined. We were quarrelling with Joseph that, that wasn't what he told us. He started quarrelling us too that why shouldn't we accept, that he has been doing it and that there is nothing in it then Oga came in and started quarrelling with Joseph, that these people didn't respond fine".

Under cross-examination, at pages 18/25, and 19/26 thereof, the following appear, inter alia:

Ques: You told this court that Mohammed was sleeping on the bed with you, tell this court if you know anything about sex.

Anything you know about sex, tell this court.

Ans: What I mean about sex is that he used his private.....

Ques: No, what you yourself know about sex?

Ans: I don't know any other form I can put it but I know it means making love to someone.

Ques: To who? Is it a man making love to a man or a man making love to a woman?

Ans: It is supposed to be a man making love to a woman

Ques: But you said you were there when he was making love to Mohammed*?*

Ans: Yes Sir.

Ques: And he was furking him in your presence?

Ans: But I was among now. He said I should be romancing him.

Ques: Tell this court how you reported the matter to your father?

Ans: After he gave us the money, I and Joseph went to Mile 2 to buy clothes.

When my father saw me with the clothes he asked me from where I got the money and told him, that was how he came to know what happened.

Ques: How did you feel after drinking the small stout?

Ans: My eyes_were turning me".

Under re-examination, at page 27 thereof, the following appear, inter alia:

Ques: What do you mean by saying the offr sexed you?

Ans: He put his penis into my anus".

The evidence is clear and unequivocal in my respectful view. Having regard to the said definition of Sodomy, there was definitely penetration of the penis of the Appellant into the anus of PW1. In any case, the evidence of PW1 as to what happened to him was never challenged in cross-examination. Again, his said evidence was not controverted in evidence by the Appellant who rested his case on that of the prosecution. The effect or consequences, I have already stated in this judgment. That puts squarely to rest, all the arguments in respect of this issue in the Appellant's Brief which with respect, under the circumstances, are irrelevant.

As rightly stated at page 27 of the Records by the prosecution when the Defence applied for the PW1 to be tested/examined by a Medical Doctor,

"My Lords, the issue before the court in a sexual issue my Lord, it is not an issue as to the resultant effect of the act, but as to the act itself simple; Did it take place or did it not whether the person become pregnant or whether semen was poured all over. Again my Lords, the event took place over 4 months ago. Definitely, traces of whatever would have been there wouldn't have gone (sic). The issue of a doctor's test does arise at all and we (sic) urge this court to disregard that application"

Again in my view, the objection was, rightly sustained by the GCM. It seems to me that the rejection of the said application, has led to the submission in the Appellant's Brief about lack ofcorroboration. I agree with the Respondent that the offence of sodomy is not one of the offences that require corroboration. When however, the Appellant rested his case on that of the prosecution, the settled law is that evidence of prosecution not controverted or disputed by an accused person, is deemed to have been accepted or admitted by that accused person. See the case of *Ubani & 2 ors. v. The State (2003) 12 SCNJ. 111 @ 130.* In the case of *Ohunyon v. The State (1996) 2 SCNJ. 280 @ 288,* it was held that an accused person has the burden of bringing the evidence on which he relies for his defence. Also settled, is that where there is unchallenged and uncontroverted evidence, a court has a duty to act on it where credible. See the case of*Oforlete v. The State (2000) 7 SCNJ. 162 @ 179, 1S3. 184.*

I wish to pause here to state that although the evidence of PW2 may be regarded as hearsay, but the uncontradicted or uncontroverted evidence of PW1, who was lying on the bed when the Appellant did the act described on oath by the PW.1, I do not see how the evidence of PW2, the Appellants has helped case. It is again firmly, settled that a court, can and is entitled to act on the evidence of one single witness, if that witness is believed, given all the circumstances, and a single credible witness, can establish a case beyond reasonable doubt, unless where the law requires corroboration. There are too many decided authorities in this regard. See the cases of *Alonge v. Inspector General of Police (1959). 4 FSC 203: Ali & ors, v. The State (19881 1 NWLR (Pt. 68) 1 @ 20 (Supra): Ogoala v. The State (1991) 2 NWLR (Pt.175) 509 @ 533; (1991) 3 SCNJ. 61; Uqwumba v. The State (1993) 5 NWLR (Pt.296) 660 @ 674: (1993) 6 SCNJ. 217;Theophilus v. The State (1996) 1 SCNJ. 79(5) 91; Nwaeza v. The State (1996) 2 SCNJ. 42 @ 51 and Gira v. The State (1996) 4 SCNJ. 95 @ 101 and The State v.Godfrey Ajie (2000) 7 SCNJ.1,* just to mention but a few. In my respectful view, by putting or inserting his penis into the anus of

the PW1, it amounts to having carnal knowledge of him and this act is against the order of nature and therefore, amounts to the said offence of sodomy contrary to *Section 81 (1)(a) of the Act.*

In concluding this issue, I note that at page 12 of the Appellant's Brief, the conviction and sentence by the GCM, have been criticised. It is therein stated that it delivered its judgment in fourteen words at page 44/51 of the Records as follows:

"This court having (sic) (meaning having) deliberated carefully on this case, we find the accused officer guilty".

[The underlining mine]

It is submitted in the Appellant's Brief that beyond this remark, the GCM did not consider all the issues raised before it and did not state the reasons for its verdict thereby leaving room for arbitrariness. The Court is urged not to allow the said conviction to stand as according to the learned counsel to the Appellant, the prosecution failed to establish clear evidence of penetrationand that the suggested corroboration in fact, are not.

I have in this Judgment, held or stated that the prosecution established completely, the case or guilt of the Appellant beyond all reasonable doubt. The offence of sodomy for which the Appellant was charged, tried and convicted, was proved at least by the PW1. PW3's evidence of how the Appellant got his victims drunk or intoxicated by causing them to consume alcoholic drink before he dealt with them, was not controverted in evidence by the Appellant, His evidence, amounts to corroboration in all the circumstances of the said evidence of PW1 and PW2 in that respect. In my respectful view, the above ruling or statement of the GCM, is all embracing or encompassing, it is headed/titled "Findings" It is a finding of Guilty after a careful deliberation. Period! It needs no interpretation. The plea in mitigation of sentence at page 48/52 of the Records seems to me, to have influenced their light sentence of the Appellant.

It must be borne in mind that the GCM, cannot be equated to the regular courts, where strict procedures are required. It is no more than a tribunal and at best, it can be equated to a jury trial. Even in the regular courts, it has been stated and restated that there is no specific style of writing a judgment. See the cases of *Adamu v. The State (1991) 6 SCNJ. 33 @ 40* and *Awobajo & 6 ors. v. The State (2001) 12 SCNJ. 293.* It is not contended by the Appellant's learned counsel, that the ruling of the GCM, is not the style it adopts in the trials offences by it.

The court below, at page 386 of the Records, stated inter alia, as follows:

"..... I agree with the learned counsel for the Respondent that by its very nature**,** a Court Martial being akin to a jury trial has no compelling duty under the law to be detailed in its judgment in the manner of regular Civil Courts. See *Lt. Col. K.D. Ajiav. Nigerian Army* (Unreported) Ref. CA/L/9M/98 delivered on 6th July 2000. I do not think that in the absence of an elaborate, detailed written judgment by the Court Martial, as contended by the Appellant in this appeal that alone should be the ground to set aside the judgment of the court, once the essential ingredient of the offence of sodomy was established beyond reasonable doubt".

I also agree. My answer to this issue is in the Affirmative/Positive.

Issue 4:

In the opening Address of the prosecution already reproduced in this Judgment, the prosecution stated that it "will lead evidence which will consist of documentary evidence ....." I have also reproduced the application of the prosecution before the Exhibit 1 was admitted. As stated by the court below, the issue of duress raised by the defence counsel was in the written Address and therefore, there could not have been procedurally, trial within trial. The case of *Adeleya* (not Adeja as appears in Respondent's Brief) *v. Attorney-General (WEST) (1956-84) Vol. 10 Digest ofSupreme Court* - per Lewis, JSC cited and relied on in the Appellant's Brief, with respect, is inapplicable in the circumstances of this case leading to this appeal.

The application to tender the document was made pursuant to *Rule 57* of the *Rules of Procedure (Army) 1972, M/M, 1972* which reads as follows:

"..... A written statement which is admissible in accordance with the provision of *Section 9 of the Criminal Justice Act, 1967,* as modified by the Court Martial Evidence Regulation 1967 shall be handed to the court by the prosecutor or the accused as the case may be, without being produced by a witness".

[The underlining mine]

This provision in my respectful view is an answer to this issue.

However, I have already stated that if the purpose of calling as a witness is just to tender a document, a trial court may dispense with the personal appearance of the person who recorded the contents of the document such as the Investigator in the instant case. Exhibit 1 although a photo copy is/was certified. It is now settled that photo copies of documents, must be certified. See Section 111/112 of the Evidence Act. In the case of *Daily Times Ltd, v. Williams (1986) 4 NWLR (Pt.36) 526* (referred to by the court below as *Iheonu v. F.R.A. Williams*), it was held that a photo copy of a certified document, is admissible, So this authority, also puts to rest, the complaint in the Appellant's Brief about the admissibility of the Appellant's Statement or Exhibit 1. As a matter of fact, in the case of *International Bank Nig. Ltd, v. Dabiri & 2* ors. *(1998) 1 NWLR (Pt.583) 284* (5) **297** C.A, it was held that photocopies of a Certified True Copy of a public document, needs no further certification under Section 111 (1) of the Evidence Act.

In all the circumstances, it seems to me and I also hold that the said statement or Exhibit 1, is/was **relevant** to the case and therefore, admissible. This is because, it is now firmly settled that admissibility of a document, can also be based on relevance**.** See the cases Of *Ogbuanyinya & 5* ors. *v. Obi Okudo (1979) 6-9 S.C. 32: (1979) ANLR 105 & 112-113; (1979) 1MSLR 731; (1979) 3 LRN 318 & 324: Qshunrinde v. Akande (1996) 6 SCNJ. 183 @ 199-200; Artra - Industrial Ltd, v. M.B.C.L (1997) 1 NWLR (Pt483) 574* C.A: *A.K. Faddatlah v. Arewa Textiles ltd. (1997) 7 SCNJ. 202 @ 217-* per Ogwuegbu, JSC (Rtd) and the English case of *Kuruma v. R (1953)* AC. *197 @* 203 to mention but a few, On these authorities and other reasons above adumbrated, my answer to this issue, is also in the Affirmative/Positive.

Issue 5:

This issue was also raised by the Appellant in the court below which held at page 416 of the Records inter alia, as follows:

"It was argued that the Court Martial virtually took over the examination of prosecution witnesses. My careful study of some of the questions put to the witnesses by the court show that these questions were aimed at clearing ambiguities which arose in the course of examination in chief and cross-examination. The relevant rules allow the Court Martial to put questions to witnesses called by the parties to the proceeding without necessarily descending into arena of contest to take side. By virtue of rule *56 (1) of the Rules of Procedure (Army) 1972 MML 1972* the Court martial is allowed to call its own witnesses where a just and fair adjudication of case so demands, Rule 54(1) particularly states as follows**:**

"The President, the Judge advocates and, with permission of the President, any member of the court may put questions to a witness.

His Lordship, who read the lead Judgment, concluded as follows:

"There is nothing in the record of proceedings which indicates that the questions put to the witnesses by the Court martial contravened the appellant's right of fair hearing.'

Careful study of the record reveals that PW1, the key witness, was not asked any question by the Court martial. **As** for PW2, only one question was asked.

For PW3 and PW4 some questions were put to them. Their answers bear no relevance to the prosecution's case".

[The underlining mine]

I cannot fault the above. I agree because, the above, is borne out from the Records. The lone question the GCM asked the PW2 is:

"You said Maj Bello gave you ₦ 1,500.00 the first time, you met him what was it for? Did he send you to buy anything for him?

Ans: For what he did to me. He said I should not tell anybody about it".

That was the end of the PW2's evidence both in-chief and under cross-examination. There is no evidence that the defence counsel applied to ask the PW2 or the other witnesses any question thereafter and that this was refused by the GCM. This is because as rightly stated in the Respondent's Brief, rule 54 (2) provides as follows:

"Upon any questions he answered, the prosecutor and the accused may put to the witness such questions arising from the answer which he has given as seen proper to the court".

[The underlining mine]

My answer to this issue is clearly and unhesitatingly, in the Affirmative/Positive.

In concluding this perhaps, lengthy contribution which is necessitated by the volume of the arguments in the respective Briefs of the parties which has led to many grammatical, spelling and typing errors in the Respondent's Brief and which undoubtedly, was not vetted before its being filed. The Appellant is lucky for the light sentence eventually confirmed. In the reliefs sought in the Notice of Appeal at page 400 of the Records and which the Appellant in his Brief has urged the Court to grant, read thus;

"To quash the conviction and sentence of the Appellant.

To discharge and acquit the Appellant of the offence for which he was convicted.

To order re-instatement of the Appellant and payment of all his entitlements from date of his arrest to the date of the determination of his appeal and re-instatement".

Speaking for myself, since there is an appeal against sentence, I should have increased/enhanced the Term. He is also asking for re-instatement and payment of entitlements. This is evidence, in my respectful view, that the Appellant has no remorse for his shameful and condemnable acts against these young boys who were given the impression that they were going to be employed for work from where they will earn some income. What distresses me with disgust, is that from the Records, the Appellant is a married man with **(2)** wives and seven (7) children and according to him, three (3) girl friends in addition. He preferred having or enjoying sex by first getting his victims - young boys, drunk and when the victims tried to resist his despicable act, he bribed them not to let anybody else know. He even complained to his agent - Joseph Unigbe - "that these people didn't respond fine". What is worse, I have a hunch that he is or may have been alawyer since from his statement at pages 125 of the Records, he was at the Law School in 1990. I say so, because at page 125A thereof, he was a legal Adviser to the Task Force on Telecommunication and Postal Offences since July, 1996. He attended both the Sardauna Memorial College in 1973 to 1977 and the University of Sokoto in 1985 to 1989. He blamed his actions on "psychological and psychiatric problem which according to him, started about two (2) years before the date of the act that led to his trial and conviction. When he was asked whether his psychiatric problem was registered in any hospital, he answered in the negative and stated that he was afraid of exposure and that he acted on impulse. It is my humble and firm view that the Appellant, deserves to be put away from the

society and to be in prison custody in a secluded and single cell for a very long time where his alleged problem, will be taken care of by a Psychiatric Doctor.

From whatever angle I or one looks at this appeal, with all sorts of defences/submissions, proffered in the Appellant's Brief and which had been thoroughly and adequately dealt with by the court below, it fails abysmally. Having made the above observations, in the final analysis, having had the privilege of reading the lead Judgment of my learned brother, Niki Tobi, JSC which I am in agreement with, I too, see no slightest merit in this appeal. I too dismiss it and affirm the decisions of the two lower courts which are concurrent and therefore, I am unable to disturb or interfere with.

**Judgment Delivered by**
Francis Fedode Tabai. JSC

The Appellant was a commissioned officer of the Nigerian Army. He was of the rank of a Major. He was charged before the General Court Martial on a charge of Sodomy contrary to *section 81(l) (a) of the Armed Forces Decree No. 105 of 1993*. The charge was that sometime in 1976 he had canal knowledge of four officers namely Mohammed Abubakar, Joseph Unigbe, Emmanuel Ilagoh and Isaac Jonah. On arraignment he pleaded not guilty to the charge.

The trial involved the testimony of each of the four victims of the alleged offence. The Appellant informed the General Court Martial through his counsel that he would not call witnesses and that he was resting his case on that of the prosecution. At the end of the trial he was found guilty as charged, convicted and sentenced to a term of 7 years imprisonment. The sentence was however later reduced to 5 years by the Confirming Authority.

Dissatisfied with the conviction and sentence, he appealed to the Court of Appeal. The Appeal was dismissed. He has then come on further appeal to this court.

Before this court briefs have been filed and exchanged. The issues presented for determination are reproduced in the lead judgment of my learned brother Tobi JSC. I need not reproduce them. He has painstakingly dealt with the issues and I agree entirely with his reasoning and conclusion. The Appellant has nothing challenge on the findings of fact particularly having regard to the fact that he rested his case on that of the prosecution. I shall also dismiss the appeal as lacking in merit.

Counsel

Robert Clarke (SAN) ..... For the Appellant

Mallam Jimoh Abdulkadir Adamu
(Assistant Chief Legal Officer, Federal Ministry of Justice, Abuja)