ANALYSIS OF COURT MARTIAL CASES UPTURNED ON APPEAL IN NIGERIA ON GROUNDS OF FAIR HEARING*

Abstract
The Constitution of the Federal Republic of Nigeria 1999 as amended created the Armed Forces of Nigeria and recognizes court martial as a court of competent jurisdiction. The Armed Forces Act Chapter A 20 Laws of the Federation of Nigeria 2004 provides that appeals from courts martial lie to the Court of Appeal. Several cases that emanated from courts martial have been upturned on appeal in Nigeria due to different reasons, one of which is the issue of fair hearing. This research was therefore aimed at pointing out the reasons for the upturning of the judgments with a view to correcting the anomaly in the future. The work is based on doctrinal and teleological research methods. In terms of doctrinal research method, the researcher made use of decided cases as sources while for teleological research method, he used his practical experience in courts martial. The research found among others that the major reasons for the upturning of the cases on grounds of fair hearing were issue of bias, descent of the court president and members into the arena and non-invitation of vital witnesses to testify in a case among others. As a way of solving the problem, the research recommended an amendment of the Armed Forces Act to bring in retired legal officers as judges in courts martial but in the interim, to bring in court martial members from outside the immediate jurisdiction of the convening officer.

Keywords: Armed Forces Act, Appeal, Court martial, Fair hearing, Judgment, Officers

1. Introduction

Fair hearing is defined as a judicial or administrative hearing conducted in accordance with due process.[1] It is a cardinal principle in every trial, that of court martial inclusive. The Supreme Court of Nigeria held, with regard to fair hearing in the case of *Orugbo v Una*[2] that: 'fair hearing lies in the procedure followed in the determination of the case and not in the correctness of the decision. Where a court arrives at a correct decision in breach of the principle, an appellate court will throw out the correct decision in favour of the breach of fair hearing.' [3] Courts have continued to hold that the principle of fair hearing cannot be compromised. In the case of *Omoniyi v Alabi*[4] the Supreme Court held that 'once it is shown that a party's right to fair hearing guaranteed by Section 36(6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) has been breached, the decision reached, no matter how well considered, would be declared a nullity and is bound to be set aside.' Fair hearing also requires the observance of twin pillars of the rules of natural justice of *audi alteram partem,* that is, hear the other side and *nemo judex in causa sua,* that is, no one should be a judge in his own cause. This is a rule against bias.[5]

Lack of fair hearing has been a major problem in court martial trials in Nigeria. Considering the nature of military service, some prominent officers like Charles De Gaule believed that rights of soldiers, including right to fair hearing should not be strictly observed. In his words:

> There is no human right in the profession of arms. Men who adopt the profession of arms submit of their own free will to a law of perpetual constraint of their own accord. They reject the right to live where they choose, to say what they think, to dress as they like from the moment they become soldiers, it needs but an order to settle them in this place, to move them to that place, to separate them from their families and to dislocate their normal lives. On the word of command, they must rise, march, endure bad weather, go without sleep or food, be isolated in some distant post, and work till they drop. They have ceased to be masters of their fate. If they drop in their tracks, if their ashes are scattered to the winds, that is all part and parcel of their job.[6]

A practical war situation where troops are being killed and those who are living are ordered to continue to advance seems to give credence to the above quotation and indirectly influences some officers during court martial trials. Such situations or beliefs do not stop appellate courts from standing on the side of justice to take

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[1]Garner, B.A. *Black's Law Dictionary* Ninth Edition, West Publishing Company, Dallas, USA. 2004, p.789.
[2](2002) 12 MJSC 14.
[3] Ibid.
[4](2015) 6 NWLR Pt 1456, 572 578.
[5]*Rear Amiral Agbiti v Nigerian Navy* (2011) 4 NWLR Pt 1236, 175, 187.
[6] De Gaule, C.A.J.M. *The Edge of the Sword.* Faber and Faber, Paris, 1960. p.54.

appropriate decisions when cases that were decided without due consideration to the principles of fair hearing are brought before them. The Armed Forces Act (AFA) CAP A20 Laws of the Federation of Nigeria 2004 made several provisions to ensure fair hearing in courts martial.[7]

This work seeks to analyze the specific actions of courts martial in different cases which breached the principle of fair hearing. This is done with a view to making future court martial presidents and members avoid such actions in subsequent trials. The problem of lack of fair hearing that led to the upturning of court martial cases being analyzed were the issue of bias, descent of the court president and members into the arena and non-invitation of vital witnesses to testify in a case. It is necessary to point out that some court martial cases were conducted correctly and the tenets of fair hearing were observed and the judgments were upheld by appellate courts.[8] Some of the cases were also conducted during military rule but the problem of fair hearing in courts martial still exists, hence this work. The focus of the research is however on the cases that their judgments were upturned on appeal.

2. Issue of Bias Raised but Overruled.

The word bias when used in a judicial proceeding implies the favouring of one side against the other by the judge or members of a jury or tribunal. In the case of *Rear Admiral Agbiti v Nigerian Navy*[9], the appellant objected to the participation of two members of the court martial, namely Rear Admiral JM Ajayi (President) and Rear Admiral AO Oni (Member). He gave the reason that he had crossed path with the President who had through a conversation considered him as his problem in the Nigerian Navy. Rear Admiral Oni on the other hand was said to have been actively involved in the publication in the Insider Weekly Magazine which contained adverse comments on the appellant. The objection of the appellant was on the ground of bias and he was overruled. The appellant had a right to object to the membership of any member of the court martial he felt was going to be biased against him. The AFA provides that 'an accused about to be tried by a court martial shall be entitled to object, on any reasonable grounds to any member of the court martial or the waiting member whether appointed originally or in lieu of another officer.'[10] For the purpose of enabling the accused to avail himself of this right, the Act further provides that the names of the members of the court martial and the waiting member shall be read over to the accused before they are sworn.[11] An objection made by an accused to an officer shall be considered by the other officers appointed members of the court martial.[12] The Act also provides that if the objection is made against the president of the court martial and not less than one-third of other members allow it, the court martial shall adjourn and the convening officer shall appoint another president.[13] If however the objection is made to a member of the court martial other than the president and one half of the members entitled to vote allow it, the member objected to shall retire and the vacancy may be filled if the court will be reduced below the legal minimum, in the prescribed manner.[14] The implication of these provisions is that the president of a court martial cannot sit to deliberate on whether an objection to his membership of the court by an accused should be overruled or not. In the case of *Rear Admiral Agbiti v Nigerian Navy*,[15] after the appellant objected to the membership of the president, it was the same president of the court who acted as judge in his cause, to pronounce judgment, discharged and acquitted himself of the allegations against himself.

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

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

[7] Section 134(2) Armed Forces Act, CAP A20 Laws of the Federation of Nigeria 2004.
[8] *Nigerian Air Force v Ex Wing Comd LD James* (2002) 18 NWLR Pt. 798, 295, *Nigerian Air Force v Wg Comd Shekete* (2003) 2 MJSC 63, *Nigerian Air Force v Obiosa* (2003) 4 NWLR Pt. 810, 233, *The State v Sqd Ldr Olatunji* (2003) 14 NWLR Pt. 839, 218, *Lt Cdr Obisi v Chief of Naval Staff* (2004) 8 MJSC 137, Capt Akande v Nigerian Army (2001) NWLR Pt. 714, 1, *Maj Bello Magaji v Nigerian Army* (2004) 16 NWLR Pt. 899, 222, *Cpl Isah Ahmed v Nigerian Army* (2011) 1 NWLR Pt. 1227, 89 and *Odunlami v Nigerian Navy* (2011) 6 NWLR Pt. 1244, 589.
[9](2011) 4 NWLR Pt 1236 175.
[10] Section 137(1) Armed Forces Act, Cap A20 Laws of the Federation of Nigeria 2004.
[11]Ibid. Section 137(2).
[12]Ibid. Section 137(3).
[13]Ibid. Section 137(4).
[14]Ibid. Section 137(5).
[15](2011) 4 NWLR Pt 1236 179.

> he was as impartial as he could be, nevertheless, if right minded persons would think that in the circumstances, there was a real likelihood of bias on his part, then he should not sit.[16]

This is therefore a clear example of where the president of the court martial would not have sat due to likelihood of bias. The Court of Appeal equally raised the issue of bias in the case of *Colonel Clement Gami v The Nigerian Army.*[17] The sentencing and confirmation of the court martial's decision were done within four days. Oguntade J.C.A (as he then was) in his lead judgment expressed his displeasure in the following words:

> I am however shocked or greatly disturbed by the fact that the confirmation of the decision of the General Court Martial (GCM) was done in four days after the decision was given. The appellant was in the process prevented from making representation to the confirming authority as to why the decision should not be confirmed. The confirming authority by proceeding to confirm the decision of the GCM without waiting for the representations of the appellant would appear to have believed that nothing the appellant said could have persuaded it to change its mind. The confirming authority had thus exposed itself to a justifiable accusation of bias against the appellant and unfairness of its approach.[18]

It is necessary at this juncture to consider what may have caused the court martial and the confirming authority in the above cases to resort to procedures that led to appellate courts to upturn the decisions based on bias. One of the pointers to the reason for the position taken by the president and other members of the courts martial in being biased is command influence. In the words of Ihejirika,[19]

> The Army of today is slightly an improved version of what some of our colleagues had during their time. If a GOC (General Officer Commanding) sets up a court martial today, he does not need to come to AHQ (Army Headquarters) to confer with the COAS (Chief of Army Staff) as to which punishment should be awarded. It is not false that in the past, the COAS or the GOC will set up a court martial and suggest possible punishment, while the members work towards it.

This observation was made in 2011 by the then Chief of Army Staff. This is a clear evidence to show that command influence in courts martial is not imagined but real. In a situation where the convening officer has suggested punishment and the members work towards it, it simply means that anything that will make the court members to deviate from the target verdict would be resisted. In the case of *Rear Admiral Agbiti v Nigerian Navy*,[20] the GCM dismissed the objection based on the likelihood of bias as lacking in merit. All the preliminary objections which would have made two members of the court martial not to participate in the proceedings were dismissed by the court. It does not mean that there were no other officers in the Nigerian Army, Nigerian Navy and the Nigerian Air Force in Lagos then to replace the officers that informed the objection by the appellant. It simply suggests that, as the former Chief of Army Staff pointed out, it appeared that the court members were given a target and changing them may not have yielded the result required by the convening authority. The refusal of the GCM to change the members, whose memberships were genuinely objected to, caused the upturning of the judgment on appeal.

Making courts martial truly independent is suggested as a way out of this problem wherein the court members are told what to do. The practice in Ghana appears to ensure more independence for courts martial than what is currently obtained in Nigeria. The Ghana Armed Forces (GAF) operates a unified code of military justice wherein the Judge Advocate Department, equivalent of Directorate of Legal Services in Nigerian Army, is answerable to the Minister of Defence. The Department is headed by a Judge Advocate General of the rank of Brigadier General or equivalent.[21] The Chief of Ghana Armed Forces in consultation with the Chief Justice of Ghana appoints the Judge Advocate General who is also a member of National Judicial Council.[22] The Judge Advocate is directly responsible to the Judge Advocate General. There exists a direct relationship between Ghana's judicial system and the Ghana Armed Forces Justice System.[23] The established rank of the head of Legal Department of the Nigerian Army is Maj Gen which is higher than that of Ghana but the military lawyers

[16]Ibid.p.189.
[17] Appeal No. C.A/276/98 (unreported) delivered in February 2001.
[18]Chiefe, T.E.C. (2008). *Military Law in Nigeria Under Democratic Rule*. DiametricsNig Ltd, Lagos.p.179.
[19]Ihejirika, O.A.Comments on Reasons Why Court Martial Trials are Upturned by Appellate Courts.*Military Lawyer*, Abuja, Directorate of Legal Services (Army) Vol.5.p.54.
[20](2011) 4 NWLR Pt. 1236, 175.
[21]Dada,OA. (2014). *Administration of Military Justice and Discipline in the Nigerian Army.* (Unplished), MSc Research Project, University of Ibadan.p.19.
[22] Article 153(i) Constitution of the Federal Republic of Ghana 1992.
[23] Dada, O.A., ibid. p.19.

who serve in courts martial in Ghana are, to a large extent insulated from command influence. The appointment and removal of the Judge Advocate General are not within the powers of the military authorities, though he is equally responsible to them in military matters. This guarantees some level of institutional independence and would be good for the Nigerian Armed Forces.[24] It is similar to what is obtainable in the United States of America where there is also the Judge Advocate General Corps. The judge advocates are usually made up of retired military lawyers but who are appointed to the bench.[25] When those who serve in courts martial do not have their yearly personal evaluation reports written by the convening officer, they may exercise some independence and not be afraid of their careers being truncated for voting contrary to the dictates of the convening officer at a court martial.

3. Descent into the Arena by the President and Members of Courts Martial

Descending into the arena is a situation where a judge takes the position of either the prosecuting or defence counsel instead of remaining as an arbiter. In all courts of justice, the judge is not expected to descend into the arena. In the case of *Addah v Ubandawaki*[26] the Supreme Court of Nigeria, on the onus of trial judge not to descend into the arena of dispute, held by Muhammad J.S.C held that:

> I am afraid, the learned trial judge entered into the arena, which of course he is not entitled to do. A case before a court of law belongs to the parties and not to the court as a court is not competent to make a case for any of the parties. The judge is an umpire and must limit himself to what is pleaded and established by the parties before him. Otherwise, he will be accused of going against the known and well cherished principle of fair trial.[27]

In courts martial, the role of the president and members is similar to the role of the judge or panel of justices in a civil court. Descent into the arena by court martial president and or members has been a problem that led to some court martial cases being upturned on appeal on account of lack of fair hearing. In the case of *Nigerian Army v Col Umar Mohammed,*[28] the Supreme Court, affirmed the decision of the Court of Appeal by upturning the judgment of the court martial in the matter principally on grounds of fair hearing. The respondent was arraigned before a GCM on eight count charges of conduct to the prejudice of service discipline, offences in relation to service and public property and extortion. He was found guilty on six count charges and sentenced to a total of nine years imprisonment to run concurrently.[29] The five justices of the Supreme Court in affirming the decision of the Court of Appeal dismissed the appeal for lacking in merit. The judgment was quite brief as the Supreme Court mainly relied on observations of the Court of Appeal. The main contention was that the president of the GCM made disparaging statements that made it obvious that the respondent was not given fair trial and was sure to be convicted. Belgore, J.S.C held:

> The President of the General Court Martial no doubt went to town virtually finding the respondent guilty before the end of the trial. Several documents received in evidence ought not to have been admitted in view of Evidence Act S.92. The respondent never had a fair trial and the judgment amounts to miscarriage of justice. Court of Appeal was perfectly right to allow the appellant's appeal. It is true court martial is a military court, it is however always bound by rules of evidence and manifestation of fair trial. The respondent was virtually not allowed fair trial. I find no reason to disturb the judgment of the court of appeal.[30]

In order to properly analyse this case, it is pertinent to refer to the pronouncements of the Court of Appeal in the matter.[31] The Court observed that in one or two instances, the president of the court martial made rulings on the objections raised by the prosecutor without giving the defence a hearing. In other instances, the president issued threats of prosecution against defence counsel without any obvious cause, thereby giving an impression that those threats were intended merely to cow the defence and weaken defence counsel in the performance of their duties to the appellant.[32] In one of the instances, the president told the prosecutor 'don't over flog the dead horse'[33] while he was making a point, giving an impression that the court martial had concluded on the decision to take. The Court of Appeal also noted that he intervened at random in the course of cross examination. At a stage, he was reported to have said, 'stop making references because I am going to take a decision, the court is

[24] Ibid.
[25] Ibid.
[26](2015) 7 NWLR Pt 1458, 325 334.
[27] Ibid.
[28](2002) 15 NWLR Pt. 789, 42.
[29] Ibid.
[30]Ibid. p.43.
[31]*Mohammed v The Nigerian Army* (1998) 7 NWLR Pt 557, 232.
[32]Ibid.p.248.
[33]Ibid.p.249.

mine, I am going to take a decision to clear doubts I have. Your rules of procedure will wait, whatever you want to quote there will wait.'[34] Acholonu J.C.A, (as he then was) described the statements of the court martial president as 'betraying a primordial intent of conviction very much reminiscent of a remark by a sheriff in the wild west in USA who, while speaking of a horse thief said 'we will give him a fine trial and after that, we hang him.''[35] He stated further that 'the unnecessary prejudice and the devil may care attitude shown by the presiding adjudicator in the trial court martial does not augur well for the tenets and principle of fair hearing enshrined in our Constitution to reign.[36]

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

> It is true that whether a Judge has descended into the arena depends on the perception of the whole trial, of the objective bystander and of the appellate court putting itself in the position of that objective bystander. While the trial judge is not expected to be a note-taking robot, recording evidence and not intervening to clarify ambiguities that may arise from unclear statements or from the evidence generally, where the interventions go beyond clarification of evidence but can be seen as an exercise designed to assist one party at the expense of another or to confirm a preconceived notion of the Judge of what the facts are, such become objectionable by reason of incompatibility with the fairness of the trial.[37]

In all these, no one is still asking whether the appellant at the Court of Appeal who is also the respondent at the Supreme Court committed the offences he was convicted of or not. The emphasis shifted to the procedure adopted during the trial. The outcome of this trial at appellate court has a very negative effect on discipline in the Armed Forces hence the need to ensure that such procedural errors do not repeat themselves. The accused was set free, not that he did not commit the offence, but that the president of the court martial did not conduct himself the way he ought to have conducted himself. Would-be offenders may be encouraged that there is hope to escape justice through such procedural errors. The problem of court martial members descending into the arena was equally one of the reasons for upturning the judgment of the court martial in the case of *Lt Col Ahmed Dayo Karim v Nigerian Army.*[38]The appellant was arraigned before a GCM on three count charges of stealing contrary to Section 66(a) of the AFD 105 of 1993 and making of false documents contrary to Section 90(d) of the same Decree. In this matter, the Court of Appeal defined descending into the arena as 'not only asking too many questions by the Judge but also asking a few questions that will decide the case one way or the other.'[39] A prosecution witness was also recalled to testify after the judge advocate had summed up which is contrary to the Rules of Procedure Army which provides that 'the court may at any time before they close to deliberate on their finding or if there is a Judge Advocate before he begins to sum up, call a witness or recall a witness if in the opinion of the court it is in the interest of justice to do so.'[40] The court therefore observed that 'it is clear that the power of the court to call a witness or recall a witness is limited to the period before the Judge Advocate sums up.'[41] While referring to the recalling of a witness after the judge advocate's sum up, Galadima J.C.A (as he then was), who read the lead judgment observed thus: 'I must say that this invidious and unorthodox procedure is not only scandalous but it is also fatal to the entire proceedings thereby rendering the trial of the appellant procedurally null and void.'[42]

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

> Although Section 223 of the Evidence Act gives a court and a court martial liberty to discover or to obtain proof of relevant facts by asking questions of witnesses, the court cannot under that section appropriate a case and constitute itself into a prosecuting agency. The liberty given by that section is extensive but it is limited by the duty of fairness. The breach of this duty of fairness can arise from the duties that pertain to the adjudicator and those duties that relate to the conduct of the proceedings. In the latter category are instances of undue interference by the adjudicator in the proceedings and descent by the adjudicator into the

[34] Ibid.p.248
[35]Ibid.p.253.
[36]Ibid.p.254.
[37]Ibid.p.238.
[38](2002) 4 NWLR Pt. 758, 716.
[39]Ibid.p.725.
[40]Rule 56(1) Rules of Procedure Army 1972 applicable under Section 181 of AFD 105 1993.
[41]*Lt Col Ahmed Dayo Karim v Nigerian Army.* Ibid.
[42]Ibid.p.736.

> arena of contest manifested by taking a dynamic role in the cross examination of the witnesses or the accused or seizing the conduct of the case from counsel for one side.[43]

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

In the case of *Lt Yahaya T Yakubu v Chief of Naval Staff,*[44]the problem of the president of the court martial descending into the arena was one of the grounds under which the decision of the court martial was upturned by the Court of Appeal. In the matter, the appellant was arraigned before a court martial at NNS Anansa at Calabar on a –two count charge of conspiracy and stealing contrary to Section 516 of the Criminal Code and Section 114 of the AFD 105 of 1993 respectively.[45] The court held with regard to fair hearing that 'the trial court actually descended into the arena and advised the prosecutor to go and prepare his case properly.'[46] As ridiculous as it may sound, the court martial president while advising the prosecutor in open court to rewrite his final address stated thus:

> Probably, you are not able to put it properly. So yourself and your other colleagues, as soon as we adjourn on your behalf right now, go and do that thing properly, the way it should be. Do your rehearsal and then you can come up and present it at 2000 hours…The Judge Advocate, the liaison officer, they will discuss with you on how to be able to get that thing done properly. Do not just bring it anyhow. Do you understand?[47]

It is obvious from the proceedings of this court martial that no appellate court would have allowed a decision that came out of this kind of proceeding to stand. The unfortunate thing is that in such situations even when such senior officers are advised not to say such things in a trial, they will claim to know the law sometimes more than the judge advocate whose duty it is to advise the court on legal matters. The same problem of court martial members descending into the arena of trial was an issue in the case of *Lt Col EO Anene v Nigerian Army*[48]wherein the president of the court martial subjected the appellant to serious examinations on matters that were not relevant facts. The Court of Appeal while allowing the appeal held that 'the appellant's right to fair hearing was breached.'[49]

4. Non-Invitation of Vital Witness by the Prosecution

A vital or material witness is a witness whose testimony will help the court to decide a matter in one way or the other. The prosecution is not bound to call any number of witnesses. His duty is only to call such number of witnesses sufficient to prove his case.[50] The number of witnesses the prosecution would call to prove his case would naturally include vital or material witnesses. In the case of *Capt GNH Asake v The Nigerian Army Council & The Attorney General of the Federation*,[51]the Court of Appeal upturned the judgment of the court martial based on the fact that a vital witness in the matter was not called by the prosecution to testify. In the case, the appellant was arraigned before a GCM on a one count charge of conduct to the prejudice of service discipline punishable under Section 71 of Nigerian Army Act 1960 (Revised). He was alleged to have borrowed the sum of 300 USD from a soldier while serving in Operation Liberty in Monrovia, Liberia in 1991. He was found guilty and sentenced to reduction in rank with three years seniority on the rank. The confirming authority changed the sentence to dismissal. It was stated that the appellant paid a part of the money. The soldier from whom the appellant borrowed money was not called to testify and the adjutant who was told to take record of the part payment made by the appellant was not also called to testify.[52]

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

> Where a material witness who ought to have been called by the prosecution to testify on his allegation and who would have been subjected to cross-examination, a portent tool for perforating falsehood, was not called and no plausible explanation was given to call him,

[43]Ibid.p.724.
[44](2004) 1 NWLR Pt.853, 94.
[45]Ibid.p.96.
[46]Ibid.p.118.
[47] Ibid.
[48] C.A/L.144/97 (Unreported). Chiefe, op cit. p. 111.
[49] Ibid.
[50]*Akpan v State* (1992) 2 NWLR Pt. 296, 64.
[51] (2007) 1 NWLR Pt. 1015, p. 408.
[52]Ibid.p.410.
[93]Ibid.p.416.

> the allegation is left for speculation by the court. In the instant case, LCpl Yau Suleiman who complained to P.W.1 that the appellant borrowed money from him was not called to give evidence before the military court. He was a material witness and failure to call him has left the alleged financial transaction between the soldier and the appellant to speculation by the military court.[53]

The non-invitation of the vital witnesses in this case deprived the appellant of fair hearing because he would have had the opportunity of cross examining them on the allegation made against him. The witnesses were not called and the court martial still went ahead and convicted the appellant. It is necessary to point out that this researcher humbly, with respect, disagrees with the Court of Appeal on one of its decisions in this matter that the Captain borrowing money from a LCpl was not an offence because it is not written in any law that borrowing money is an offence.[54] With due respect to the court, the military is a peculiar institution that requires some peculiar rules to survive. Integrity is a major aspect of the life of an officer and it is very essential for effective command. It is difficult for a Captain to borrow money from a LCpl and still effectively command him. A Captain can be equated with Level 13 officer in the Federal Civil Service while a LCpl can be equated to Level 4. Borrowing of money by the Captain from the LCpl naturally has a negative effect on discipline in the unit commanded by that Captain. That is the reason why Nigerian Army Act, AFD and AFA made provision for the offence of conduct to the prejudice of service discipline.

In the case of *Zakari v The Nigerian Army*[55] the Court of Appeal held that 'to secure the conviction of an accused for conduct prejudicial to service discipline…the prosecution must prove the following: that the accused is subject to service law, that he is guilty of an act which is prejudicial to service discipline and that such an act or conduct must have brought the Armed Forces into disrepute.'[56] Certainly, a Captain borrowing money from a LCpl is prejudicial to service discipline. The embarrassment faced by the appellant when the case came up at the court martial is an indicator that such an act was unbecoming of a gentleman officer. It is expected that the Captain who receives more money than the LCpl and is about nine levels above the LCpl should not borrow money from him. Worse still, he did not pay back the money which prompted the soldier to report him and led to his being prosecuted at the court martial. Non-invitation of a material witness to testify at the court martial was also the problem that led to upturning of the judgment of the court martial in the case of *Maj IO Amachree v Nigerian Army.*[57] In the case, the appellant was arraigned before a GCM on two count charges of conspiracy punishable under Section 114(1) AFD 105 of 1993 and cheating punishable under Section 516 Criminal Code Act Cap 77 Laws of the Federation of Nigeria 1990. He was alleged to have conspired with one Zamani Karfa to cheat one Mr Jude of Idowu Taylor Street Victoria Island Lagos of One Hundred and Ninety Thousand Naira (N190, 000.00). He was also alleged to have actually cheated Mr Jude of the said amount of money.[58] The only major evidence the prosecution had was the confessional statement of the appellant which he alleged was made under duress but was admitted by the GCM after a trial within trial. The appellant stated that he made the confessional statement based on threat and promise. The account of the appellant on why he made the confessional statement which the Court of Appeal held to be involuntary not minding that the GCM admitted it after trial within trial, is worthy of repeating in this work. He said:

> I was surprised when Lt Col Frank said 'after giving you seven years, you will forget your wife and your friends will fork your wife,' I was weak. 'We are not after you… just go and admit what this woman said-I will set you free.' He kept me on the chain throughout and followed me with a report that I was going to escape.[59]

The revelation made by the appellant during the court martial trial as contained in the record of proceedings made the Court of Appeal to hold that 'the GCM was wrong to admit the confessional statement as it was obvious that it was not made voluntarily.'[60] It was therefore obvious that the appellant's right to fair hearing was breached at the trial. Having nullified the admission of the statement, there was nothing again to hold on to in convicting the appellant, as other vital witnesses were not called, the court unanimously allowed the appeal. On presumption raised by failure of prosecution to call a vital witness in this case, the court held inter alia that:

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[54]Ibid.p.413.
[55](2012) 5 NWLR Pt. 1294, 478.
[96]Ibid.p.487.

[57](2003) 7 NWLR Pt. 807, 256.
[58]Ibid.p.259.
[99]Ibid.p.278.

[60] Ibid.

> Where the prosecution fails to call an investigating officer against whom an accused person has made allegations of inducement and threat in respect of a confessional statement as a witness in trial within trial or at all during the trial, the court will presume under Section 149(d) of the Evidence Act that the evidence of the investigating officer would not be favourable to the prosecution's case'. In the instant case, the failure of the respondent to call the investigating officer whom the appellant alleged made the inducement to and threat at him in respect of his confessional statement greatly prejudiced the respondent's case.[61]

Furthermore, Ene J.C.A (as he then was), observed in the case that 'there can be no gain saying that based on the facts of this matter, Mr Jude looked every inch a crucial witness for the prosecution but he was not called to testify.' One then wondered how the GCM arrived at its verdict without calling Mr Jude who was the complainant in the matter, to testify at the court martial.[62] It is necessary to note that this case happened in 1999, during military regime when such investigations were held to be unchallengeable by the military. The statement of the appellant as to how he was interrogated is an indicator on how desperate they were to convict the appellant without considering his right to fair hearing. The important thing is that those who are in any way involved in military justice system would learn that appellate court would nullify judgments of courts martial when the procedure followed is similar to the case analysed.

In the case of *Col David Akono v Nigerian Army,*[63] the Court of appeal while stressing the importance of having vital witnesses to testify at trial courts held that 'a vital witness is a witness whose evidence may determine a case one way or the other. Failure to call Chief Igbokwe who was a vital witness by the prosecution is fatal to the prosecution's case.' Chief Igbokwe was the complainant but was not called to testify at the trial, yet the GCM found the appellant guilty. The appellant did not have the opportunity to listen to the complainant and cross-examine him based on the allegations he levelled against the appellant. The principle of fair hearing was breached in this matter as one part of the two pillars of rules of natural justice- *audi alteram partem* (listen to the other side) was neglected.

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

In the case of *Nigerian Army v Lt Col AO Peters*[64], all the members of the court martial and the judge advocate were compulsorily retired shortly after the case for returning an unsatisfactory verdict.[65] The court martial discharged and acquitted the accused officer in that case and the members paid the prize with their careers. That incident which is a typical example of terrible command influence is still fresh in the memory of many officers.

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[61]Ibid.p.265.
[102] Ibid. p.265.
[63] *Col Gabriel Akono v Nigerian Army* (2000) 14 NWLR Pt 687, 318 323
[64]*Nigerian Army v Lt Col AO Peters* (Unreported); Popoola, O. (2011) Limiting Command Influence in Military Trials.*The Military Lawyer*, Abuja, Directorate of Legal Services (Army) Vol 5.p.105.
[65]Poopola, O., op cit. p.99.

5. Conclusion and Recommendations

Non-adherence to the principle of fair hearing by some courts martial has been one of the major reasons for the upturning of many judgments of courts martial by appellate courts in Nigeria. Courts martial are special courts that are meant for military personnel but the rules of evidence that guide normal court proceedings in Nigeria are the same rules that guide the conduct of courts martial. Negative command influence is one of the reasons why court martial presidents and members ignore obvious lapses when they are raised by the Judge Advocate who is meant to advise the court on legal matters. In order to avoid this anomaly, it necessary to implement measures to insulate the court martial presidents and members from being vulnerabe to the whims of the convening officer. This can be done by amending the Armed Forces Act to bring in retired retired military justice officers as judges in courts martial or in the interim to select presidents and members of courts martial who are not serving under the command of the convening officer, either directly or indirectly. This article recommends the following: The National Assembly should amend the Armed Forces Act, CAP A20 Laws of the Federation of Nigeria 2004 to make retired military justice officers judges in courts martial. In the interim, the Nigerian Armed Forces should select court martial presidents and members from outside the command of the convening officer.