# THE SUPREMACY OF THE CONSTITUTION: *UDE JONES UDEOGU V. FEDERAL GOVERNMENT OF NIGERIA & 2 ORS**

**Abstract**
*The review considers the reasoning of the court which informed the decision of the court to allow the appeal. It further considers the likely implications of the decision of the court on the development of jurisprudence in the areas of Constitutional Law, Administration of Criminal Justice Law, fight against corruption in Nigeria, the administration of criminal justice in general, among others.*

**Keywords:** Supremacy of the Constitution, *Ude Jones Udeogu v. Federal Government of Nigeria & 2 Ors,* Jurisprudence, Nigeria

## 1. Introduction

The decision of Supreme Court in the appeal of *Ude Jones Udeogu v. Federal Government of Nigeria & 2 Ors*[1] explains the supremacy of the Constitution over every other law. It further states that any law that contradicts the Constitution of the Federal Republic of Nigeria 1999 (as amended) will be null and void to the extent of its inconsistency. The appeal challenged the competence of the trial judge to conclude a trial after his elevation to the Court of Appeal. The trial court relied on the provision of Section 396 (7) of the Administration of Criminal Justice Act (ACJA), 2015 in securing a fiat to conclude the part-heard matter. The aforecited section of ACJA was said to be in contradiction with the Constitution, a situation which the apex court described as an audacious insubordination to the Constitution of Nigeria. Consequent upon the foregoing, the Supreme Court allowed the appeal of the appellant in this case to the effect that conviction of the appellant as well as the 2nd and 3rd respondents by the trial court was done in error therefore, quashing same and ordering a re-trial of the case.

## 2. Facts of the Appeal and Contention of Parties

The facts of the appeal are as follows: On 31st October, 2016, the Appellant, 2nd Respondent and 3rd Respondent were arraigned by the 1st Respondent (prosecution) on allegations of corruption and money laundering at the Federal High Court, Lagos Division before Hon. Justice M.B. Idris who was the Judge of the court at that time. All the Defendants pleaded not guilty to the charges and the trial commenced thereafter before the court. The 1st Respondent (prosecution) opened its case and after calling 19 witnesses, its case was closed on 11th May, 2018. On 20th June, 2018, the trial Judge, Hon. Justice M.B. Idris was elevated to the Court of Appeal as a justice of the court. On 22nd June, 2018, the judge took oath of office as a justice of the Court of Appeal thereby ceasing to be a judge of the Federal High Court from that point. On 2nd July, 2018, the President of the Court of Appeal *vide* a letter with reference number: PCA/S.19/XIV/20, the President of Court of Appeal acting under the provision of Section 396 (7) of the ACJA, 2015 issued to Hon. Justice M.B. Idris (a Justice of the Court of Appeal) his fiat to conclude the part-heard criminal matter: FHC/ABJ/CR/56/07 between *FGN v. Orji Uzo Kalu & 2 Ors* pending before the Federal High Court, Lagos Division. The fiat further directed that the case must be concluded before the end of September 2018.

Section 396 (7) of ACJA 2015 provides thus:

> Notwithstanding the provision of any other law to the contrary, a judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to act as a High Court judge only for the purpose of concluding any part-heard criminal matter pending before him at the time of his elevation and shall conclude the same within a reasonable time.

Therefore, based on the fiat, Hon. Justice M.B. Idris resumed sitting at the Federal High Court, Lagos in the matter: FHC/ABJ/CR/56/07 between *FGN v. Orji Uzo Kalu & 2 Ors*. On 17th July, 2018, the court allowed the 1st Respondent to amend its charges. Consequently, it withdrew the further amended charge of 30th May, 2018 and substituted same with the newly amended charge of 16th July, 2018. Subsequently, fresh plea was taken to the further amended charge of 16th July, 2018. The Appellant and two other defendants pleaded not guilty. On 25th July, 2018, the Appellant made a no case submission. The no case submission was dismissed in a ruling on 31st July, 2018. The Appellant was then called upon to enter his defence. This prompted the Appellant to file an

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[1] Unreported, *Ude Jones Udeogu v. Federal Government of Nigeria, Orji Uzo Kalu & Slok Nigeria Ltd*, Appeal No: SC. 622C/2019. Before His Lordships, Hon. Justice Olabode Rhodes-Vivour, Mary Ukaego Peter-Odili, Olukayode Ariwoola, Kudirat M.O. Kekere-Ekun, John Inyang Okoro, Amina Adamu Augie and Ejembi Eko, Judgement delivered by Hon. Justice Ejembi Eko, JSC on 8th of May, 2020.

appeal at the Court of Appeal challenging the competence of Hon. Justice M.B. Idris who was already a Justice of the Court of Appeal to continue hearing the matter pending before the Federal High Court, Lagos. The appeal was heard by the Court of Appeal on 7th February, 2019 and judgement delivered on 24th April, 2019. The appeal was dismissed unanimously by the Justices of the Court of Appeal.
The Appellant still dissatisfied further appealed to the Supreme Court.

**3. Appeal**
Hon. Justice M.B. Idris was a judge of the Federal High Court until about 20th June, 2018 when he was elevated to be a Justice of the Court of Appeal. On 22nd June, 2018, he took the oath of office as a Justice of the Court of Appeal. This implies that from the 20th and 22nd June, 2018 respectively, he had ceased to be recognised and constitutionally function as a judge of the Federal High Court. Invariably, as at 2nd July, 2018 when a fiat *vide* a letter with reference number: PCA/S.19/XIV/20 was issued by the President of the Court of Appeal to Hon. Justice M.B. Idris to the effect that he should continue the part-heard matter: FHC/ABJ/CR/56/07 between *FGN v. Orji Uzo Kalu & 2 Ors* pending before the Federal High Court, Lagos, Hon. Justice M.B. Idris had ceased to be judge of the Federal High Court. The Appellant submitted that, importantly, the Section 396 (7) of the Criminal Justice Act which the President of the Court of Appeal claimed to have derived his power to issue the fiat does not exist in the laws of the Federation of Nigeria rather, what is in existence is the Administration of Criminal Justice Act (ACJA) 2015. Therefore, an act done in pursuance of a non-existent law is in itself a nullity with no binding effect. The Appellant formulated three issues for determination of his appeal before the Supreme Court thus:

a. Whether the Court of Appeal was right when it held that Section 396 (7) ACJA, 2015 vests a Justice of Court of Appeal with requisite power to sit and conclude part-heard matter at the Federal High Court and that the said section is not contrary to Section 250 (2) and Section 253 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
b. Whether the failure and/or refusal of the court (Court of Appeal) below to determine the issue of power of the President of Court of Appeal to issue a fiat to a Justice of the Court of Appeal to act as a judge of the Federal High Court raised by the Appellant does not violate the Appellant's right to fair hearing.
c. Whether the lower court was right in its decision that Hon. Justice M.B. Idris (JCA) can by reference to himself as 'Judge' in the proceedings confer on himself jurisdiction to sit as a judge of the Federal High Court.

The 1st Respondent adopted Appellant's issue one as its only issue for the determination of the appeal. This only issue for determination bothers on the constitutionality of statutory dispensation and administrative fiat respectively given by the National Assembly *via* legislation that is, Section 396 (7) ACJA, 2015 and the President of the Court of Appeal on 2nd July, 2018. Appellant further submitted that, in the whole of the ACJA, 2015, no mention was made of 'law' or 'any other law' or 'any other law to the contrary' which Section 396 (7) of ACJA intends to override. It is also trite that, the Constitution is the *grundnorm* from which other laws including the ACJA 2015 derive their validity and legitimacy. Section 1 (3) of the Constitution of the Federal republic of Nigeria, 1999 (as amended) is instructive in this regard. It provides thus: 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void'

To further support the submission of the Appellant on the fact that when a judge becomes elevated to a higher court, he ceases to function as judge in the lower court which he used to occupy before his elevation, the cases of *Ogbunyinya & Ors v. Okudo & Ors* (1979) NSCC 77 and *Our Line Ltd V. S.C.C Nig. Ltd & Ors* (2009) 17 NWLR (Pt. 1170) 383 were cited. The 1st Respondent on the other hand who ordinarily should defend the decision appealed against in this instant case was dissenting with the decision appealed though, no cross-appeal was filed. Section 396 (7) ACJA, 2015 was described as lacking the capacity to amend the provision of S. 250 (2) and Section 253 of the Constitution of Nigeria 1999 (as amended) which provision are in tandem with the principles in *Ogbunyinya & Ors v Okudo & Ors* (1979) NSCC 77 and *Our Line Ltd V. S.C.C Nig. Ltd & Ors* (2009) 17 NWLR (Pt. 1170) 383.

The fiat issued by the President of the Court of Appeal to Justice M.B. Idris was not directing him to carry out any of the constitutional functions of the Court of Appeal as enshrined in Sections 239 and 240 of the Constitution of Nigeria 1999 (as amended) rather, to conclude a part-heard criminal matter: FHC/ABJ/CR/56/07 at the Federal High Court, Lagos Division which ordinarily should not be the business of a Justice of the Court of Appeal in the person of Hon. Justice M.B. Idris.

The Appellant further postulated that, if by any chance the provision of Section 252 (2) of the Constitution of Nigeria 1999 (as amended) could be construed to be same as that of Section 396 (7) of ACJA, 2015 to the effect that it extends the tenure of office of a judge of the Federal High Court elevated to the Court of Appeal? The answer is no because the appointing powers to the office of a judge in the Federal High Court lies solely in the presidency and not the legislature or judicature. Again, the Appellant analysed that the provision of Section 396 (7) ACJA, 2015 *vis-à-vis* the internal workings of the Federal High Court and the Court of Appeal. He submitted that, it is clear that only the Chief Judge of the Federal High Court has the power to issue a fiat to a judge of the Federal High Court to conclude a part-heard matter pending in the Federal High Court. The Chief Judge cannot issue a fiat to a Justice of the Court of Appeal to conclude a part-heard matter pending before the Federal High Court. This is clearly spelt out in Section 19 (3) and (4) of the Federal High Court Act, CAP F12, Laws of the Federation of Nigeria, 2004. Similarly, the President of the Court of Appeal does not have the powers to direct any judge of the Federal High Court to hear any matter pending before the Federal High Court or conclude any part-heard matter in like manner. Therefore, in consideration of the appeal, the court asked a pertinent question thus: On what constitutional authority did the National Assembly or the President of Court of Appeal stand to grant the fiat or permission to Hon. Justice M.B. Idris to conclude the part-heard criminal case at the Federal High Court, Lagos Division? Again, what is the authority for him to continue to act as a judge of the Federal High Court, Lagos where he had ceased to be a judge following his elevation to the Court of Appeal.

**4. Judgement**

The court agreed with the submissions of the Appellant that the President of the Court of Appeal is not recognised by both the ACJA, 2015 and the Federal High Court Act as the appropriate authority to exercise any powers pursuant to the provision of either the Federal High Court Act or Section 396 (7) ACJA, 2015. As such, the President of the Court of Appeal through his fiat *vide* a letter dated 2nd July, 2018 to Hon. Justice M.B. Idris to conclude the part-heard criminal matter: FHC/ABJ/CR/56/07, between *FGN v. Orji Uzo Kalu & 2 Ors* pending before the Federal High Court, Lagos Division acted *ultra-vires.* The court further agreed with the Appellant that the President of the Court of Appeal lacked the competence to control or supervise the administration of the Federal High Court as envisaged in Sections 1 (2) (a) and 19 (3) and (4) of the Federal High Court Act. Similarly, Section 396 (7) of the ACJA, 2015 does not empower the President of the Court of Appeal to usurp the statutory duties of the Chief Judge of the Federal High Court. The powers as envisaged in Sections 1 (2) (a) and 19 (3) and (4) of the Federal High Court Act can only be exercised by the person to whom they are donated, that is, the Chief Judge of the Federal High Court as anything otherwise will be *ultra vires*, null and void. On the position of the Court of Appeal that the decisions in *Ogbunyinya & Ors V. Okudo & Ors* (1979) NSCC 77 and *Our Line Ltd V. S.C.C Nig. Ltd & Ors* (2009) 17 NWLR (Pt. 1170) 383 were extant and good law but not applicable to the appeal at hand, the court is of the opinion that they are material and applicable to the instant appeal in the resolution of the core issue of this appeal. Accordingly, the court further holds that Hon. Justice M.B. Idris having being elevated to the Court of Appeal had ceased to be a judge of the Federal High Court thereby lacked jurisdiction and competence to conclude the part-heard criminal case of FHC/ABJ/CR/56/07, between *FGN v. Orji Uzo Kalu & 2 Ors* pending before the Federal High Court, Lagos Division. Section 396 (7) ACJA, 2015 is in the opinion of the court is therefore, an unnecessary gratuitous legislative interference with, intrusion into or an outright usurpation of the appointing power of the executive arm as exercised by the President of the Federal Republic of Nigeria.

Consequently, the judgement of the Court of Appeal with number CA/L/1064C/2018 delivered on 24th April, 2019, particularly in respect of the Appellant is hereby set aside. The case with number FHC/ABJ/CR/56/2007 as it pertains to the 2nd Defendant at the trial court is hereby remitted to the Chief Judge of the Federal High Court for re-assignment to another judge of the court for it to commence *de novo.* The appeal is therefore, allowed.

**5. Observations**

a) The basic principle extoled in this appeal is the supremacy of the Constitution over all other laws. It emphasises that, no matter how good a law may seem or no matter how good the intention of the makers of a law, the moment it runs contrary to the provisions of the Constitution, it becomes null and void. It is a known fact that, the National Assembly enacted the ACJA in 2015 to proffer solution to the lingering challenges in the administration of criminal justice including, unnecessary delay in the dispensation of justice, congestion in prisons, the need for efficient management of criminal justice institutions, protection of rights and interests of suspects. The brilliant idea provided for in Section 396 (7) ACJA particularly is meant to take care of the prevalent situation whereby a criminal matter would have progressed to an advanced stage then the trial judge would get elevated to a higher court leaving the court with no other option than re-assigning the case to a new judge for it to commence *de novo*. It should not be forgotten that a lot of efforts and resources would have gone into such a matter before it got to that stage yet, it would have to start *de novo*. This simply explains why many

courts in Nigeria spend many years to determine simple and straight-forward cases. In summary, this appeal emphasises the supremacy of the Constitution over other laws notwithstanding the expediency, necessity or sentiment surrounding the issue for determination before the court.

b) There is the need for the establishment of a special court to try corruption related cases. The court should be manned by competent and impartial judicial officers with integrity, contentment and requisite skills to carry out their duties. In addition, the judicial officers to be appointed to such a court should not be eligible for elevation to the Court of Appeal or the Supreme Court. If this is done, it will forestall the opprobrium and unfortunate situation which occurred at the trial court in the instant appeal that necessitated the quashing of the conviction of the Appellant and 2nd Respondent and ordering a re-trial by the Supreme Court.

c) Again, this appeal has contributed to the development of jurisprudence and case law, particularly in the areas of Constitutional Law and Administration of Criminal Justice. This again is one of the hallmarks of democracy and rule of law. Pursuing the appeal as a result of the dissatisfaction of the Appellant from the trial court to the Supreme Court is commendable and serves as a contribution to the development of case laws in Nigeria.

d) Allowing this appeal has constituted a great loss in terms of time, efforts and resources (both human and finance) invested into it by the 1st Respondent (the prosecution). It also has grave consequences on the administration of criminal justice. First, there is the possibility of Defendants using the interpretation and decision of the court in the instant appeal as a prop in delay tactics by frustrating their trials intentionally with the hope that, the trial judge will be elevated to a higher court some day and their trial will have to commence *de novo*. Secondly, the judgement will impliedly cause injustice on the prosecution in the sense that, starting the trial afresh will definitely weaken its morale. It may also allow both sides to make a better case in the new trial having seen what the other side presented in the earlier proceedings. Worse still, locating or bringing many of the prosecution witnesses back to court testify in the fresh trial may be difficult too. Another likely consequence of the judgement is, starting a matter *de novo* will waste the time of the court and further waste tax payers money. The judgement may also open the floodgate of applications and appeals similar to the instant one by Defendants/Convicts whose cases were determined based on the provision of Section 396 (7) ACJA.

e) On the other hand, one may conclude that public interest in the instant appeal and the need to send strong signal about intolerance of government to misappropriation and embezzlement of public funds should supersede the issue of supremacy of the Constitution which has been advanced as the reason for setting aside the conviction and ordering a re-trial at the trial court.

Considering public interest and upholding the conviction of the Appellant and 2nd Respondent (a former Governor of Abia State) over supremacy of the Constitution would have gone a long way to show the seriousness of the government in stamping out corruption which the country has been grappling with for a long time. It would have consequently deterred many people with similar intentions in the future. However, in a situation whereby persons arraigned on allegations of corruption can get-off the hook and escape the long arms of the law easily by taking advantage of the lacunas in our laws will only encourage further corruption in the society. Could the Supreme Court have employed purposive interpretation of Section 396 (7) ACJA which would have required it to inquire as to the reason why the legislature came up with the provision in Section 396 (7) ACJA? Could it have considered the essence of the application of the provision of the section in question in a purposive manner? A statutory provision should not be considered to conflict with the provision of the Constitution if when put into effect will not defeat the Constitutional provision or limit its application or efficacy. Can it therefore be said that, Section 396 (7) ACJA will interfere, limit or diminish the purport of any section of the Constitution of Nigeria 1999 (as amended)?

**6. Conclusion**

This appeal upholds the supremacy of the Constitution and the reasoning behind the decision of the court is that, no matter how good a law may seem, notwithstanding the intention behind the enactment of a law, once it contradicts the Constitution, it is null and void. Therefore, all laws must be in conformance with the Constitution. For public interest, purposive interpretation should have been employed by the court in the determination of this appeal. It would have allowed the court to look more closely into the reason why the legislature enacted the ACJA and particularly, Section 396 (7) of the Act. In the same vein, it would have considered the essence of Section 396 (7) of ACJA in a purposive manner by glossing over the purported contradiction with the Constitution and the fact that Hon. Justice M.B. Idris concluded the matter as a justice of the Court of Appeal. The court could have interpreted Section 396 (7) of ACJA purposively as adding an interim role to the newly appointed justice of the Court of Appeal without diminishing his role or function as a justice of the appellate court. It was simply for him to function additionally as judge of the trial court solely for the

purpose of concluding a part-heard matter. Section 396 (7) of ACJA does not in any way interfere, limit or diminish the purport of the Constitution.

The judgement in this appeal has wrought a great disservice to the Nigerian nation and particularly, the anti-corruption war. A judgement which quashes the conviction of the Appellant and 2nd Respondent (1st and 2nd Defendants at the trial court) based on the principle of supremacy of the Constitution is to say the least, inimical and antithetical to the entrenchment of a corruption-free society. It is procedurally and substantively unjustified. Moreso, it was the Appellant (2nd Defendant at trial) who requested by virtue of Section 396 (7) of ACJA for the newly elevated trial judge, Justice M.B. Idris to conclude the part-heard matter. Why then should the same Appellant turn round to challenge the competence of the same judge in concluding the trial and consequently benefitting from his action which was later found to be unlawful? What else could have been done differently? The Constitution could have been amended to allow for the purpose which Section 396 (7) of ACJA seeks to achieve. There is need for constant amendment to the Constitution even as the society is evolving and in tandem with prevailing situations in the society. The process of amending the Constitution should also be simplified. If this is done, it will forestall a situation whereby laws made to take care of contemporary and topical issues in the society are found contradicting the provisions of the Constitution which may somewhat be archaic or static. The Nigerian Constitution should be amended to accommodate many of the innovations of the ACJA particularly in the areas of enhancing quicker dispensation of justice and prison congestion. Also, the Constitution should be amended to accommodate the provisions of the various anti-corruption laws for them to be in tandem with the Constitution.