JUDICIAL DISCRETION OF JUDGES IN CRIMINAL CASES IN NIGERIA: PROSPECTS AND CHALLENGES

BY
DR ALFRED ABHULIMHEN-IYOHA,
LLB (HONS), BL, LLM, PhD (LAW), PhD (STRATEGIC STUDIES),
MPA (PUBLIC ADMINISTRATION), DIPLOMA (BIBLE AND THEOLOGY)

PRESENTLY CHIEF MAGISTRATE GRADE 1, EDO STATE JUDICIARY,
BENIN CITY, NIGERIA
E-mail: aaiyoha@yahoo.com
Tel: +234 8055968440

2015.

ABSTRACT

Judicial discretion is exercised when a judge is granted a power under either statute or common law that requires the judge to choose between several different, but equally valid, courses of action. It is the power to make a choice between alternative courses of action. Judicial discretion is unavoidable because law cannot anticipate every eventuality or how to decide which law may apply to a given situation. There are some prospects and challenges inherent in the applicability of judicial discretion.

This paper utilized secondary data as books, journals., articles, internet, law report, statutes, court judgments etc. It was the findings of this paper amongst others that judicial discretion is an indispensable tool used by judges for adjudication in the areas of issuance of summons, leave to file information, or prefer charges in the high court, bail, and issuance of search warrant. Judges plays effective roles, using their judicial discretion in the sphere of admission of evidence, substitution and amendment of charges/information, contempt of court, adjournments, allocutus, sentencing, and imprisonment. The exercises of judicial discretion have their own peculiar challenges such as inconsistency and uncertainty, use of instinct and intuition instead of reasoned decisions, perpetuation of injustice, breach of fair hearing, miscarriage of justice, bias, non adherence to strict stipulated principles, corruption, abuse of judicial powers, arbitrariness and so on.

It was recommended amongst others that the judiciary should be impartial and really independent. Judicial immunity should be preserved; the criteria for appointing judges should be revisited. There should be job security for judicial officers, and there should be regular, continuous and mandatory legal educations for judges, as well as the sustenance of bar and bench-forum to curb abuses of judicial discretion by judges.

INTRODUCTION

Judicial discretion is the power or right to make official decisions using reason and judgement to choose from acceptable alternatives. Judges are charged with exercising judicial discretion in the discharge of judicial functions. All decisions made are subject to some kind of review and are also subject to reversal or modification if there has been an abuse of judicial discretion[1].

Judges as human beings are prone to human weaknesses. Hence, whenever the courts are exercising their judicial discretion on matters before them, the outcome of such actions cannot be totally free from the personal prejudices, whims and caprices of the "judge". No wonder, the law is ultimately a product of what a judge deems right under different situations. Therefore, the exercise of law is completely a product of the judicial discretion of a judge. In the criminal justice system, judges are often able to exercise a degree of discretion in deciding who will be subject to criminal penalties and how they will be punished.[4]

In spite of several challenges, judicial discretion remains one of the viable options available to "judges" in exercising the law in Nigerian courts in relation to criminal matters. The law regulates society and conflicts therein. Courts are created by the law as the last hope of the common man to obtain redress, when his rights are trampled upon in reality, the law is what a judge says the law is, partly or entirely connected with his social environment, economic condition, personality thought, emotion, interest, and psychology. The reasons for giving "judges" judicial discretions are to cater for unforeseen situations in the course of adjudication and to prevent unnecessary outcomes procedurally.

From the above, it is clear that judicial discretion, which the courts exercises, no matter how logically designed and its procedures are, may be abused, and completely utilised to prevent justice.

---

[1] See Davis, Kenneth C. (1971). Discretionary Justice: A preliminary inquiry Champaign, Illinois University of Illinois P 5.

[4] See Paquette, J. and D. Allison (1997) a Decision-Making and Discretion: the Agony and Ecstasy of law and administration" Education and law journal 8 (September):P 161.

DEFINITION OF TERM

JUDICIAL DISCRETION: Judicial discretion is the power of the judges to make some legal decisions according to their discretion, under the doctrine of separation of powers. The ability of judges to exercise discretion is an aspect of judicial independence. It allows a judge to decide a legal matter within a range of possible decisions.[16] Judicial discretion are those where the judge has an area of autonomy, free from strict legal rules, in which the judge can exercise his judgement in relation to the peculiar circumstances of the case.[17]

It must be stated that the exercise of judicial discretion is normally limited to guidelines or principles, or by reference to list of relevant factors to be considered. It comprises the common law and the statute, but is never absolute and must be exercised within a broader legal and social context. [18]

> "Judicial discretion is the power of judicial officers to make decisions on some matters without being bound by precedent or strict rules established by statutes. On appeal, a higher court will usually accept and confirm decisions of trial judges when exercising permitted decisions; unless capricious showing a pattern of bias, or exercising discretion beyond his or her authority.[19]

It is an exercise of a person empowered by law to act as he wishes during adjudication.[20]

Judicial discretion are exercised only in instances, where the law confers it on the court, derivable from the relevant statute.[21] Judicial discretion (judicial discretion) was defined as the power the gives the court or a judge to choose among two or more alternatives, each being lawful.

The Black's Law Dictionary defines judicial discretion as:

---

[16] See Vila, Marisa Iglesias (2001). Facing Judicial Discretion: Legal Knowledge and Right Answers Revised Dordrecht, Netherlands, Kluwer Academic P 81.

[17] See http://answers.encyclopedia.com/questions/defnition-abuse-discretion.

[18] Discretion from Wikipedia, the free encyclopedia, available on http:Wikipedia/org 2013 p. 561 31-5-2013 at 8.10pm.

[19] According to West's Encyclopedia of American Law, Edition 2, Copy Right 2008, THE GALE GROUP, INC.

[21] See also In University of Lagos and ORS v. Olaniyan (1978) All N.L.R 1,

> The exercise of judgement by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a mater of right.[22]

Also the Oxford Dictionary of Law defines judicial discretion as:-

> The power of the court to take some step, grant a remedy, or admit evidence or not as it thinks fit. Many rules of procedures and evidence are in judicial form or provide for some element of discretion. In criminal cases, under the provisions of the Police and Criminal Evidence Act 1984, the court may exclude prosecution evidence if its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[23]

Furthermore, the Longman Dictionary of Law defines discretion as "the right of an official, e.g a judge, to act in certain circumstances and within given limits and principles on the basis of his judgement and conscience" [24] It also defines judicial discretion as "the power residing in the court, of deciding a question fairly where latitude of judgement is allowed."[25]

Jowitts Dictionary of English Law defines discretion as:-

> Discretion is a man's own judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind.....So a judge or court often has a discretion in making orders or imposing conditions on litigants, e.g as to payment of costs, relaxing rules of practice, etc. Discretion however, is to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion. [26]

AN EVALUATION OF THE PROSPECTS AND INSTANCES OF JUDICIAL DISCRETION BY JUDGES IN CRIMINAL MATTERS.

1. **ISSUANCE OF SUMMONS:** A court ensures the attendance of an accused person, through the issuance of summons, where there is a complainant before

a Magistrate or judge stating that a person has committed an offence. The court may issue a summons directing the offender to appear before him, on a fixed date, time and place to answer the charge against the offender after hours of service on him and every summons must be in writing, and in duplicate signed by the judicial officer of such court.

Summons are normally utilised for lesser offences and in instances where the person whose appearance is being sought is not likely to refuse to appear. A court has absolute discretion in deciding whether to issue summons to appear or a warrant of arrest or to reject the complaint.

.

2. LEAVE TO FILE AN INFORMATION OR PREFER A CHARGE IN THE HIGH COURT

Criminal cases are generally initiated by the State at the instance of the Attorney General at the High Court, or by the Police at the Magistrate Court. In fact, Section 77, CRIMINAL PROCEDURE ACT 1945 CAP C41LFN 2004 provides that:

"Subject to the provision of any other enactment, criminal proceedings may in accordance with the provision of this Act be instituted

(a) In the Magistrate Court on a complaint of the State

(b) In the High Court

  (i) By information of the Attorney General of the State

  (ii) By information filed at the High Court after the accused is summarily committed for perjury by a Judge or Magistrate.

  (iii) By information filed in the Court after the accused has been committed for trial by a Magistrate under Part 36 of the Act, and;

  (iv) On complaint whether on oath or not

By filing (first information report) in the court by the police[31]. The exercise of judicial discretion lies in the procedure that must be adopted with drawing up information and other supporting documents. In other words, a bill of indictment with a supporting affidavit, except it is the Director of Public Prosecution (DPP) or the

[31] See Section 143(b) Criminal Procedure Code

Attorney General that proffers the indictment. The proof of evidence of the witnesses intended to be used at the trial, a statement of the evidence to be relied upon at the trial, pursuant to the Indictment Procedure Rules of 1971 adopted in Nigeria under Section 363 of the Criminal Procedure Act shall be sent to the Judge for his consent to arraign an accused before the Court.

The Court in exercising its discretion may grant the request or refuse by indicating on the information preferred that he cannot grant his consent. Where a Judge decides otherwise, the prosecutor cannot successfully sue for refusing to exercise his discretion in their favour. The prosecution may only re-forward such an application to another Judge, even though such a refusal is malicious. The case of FRED EGBE V JUSICE ADEFARASIN & S.O. ILORI[32] clearly supports the above position.

In reaching his decision, the Judge must be satisfied that the documents before him depict a serious case they want him to hear and not really that the evidence before him must prove the guilt of the accused person. The judge should be convinced that the prosecution has not proffered the matter in order to scandalise him. The reason for this immunity given to Judge(s) for actions done though malicious in the scope of their judicial duty or act was well articulated in the case of SIRROS V MOORE[33] , where Lord Denning observed thus:

> "... The reason is not because the Judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fears."

Therefore, the power exercisable by the Court here, as far as the prosecution is concerned is unquestionable and undiluted. But, where the Court wrongly exercises its discretion in favour of the prosecution, and the accused person is aggrieved, that there is no prima-facie case against him, he can apply to a high court to set aside the indictment. My authority here is IKOMI & ORS V STATE[34] Where the Supreme Court of Nigeria observed thus:

---

[32] 1985) 1 NWLR (PT 3) 549 at 550.
[33] 1974) 3 ALL.E.R. 776
[34] (1986) 3 NWLR (PT. 28) at 340

> "... A Court granting consent ought to be satisfied that a prima facie case has been established and a challenge of the consent can only be made in the proof of evidence put forward before the Judge. The issue is not whether the evidence is sufficient to ground a conviction, all that is necessary is whether the evidence discloses a prima facie case even if it is weak, against the accused person"

In Northern Nigeria, the rule applicable is the Criminal Procedure Code (Application for leave to proffer a charge in the High Court) Rule 1999. The rules are essentially the same with the Indictment Procedure Rules of 1971 in force in Southern Nigeria, except that an applicant can apply orally to file a charge at the High Court, and that an indictable offence need not be committed before one can proffer a charge against an accused person in the High Court.

BAIL: Bail is a means by which a person arrested, because of an offence is released temporarily from custody, on security being taken to enable him re-appear on a given day, place and time. See ENEBELIE V CHIEF OF NAVAL STAFF [35]There are basically different two types of Bail.

(a) Bail by the Court, which is further classified into

(i) Bail by the Court pending trial

(ii) Bail by the Court during trial

(iii) Bail by the Court pending appeal

3. GRANTING / REFUSAL OF BAIL APPLICATION

A Court, where an accused person has been arraigned for the commission of an offence can grant bail. Bail is vital here, because of the interval between the time proper trial will commence and when it will be ended; which is normally very lengthy, coupled with the fact that there is a constitutional presumption of innocence of the accused person until the contrary is proved. See section 36(5) OF 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA provides as follows:

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty"

[35] 2000 NWLR PT. 671, 119 at 121.

The clear meaning of the above is that bail pending trial is a constitutional right, the onus is on the prosecution who objects to bail, to show the facts that would make the court refuse bail to the accused person(s). In accordance with Section 30(1) CRIMINAL PROCEDURE ACT AND 5.57(1) CRIMINAL PROCEDURE CODE, where a Court issues a warrant of arrest for an offence, excluding a capital offence, it may endorse the warrant of arrest with bail. The Court will state the (a) the number of sureties if any (b) The amount of money in which the sureties and the accused person(s) named in the warrant are respectively bound (c) The Court which the accused person(s) is to stand trial and (d) the time, he is to attend, with an undertaking to always appear subsequently, as may be ordered by a court before which he will appear. Furthermore, where the offences are capital in nature, application to the High Court could be granted. The granting of bail is primarily regulated by Section 118(1-3) of the Criminal Procedure Act, as well as Section. 341(1-2) of the Criminal Procedure Code. S. 118(1) CPA expressly provides thus:

> "A person charged with an offence punishable with death shall not be admitted to bail except by a Judge of the High Court."

The express implication of the foregoing is that if an offence is punishable with death only a High Court Judge may grant bail. So granting bail for crimes with death penalty depends solely on the judicial discretion of the Judge.

Section 118(2) CRIMINAL PROCEDURE ACT, stipulates that:

> "Where a person is charged with any felony other than felony punishable with death, the Court may, if it thinks fit admit him to bail".

I hold that absolute judicial discretion is clearly conferred on a judge to either grant or refuse bail. Even in S.118(3) CRIMINAL PROCEDURE ACT, The Courts are still empowered to grant bail in instances outside the preceding subsections by using the word SHALL. The Court is armed with discretion by the words:

> "...Unless it sees good reasons to the contrary".

Section 118(3) CRIMINAL PROCEDURE ACT provides thus:

> "Where a person is charged with any offence other than those referred to in the last two preceding subsections, the

> Court shall admit him to bail. UNLESS IT SEES GOOD REASONS TO THE CONTRARY".

In exercising judicial discretion in bail matters, the court usually considers certain factors plus those canvassed by the applicant to win the discretion of the Court in his favour. The Court in ADETILOYE & ORS V ALUYI & ORS[36] said that:

> "It is the duty of the applicant seeking the discretion of court to place before the Court all necessary and relevant materials required to guide the court in the determination of the application."

IN DANBABA v. STATE[37]. The Court of Appeal spelt out the factors regulating the judicial discretion of the Court in granting bail, but not restricted to

(a) The nature of the offence and the punishment prescribed therein for the offence.

(b) The criminal records of the accused

(c) The possibility of the accused committing further offence(s) while on bail.

(d) The possibility of the accused interfering with the investigation of the offence.

(e) The degree of probability that the accused will stand his trial.

The above conditions necessary for granting bail is impari-material with S. 341(2) CRIMINAL PROCEDURE CODE. Notwithstanding, that the power to grant bail rests with the discretion of the judges, where the terms of bail is excessive or burdensome, an appellate court will review it, relying on EYU V STATE[38] Where the judicial discretion is exercised in good faith by a lower court, unguided by relevant consideration, and not illegal, or arbitrary, the appellate court would not necessarily interfere.

Judges are granted judicial discretion to grant or refuse bail. This means that the issue of bail is at the discretion of the judge. This is so by virtue of section 118, 119, 120, 123 and 125 of the Criminal Code Act of 1916 Cap. C38 LFN 2004. It is convenient to reproduce the provisions of the said sections for utter clarity.

> Section 119: Where any person is brought before a court on any process in respect of any matter not excluded within section 118 of this Act, such person, may in the discretion of the court, be released upon his entering, in the manner herein after provided, into a

[36] (1999) 10 NWLR PT 62 4 AT 648

[37] (2000) 14 NWLR (PT 687) 396 at 398.

[38] (1988) 2 NWLR (PT 78) 602 at 610 and S.120 Criminal Procedure Act.

recognisance conditioned for his appearing before such court or any other court at the time and place mentioned in the recognisance.

Section 120: The amount of bail to be taken in any case shall be in the discretion of the court by whom the order for the taking of such bail is made, s hall be fixed with due regard to the circumstance of the case and shall not be excessive .

Section 123: A judge of the High Court may, if he thinks fit, admit any person charged before a court in the state subject to the jurisdiction of the High Court to bail although the court before whom the charge is made has not thought fit to do so.

Section 125: Notwithstanding the provisions of section 119 and 120 of this Act. A Judge of the High Court may in any case direct that any person in custody in the state be admitted to bail or that the bail required by a magistrate's court or police officer be reduced.

Bail is an essential part of administration of criminal justice system.[39] Besides the court of Appeal pointed out in the case of *Mohammed v. Olawunmi*[40] that under section 29(1) of the Court of Appeal Act 1976, the grant of bail by the court of appeal is discretional, as justices of the court possesses the judicial discretion to grant or refuse it.[41] This is so when such application for bail made at the lower court is refused and appeal is made to the appellate court. In *Oshinaya v. Commissioner of Police, Lagos State,*[42] Court of Appeal stated the factors to consider for grant or refusal of application for bail as follows:

(a) The magnitude of the crime or the nature of the charge

(b) The quality of strength of the evidence in support of the charge which must be such as is capable of inducing the accused to flee from justice if released on bail.

(c) The degree of severity of the punishment on conviction for the offence.

(d) The likelihood and extent of delay in the trial of the case.

(e) The criminal record of the accused, if any.

(f) The likelihood of the repetition of the offence.

---

[39] E*nebili v. Chief Of Naval Staff* [2000] 9NWLR (Part 671) 119 at 121

[40] [1993] 4NWLR (Part 287) 254

[41] Ibid 264

[42] [2004] 17NWLR (Part 901) 1 at 4

(g) The risk that if released the accused may interfere with witnesses or suppress the evidence likely to incriminate him.

BAIL PENDING APPEAL

The discretion to grant bail pending appeal rests in the courts. After conviction and sentence to imprisonment, a convicted person who filed an Appeal can be granted bail pending the final determination of the Appeal. Bail after conviction in the Appellate court is completely discretionary. In MOHAMMED V OLAWUNMI[43]. The Court held amongst others, that under S.29(1) of the Court of Appeal Act 1976, the grant of bail by the Court of Appeal is discretionary. Justices of the Court possesses the judicial discretion to grant or refuse it. The rationale for it was given by BARON C.J in MURI V INSPECTOR GENERAL OF POLICE[44] as follows:

> "... Before conviction, there is a presumption of innocence, after conviction, the person convicted has no right to bail."

An application for bail to the Court of Appeal is not regulated by the Criminal Procedure Code or the Criminal Act, as the court lacks inherent jurisdiction to grant this kind of bail. In OBASEKI V COMMISSIONER OF POLICE[45], it was stated that none of the sections in part 14(fourteen) of the Criminal Procedure Act namely S. 118-S.120, 123 and 125 which makes provisions for bail, is applicable where a convict desires to be admitted to bail after conviction and pending Appeal. Though, bail is normally given at the discretion of the Court. There are principles guiding the admission of an Appellant to bail pending the determination of his appeal, as was the position in R V TUNWASHE[46] thus:

> "(a) That bail will not be granted pending an Appeal save in <u>exceptional circumstances,</u> or where the hearing of the appeal is likely to be <u>unduly delayed</u>.
>
> (b) That in dealing with the later case the court will have regard not only to the length of time which must elapse before the Appeal can be heard, but also to the length of sentence to be appealed from, and further that these two matters will be considered in relation to one another."

---

[43] (1993) 4 NWLR PT 287, 254 Ratio 16.
[44] (1957) NR.N.L.R 3 at p 6.
[45] (1975) N.R.N.L.R 3 at p6
[46] (1935) 2 WACA 236.

Where there is no special or exceptional circumstances, bail will not be granted pending appeal.

The categories of what constitute special or exceptional circumstances are not closed as to support the grant of bail pending appeal, as each case is always handled meritoriously. In GANI FAWEHINMI V THE STATE[47], the Court held that health challenges (illness) was a special or exceptional circumstance to warrant the exercise of the court's discretion to grant bail in favour of the Appellant. From the totality of the above, it is manifestly clear that what would amount to special or exceptional circumstance depends essentially on the Court's discretion (breast of the Court).

The Court is under obligation to weigh all the circumstances of a given case in the interest of justice, when exercising judicial discretion, relying on ECHAKA CATTLE RANCH LTD V N.A.C.B. LTD[48].

4. SEARCH WARRANT

Search warrant is a written authorisation by a Magistrate based on an oath by a person that there is good cause for believing that it is important to search any building, carriage, ship, receptacle or place; so as to ascertain if any crime has been committed, or to use for evidence. S. 107 CRIMINAL PROCEDURE ACT stipulates instances for the utilisation of search warrant; thus:

> "where a Magistrate is satisfied by information upon oath and in writing that there is reasonable ground for believing that there is in the State in any building, ship, carriage, receptacle or place.
>
> (a) Anything upon or in respect of which any offence has been or is suspected to have been committed; or
> (b) Anything which there is reasonable ground for believing will afford evidence as to the commission of any offence or
> (c) Anything which there is reasonable ground for believing is intended to be used for the purpose of committing any offence.
>
> The Magistrate may at anytime issue a warrant, called a search warrant, authorising an officer of the court, member of the police force or other person therein named;
>
> i. To search building, ship, carriage, receptacle or place for any such thing to seize and carry such thing before the Magistrate

[47] (1990) 1 NWLR PT 127 at 486.
[48] (1988) 4 NWLR PT 547, at 525.

issuing the search warrant or some other Magistrate to be dealt with according to law, and;

ii. To apprehend the occupier of the house or place where the thing was found if the Magistrate thinks fit so to direct on the warrant."

I respectfully hold that the phrase ... where a Magistrate is satisfied by information... The Magistrate may at anytime issue a warrant... and... If the Magistrate thinks fit to direct contained in S. 107(SUPRA) are clear and conclusive proofs that search warrants are only issued at the judicial discretion of the magistrate.

Search warrants can be endorsed and utilised on any day, whether Sundays or public holidays, from the hours of 5 O'clock in the forenoon to 8 O'clock at night.

However, the Court in its discretion may authorise that such warrant be executed at any time by stating same on the warrant.[49]. In accordance with Section 74 CRIMINAL PROCEDURE CODE, a Justice of Peace, apart from a Magistrate can endorse a search warrant. Besides, it must relate to further investigation of a case already in court; that a search warrant can be issued. This is contrary to the position in Southern Nigeria, where the Criminal Procedure Act is operational. Search warrants already issued, but not executed are always returned to the courts based on the provisions of Section 77 CRIMINAL PROCEDURE CODE.

5. **ADMISSION OF EVIDENCE:** In criminal matters, the innocence or guilt of an accused person is determined by the court, based on the evidence adduced by the prosecution. The burden of proof rests on the prosecution and never shifts except where the law stipulates that any person must prove particular facts. Admissibility of a piece of evidence is based on law, as it is governed by the Evidence Act. Rulings and judgement of Court of the facts in issue are centred on relevance of such evidence. It can then be said that admissibility is centred on law, whereas relevance is centred on the logical reasoning of the Court.

The Supreme Court of Nigeria said in AGUNBIADE V SASEGBON[50], thus:

> "Admissibility under the Evidence Act is evidence which is relevant and it should be borne in mind that what is not relevant is not admissible"

[49] See Section 111 Criminal Procedure Act.

[50] (1968) NNLR 203 at 223

The Court of Appeal in OBEMBE V EKELE[51] at 70 Ratio 3 pertaining to the test applicable in considering admissibility of a piece of evidence, said

> "...Finally, the test to be applied, both in civil and criminal cases in considering whether evidence is admissible, is whether it is relevant to the matters in issue; if it is, it is admissible and the Court is not concerned with how it is obtained."

For evidence to be admissible, it must be relevant, and undoubtedly, relevance is anchored on ordinary logic of the Court; not law, this allows the exercise of judicial discretion. Since relevance is based on logic, for any evidence to be admissible, it must be relevant. However, evidence may be relevant, without being admissible; this is supported by Section 1 (a)- (b) EVIDENCE ACT 2011 CAP AMENDED,

> "Evidence may be given in any suit or proceedings of the existence or non existence of every fact in issue and of such other facts as are hereafter declared to be relevant, and of no others:
>
> Provided that
>
> (a) the Court may exclude evidence of facts which though relevant or deemed to be relevant to the issue, appears to it to be too remote to be material in all the circumstances of the case; and
>
> (b) this section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force."

Admissibility of evidence is important in the determination of criminal cases. When the admissibility of a piece of evidence rests upon the existence of certain facts, the question whether those facts exist or not is for the judge to decide.[52]

Admissibility of evidence is contained in the Evidence Act 2011;[53] It is within the purview of judge's judicial discretion to determine relevant evidence that will be admissible. Section 14 Evidence Act 2011 provides:

Evidence obtained-

a. Improperly or in contravention of a law; or
b. In consequence of an impropriator or of a contravention of a law; Shall be admissible unless the court is of the opinion that

[51] (2001)8 WRN 68.

[52] Aguda T.A., *The Law of Evidence,* 2nd edition, Ibadan, Spectrum Books Lmited, 2007, 20

[53] The Evidence Act, Cap. E14 F14 2004 has been repeated by the extant Evidence Act of 2011.

> the desirability of admitting the evidence is out-weighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

Section 138 (2) stipulates that the existence or non-existence of facts relating to the admissibility of evidence and or this section is to be determined by the court. In section 139(2), it is provided that:

> The burden of proof placed by this part upon a defendant charged with a criminal offence shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether on cross-examination or otherwise, that such circumstances in fact exist.

Evidence that is not relevant to the fact or facts in issue is not admissible. Where such evidence is too far the court can excise its discretion to exclude it. Section 1(b) Evidence Act provides that "the court may exclude evidence of facts which though relevant or deemed to be relevant to the issue, appears to it to be too remote to be material in all the circumstances of the case. Also in considering the issue of admissibility of evidence, a judge has a discretion to refuse the evidence even if in law relevant, and therefore, admissible, but if admissibility of that piece of evidence or work operate unfairly against the defendant.[54] This also depicts the onerous duty of the judge to ensure that justice is done to all the parties. To this end, he exercises his judicial discretion in his consideration of the necessary piece or pieces of evidence that are admissible or inadmissible that is relevant to the fact or fact in issue at criminal trial.

Here, judicial and judicious assessment of evidence by a trial judge at criminal trials is of paramount importance, in order to avoid wrongful exercise and abuse of judicial discretion and injustice.[55]

6. SUBSTITUTION AND AMENDMENT OF A CHARGE(S) OR INFORMATION

A charge is the statement of offence with which an accused person is charged for a crime in a summary trial in a Court. It is a document encompassing the statement and particulars of offence(s) upon which an accused person is tried before a Court of

[54] *Callis v. Guna* (1964) 1QB495, See also *Nanna v. Namna* 92006) 3 NWLR (Part 966) 1 at 16
[55] [2000] FWLR (Part 1) 138

law. In the Magistrate Courts in Nigeria, it is called a "Charge". But in the High Court (South) it is called an "information"[56].

It is normally prepared by the relevant authorities empowered to charge an accused person. In Northern Nigeria, under Section 160 CRIMINAL PROCEDURE CODE, charges are prepared by Magistrate. But in Southern Nigeria, Police Officer drafts charges. Based on Section 211(1) CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999, information is drafted by State Counsels (Law Officers). When an accused person is arraigned on a charge, there may be necessity to amend the charge due to errors, which may be due to the statement of offence or particulars being imperfect. In such instances, the law allows the person who prepared the charge to alter it, with the permission of the Court, or by the Court alone[57].

Courts can amend a defective charge. Such can either be on the Court's initiative, or with the leave of Court by a relevant authority. This judicial discretionary power of the Court to act is obtained from sections 162 and 163 CRIMINAL PROCEDURE ACT, as well as SECTIONS 208(1) & (2) CRIMINAL PROCEDURE CODE.

Section 162 states thus:

> "When any person is arraigned for trial on an imperfect or erroneous charge, the Court may permit or add to or otherwise alter the original charge".

Section 163 stipulates as follows:

> "Any court may alter or add to any charge at any time before judgement is given or verdict returned and every such alteration or addition shall be read and explained to the accused"

By virtue of S. 339 CRIMINAL PROCEDURE ACT, both provision apply to an information. Section 339 CRIMINAL PROCEDURE ACT provides thus:

> "The provisions of Section 151 to 180 of this Act shall apply, mutatis mutandis, to counts of an information"

Section 162 CRIMINAL PROCEDURE ACT allows a new document, or permits the charge to be altered on the face or it, or permit addition to the document before it. But Section 163 CRIMINAL PROCEDURE ACT permit alteration,

---

[56] See Section 338 Criminal Procedure Act.

[57] See Oladejo v State (1994) 6 NWLR (PT 348) 101 at 108 Ratio 7.

substitution or amendment or addition to be done by the Court on its own (suo moto), however, it must be read and explained to the accused person. One can safely hold that whether a court would allow an entirely new document, or permit the charge to be changed (altered) on the face of it, or could allow an extra count, or could on its volition amend an erroneous or imperfect charge is a matter of judicial discretion. The Court is only authorised to "read and explain to the accused". Where the Court exercises its powers under Section 162 and S.163 aforesaid suo moto. If an amendment of a charge or information is by the Court on its own accord or the relevant authority with the permission of Court, the same statutory method of amendment, must be adhered to.

7. CONTEMPT OF COURT

During criminal proceedings, certain action(s) may occur which the court may see as contemptuous. Contempt of court is an intentional conduct displayed by a person showing disrespect or no value for the court. It is any action which interferes with or obstructs the due administration of justice[58].

IN ADENIJI-ADELE V OGBE[59], the Court said that any act done or written or published which is calculated to bring a court or judge into contempt or to lower his authority or to interfere with the due course of justice or lawful process of the court amount to contempt. Words or actions which interfere, disturb or obstruct the smooth administration of justice, are a criminal contempt. The court can on its free will, issue a bench warrant for the apprehension of the contempt nor relying on AHMADU BELLO UNIVERSITY V ADO[60]

Whether a court would punish for actions, it deems contemptuous is exercising judicial discretion. Where the contempt is in facie-curia, the court is advised to apply such powers sparingly. Or to punish very rarely and must act with restrain in all circumstances, by not showing undue degree of sensitiveness about the contempt as was stated in BOYO V A.G. MID-WESTERN NIGERIA[61].

---

[58] See AWOBOKUN V ADEYEMI (1968) NMLR 289 at 294.
[59] (1998) 9 NWLR pt 567, 650 at 653
[60] (1986) 3 NWLR pt 31, 714.
[61] (1971) 1 A.N.L.R 342.

One of the regular and controversial circumstances necessitating the exercise of judicial discretion by judges is contempt of court. This power to commit for contempt of court is a necessary power to protect and enhance the dignity of the court from abuse, violation of disruption of judicial trial process. Contempt of court is provided for in section 133 Criminal Code Act 1916 Cap. C. 38 Laws of the Federation of Nigeria 2004. The Court of Appeal in the case of *Candide- Johnson v. Edigin*[62] while considering the source of power of court to punish for contempt, said that:

> The power of the court to punish for contempt is inherent and indeed preserved under section 6 and 36 (3) (a) of the 1979 Constitution. It is a *sine qua non* of smooth and proper administration of justice and ought to be preserved. It belongs to the realm of judicial discretion of the court.[63]

The Court of Appeal, has cautioned that the judicial discretion of the court to punish for contempt should be invoked sparingly and never invoked unless the ends of justice demand drastic means.[64] Similarly in the Supreme Court has explained that contempt powers are:

> Created, maintained and retained for the purpose of preserving the honour and dignity of the court, and the judge holds the power on behalf of the court and by tradition of his office he should eschew any type of temperamental outburst as would let him lose his control of the situation and his own appreciation of the correct method of procedure. [65]

So, contempt of court is contentious where the judicial discretion of a judge is brought to bear. Indiscretion of a judge in this sense will expose him to scorn and ridicule in the eyes of the public.

8. **GRANTING OF ADJOURNMENTS:** In Criminal matters, any of the parties might apply to the court, orally or in writing for an adjournment. The court on its own initiative may also adjourn. Adjournment is a postponement in a matter the court is adjudicating on, to another date at the instance of the parties, based on an application

---

[62] [1990] 1NWLR (Part 129) 659

[63] Ibid 661. See Ss. 6(1), (2) 96) (a) of the 1999 Constitution of the FRN (as amended)

[64] *Candide-Johnson v. Edigin* (Supra) 662

[65] *Daduwa v. State* (1975) MN C 12

by either of the parties, or by the court on its own. A litigant asking for an adjournment must show to the Court, the essence of such an application, before it is granted in criminal matters. The court will now consider the reaction of the opposing party against the dictate of justice.

The Supreme Court, while considering the guiding principle in allowing an application for adjournment, in MAIN VENTURES LTD V PETROPLAST IND. LTD[66] said:

> "A court is not obliged to grant an adjournment merely because counsel has asked for it. The request of a counsel is a favour to be taken into account but the court is also obliged to bear in mind the necessity for ensuring speedy justice to contesting litigants."

The Court also remarked as follows:

> "The Court has to strike a medium in determining whether to grant or refuse an application for adjournment, taking all the circumstances of the case into account particularly the justice of the matter, could the opposing party be adequately compensated on cost? What are the reasons proffered by the applicant for seeking an adjournment? These are issues to consider. Also, if the application amounts to an abuse of process, the court will of course refuse to grant it. Usually the deciding factors are the quest for justice, justice for the parties on both sides. If the interest of justice will be served by granting the application than refusing it, the trial court is obliged to grant it".[67]

From the foregoing, one can safely contend that application for adjournments are always granted at the discretion of the court. Depending on the peculiar circumstances of a given case, but such judicial discretions are always exercised judiciously, and judicially. Adjournments are not granted as a matter of course, the main crux of the matter is the dispensation of justice, in consonance with Section 36 of the CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999. A party applying for an adjournment must show that there is real need for the application. The application must not be frivolous. A judge, in exercising his judicial discretion in his

[66] (2000) 1 NWLR pt 671 151 at 154

[67] ogunsola v. NICON (1999) 10 NLR (Part 623) 492.

sphere is to weight the reason or reasons advanced by the applicant *vis-a-vis* the opposition of the other party, if any, to meet the course of justice in the case.

Justice is the underlining reason judges are granted judicial discretion. Where a judge fails and or ignores to weigh the pertinent factors granting or refusing an adjournment it will be tantamount to miscarriage of justice. It is because of that the case of *Yisi Nigeria Ltd v. Trade Bank Plc*[68] because so germane. In that case, the appellant filed an action at the High Court , Ilorin, demanding a reinstatement of a sum of money allegedly improperly taken out of its account by the respondent without its knowledge and consent. The appellant then field an *exparte* motion and was granted an interim order by the trial court res training the respondent pending the determination of the motion on notice field by the appellant which was fixed for bearing on 24th February, 1997. The interim order was made on 27th November, 1996.

On 2nd December, 1996, the respondent filed a motion on notice asking the court to discharge the *expaire* order it made on 27th November on the ground that it lacked jurisdiction to entertain the matter. The appellant's a counsel wrote a letter to the court asking for an adjournment so that he could react to the motion. The trial court ignored the letter and write to hear the motion in the absence of the appellant's counsel. In its ruling dated 6th December, 1006, the court granted the respondent's motion and struck out the case for lack of jurisdiction. The appellant being dissatisfied applied asserting that the trial court's refusal to honour its counsel's letter and proceeding to hear the motion in the absence of its counsel, constituted a violation of its right to fair hearing.

The Appeal Court, unanimously allowing the appeal, held, inter alia, that:

> While an application for an adjournment is made to a court, the court should bear in mind the requirement that justice should be done to both parties and that it is in the interest of justice that the hearing of the case should not be unduly delayed. It should grant it, if the refusal of the application is most likely to defeat the right of a party or cause injustice to one or the other, unless there is a good or sufficient cause for this refusal. In the instant case, the appellant was denied hearing altogether in the circumstances that led to miscarriage of justice. The trial court did not properly exercise its

[68] [1999] 1NWLR (Part 588) 646

discretion judiciously in refusing the appellant's application for an adjournment.[69]

Another clear case where a trial judge abused the excise of his judicial discretion in respect of refusal to grant an adjournment is the case of *Ashiru v.* Ayoade[7034] . In that case the appellant's counsel wrote a letter for adjournment to the court, giving reason that he could not come to the court that day due to fuel scarcity. However, the appellant was present in court. The trial judge refused to grant the application for adjournment. The trial judge called on the respondent's counsel to address the court and fixed a date for judgement, which he subsequently entered in favour of the respondent. Dissatisfied with the proceedings and the judgement, the appellant appealed to the Court of Appeal. Unanimously allowing the appeal, the Court of Appeal stated that:

> The courts must balance the need not to delay justice with an important requisite in the administration of justice, non-denial of justice by not refusing adjournment w here compensation by way of costs will be adequate and just.
>
> Delay of justice is bad, but denial of justice is worse and outrageous. The denial inflicts pain, grief, suffering and untold hardship on those who rely on impartial administration of justice.
>
> Every application for adjournment must be considered on its merits. Therefore, in considering whether or not to grant a request for an adjournment, the court must first confine itself to the reasons for that particular adjournment sought before considering provision applications for adjournment. This is because, the reasons and circumstances for one request for adjournment might be completely different from another. A court's negative impression about a previous application for adjournment should not be allowed to becloud its dispassionate consideration of a subsequent one.[71]

Tabai. J.C.A said that the trial judge was bound to take cognizance of the fact that the helpless defendant appellant was in court but the trial judge completely ignored the defendant/appellant's presence. He noted that before the trial judge exercised his discretion to grant or refuse the adjournment, the defendant was not

[69] Ibid 647-648
[7034] [2006] 6NWLR (Part 976) 405.
[71] Ibid 412-413

heard.[72] The trial judge's handling of that case is but an inappropriate manifestation of scorching indiscretion and impetuosity.

9. ALLOCUTUS, SENTENCING AND IMPRISONMENT DURING JUDGEMENT

Judgement is the final determination of a case by a court. Omissions and other inadvertent oversights in the course of proceedings can be cured at judgement stage, where the fate of the accused is determined. Sentencing of an accused person, who has been pronounced guilty and convicted, has to do with the punishment imposed upon him in view of the circumstances of the case. For some offences, maximum sentence are prescribed by law, but not minimum. Judges are therefore at liberty to exercise their judicial discretion in sentencing the accused. This may account for the reasons why maximum sentences are rarely imposed on accused persons after considering the extenuating circumstances of each case. A sentence is the judgement of a court upon conviction. It is the punishment imposed on an accused person for wrong doing.

It has been rightly stated by some eminent legal scholars that it is the judges that decide punishment rather than anyone else, and so since judges decide questions of guilt, they also decide the sentence.[73]Judges are granted judicial discretion in respect of sentencing an accused person. Section 382(1), (2) and 3(a) Criminal Procedure Act 1945. Cap. C41 Laws of the Federation of Nigeria 2004 becomes relevant here. It provides as follows:

> Section 382(1). Subject to the other provisions of this section, where a court has authority under any written law to impose imprisonment for any offence and has not specific authority to impose a fine for that offence, the court may, in its discretion, impose a fine in lieu of imprisonment.
> (2) In the case of a conviction in the High Court the amount of the fine shall be in the discretion of the court, and any term of imprisonment imposed in default of payment of the fine shall not exceed two years.
> (3) In the case of a conviction in the magistrate's court.
> (a) The amount of the fine shall be in the discretion of the court but shall not exceed the maximum fine authorised to be imposed by the magistrate or under the law by virtue of which he was appointed a magistrate.[74]

---

[72] Ibid 411-412

[73] Okonkwo, C.O. and Naish, *Criminal Law in Nigeria,* 2nd edition Ibadan Specturm Law Publishing 1980, 38.

[74] See also Ss. 20 and 21(1) of the Court of Appeal Act 1976 Cap C36 LFN 2004.

In the exercise of judicial discretion, there are certain factors a judge is to put into cognisance in sentencing the accused person. These were extensively stated by the court in the case of *Commissioner of Police v. Buhari*.[75] In that case the accused was the speaker of the House of Representatives. He was accused of forging his certificate, as well as a University degree purportedly issued by the University of Toronto, Canada. He was also accused of making a false declaration of age increasing his age to thirty-six years from twenty-nine years, in order to meet the age requirement as provided for in section 65 of the 1999 constitution. When he was arraigned in court for a two count charge of forgery and false declaration on the 28th July, 1999, he admitted the offences against him and begged for forgiveness. He was convicted. The defence counsel and four other counsels as *amicus curiae,* in conformity with the principle of *allocutus,* prayed the court to temper justice with mercy. In sentencing the accused, the court stated thus:

> More often than not, there are certain grounds of consideration in punishing convict who admits his offence without wasting time of the court or subjecting the court not only to rigours of calling witness but also other technicalities.
>
> Some of such considerations include the age of the convict, first offender status and admission of guilt and with these considerations, our courts are always reluctant in fully punishing offenders who are committing crime for the first time. Conduct of the offender after commission of crime and also his good work record are also factors for consideration and those considerations will no doubt from the basis of any sentence on the convict in the exercise of any judicial discretion....
>
> With this it the back of my mind I hereby sentence Ahaji Buhari, the convict to a fine of N1,000,00 on the offence of forgery country to section 364 Penal Code in default of which he would serve a prison term of 12 months.
>
> I hereby sentence the convict to a fine of N1,000.00 in place of the mandatory sentence of imprisonment in line with section 158 Penal Code in default of which he should

[75] [2000] FWLR 164.

> serve a prison term of 12 months also. The sentence are to run consecutively.

The above case is a proper case of reasonable exercise of Judicial discretion. It was for this reason that the judgement was widely acclaimed to be fair. Justice was not only done, but was manifestly seen to be done to the satisfaction of both parties and the public by the sagacious exercise of judicial discretion by the court. But the case of *Rufai v. The state*[76] is an example of an abuse of judicial discretion in sentencing an accused peron. In that case the appellant along with other two accused persons were jointly charged and arraigned before the High Court of Oyo State sitting in Ibadan, for the murder of one Bolape Olaleken. At the conclusion of the trial, the court found the appellant guilty as charged, but the other two accused persons were found not guilty and were discharged and acquitted. The appellant's appeal to the Court of Appeal was dismissed. He further appealed to the Supreme Court which allowed the appeal and declared the trial null and void. It was revealed that the appellant was not properly arraigned and his plea was wrongly taken, yet the trial judge found the accused guilty and sentenced him. Hence in setting aside of the judgement of conviction and sentence of the appellant by the trial court, the Supreme Court held that:

> In this case, the evidence on record shows that the appellant understands only Yoruba language but the record did not show that the charge was read and explained to the appellant in Yoruba language which is a contravention of the requirements of section 215 Criminal Procedure Law and section 33(6) (a) of the 1979 Constitution. Therefore the trial was null and void. Where the plea of an accused has been defectively taken in violation of the statutory provisions of section 215 of the Criminal Procedure Law, the whole trial, conviction and sentence passed on the accused based on such defective plea amounts to a nullity[77] .

So in the instance case, the neglect and or refusal of the trial judge to take into account the necessary statutory provisions in the trial of the accused/appellant, with consequent verdict of guilt and sentence on him, can best be described as gross in discretion and an abuse of powers. The only inference of the taking of that defective

[76] [2001]13NWLR (Part 731) 713
[77] Ibid 721-722.

plea is that the accused person was denied of fair hearing, as he might not have understood the offence for which he was tried and convicted. As the Court of Appeal has said, shutting out a party in violation of the constitutional provisions requiring fair hearing is an important error and any exercise of discretions based on it has to collapse[78] .

Allocutus is a plea by an accused person convicted in a criminal matter, but not yet sentenced to mitigate the punishment that would be given to him. Allocutus is normally made based on a request by the Registrar of the Court or a Judge or Magistrate, if the accused person has anything to say, why sentence will not be passed on him in accordance with the law relying on Section 247 criminal procedure act and section 197 criminal procedure code. S.247 provides thus:

> "If the Court convicts the accused person or if he pleads guilty, it shall be the duty of the registrar to ask the accused whether he has anything to say why sentence should not be passed on him according to law, but the Registrar so as to ask him or his being so asked by the Judge or Magistrate instead of the Registrar shall have no effect on the validity of the proceedings."

From the above, it is clear that omission to abide with the requirement of the law does not render the proceedings invalid.

In the criminal procedure code state, accused people will require a witness at this point in time to attest to the good character of the convicted person. Though, the prosecution can thereafter produce evidence of previous convictions of the accused relying on Section 197(2) CRIMINAL PROCEDURE CODE.

Allocutus cannot be a basis for cross-examination. A successful plea of allocutus will reduce the punishment that the court will give to the convicted person. Unless, where categorically prescribed by law, the stipulated punishment for a crime is the maximum punishment the court can give, and the court is not under obligation to impose it.

[78] *Udoh v. Asupo* [2005] 3FWLR (Part 277) 1184 at 1186

In SLAP V A.G. FEDERATION[79], the punishment Section stated that an offender will be liable to a fine of six (6) times the value of the goods. The Magistrate gave a fine of three (3) times the value of goods involved. On appeal, it was held that the Magistrate had a discretion as to the punishment to give an accused person and where well exercised, such discretion can not be reversed and overturned by the appellate court.

Thus, in criminal matters, the use of judicial discretion still comes to the fore in punishing an accused person provided the offence do not carry a mandatory punishment by law such as capital offences. Furthermore, the judges have discretion to give fine instead of imprisonment. Section 382 CRIMINAL PROCEDURE ACT states thus:

> "Subject to the other provisions of this Section, where a court has authority under any written law to impose imprisonment for any offence and has not specific authority to impose a fine for that offence, the court may, in its discretion impose a fine in lieu of imprisonment.
>
> In the case of a conviction in the High Court, the amount of fine shall be in the discretion of the court, and any term of imprisonment imposed in default of payment of the fine shall not exceed two years".
>
> In the case of a conviction in a Magistrate Court,
> The amount of fine shall be in the discretion of the court, but shall not exceed the maximum fine authorised to be imposed by the Magistrate by or under the law by virtue of which he was appointed a Magistrate.
>
> The provisions of this Section shall not apply in any case where a written law provides a minimum period of imprisonment to be imposed for the commission of an offence."

From the foregoing, it is better to hold that the judges possesses a judicial discretion to impose fine instead of imprisonment, where the law fails to provide a minimum term of imprisonment to be imposed for the commission of a crime.

[79] (1969) N.M.L.R 326.

The basic rights of every citizen as guaranteed by the constitution[80] have been and are still being maintained by the courts by the exercise of judicial discretion powers by judges[81]. Of particular interest here are right to personal liberty and right to fair hearing.

Judicial discretion of judges has enabled them to ensure that the constitutional rights of citizens are not arbitrarily infringed upon. Again, speedy dispensation of justice is being facilitated by the exercise of judicial discretion. A judge may decide based on the circumstances of a particular case to grant a "no case" submission and discharge the accused. This invariably ends the case. The view has been expressed that "it is permissible in criminal cases for the trial court to conclude its view on the merits of the prosecution's case before considering the case of the accused."[82] Judicial discretion conferred on judges' help them to meet the justice demanded of them in criminal cases. Where the provisions of the law will wreck injustice, judicious exercise of their judicial discretion comes to play. It is a common maxim that *ubi jus ibi remedium*[83] Law cannot be used as instrument of injustice; hence, judges exercise judicial discretion to ensure that a wrong should not be without remedy by looking beyond the letters into the intendment of the law to do justice in the particular case. In the case of *Ulegde v. Commissioner of Agriculture, Benue* State[84], the court remarked that:

> Although the courts will as a general rule and in the exercise of their discretion refuse an order of mandamus where there is an alternative specific remedy at law, mandamus may yet issue in cases where although there is no alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual[85].

Judicial discretion by judges in criminal cases has aided and is assisting in decongesting prisons and the courts, by releasing awaiting trial inmates in deserving cases during periods prison visit. This power is based on Administration of Justice Committees, headed by the Chief judges of the various states, by virtue of sections

---

[80] Section 33 – 43 1999 Constitution of the Federal Republic of Nigeria (as amended)
[81] *Danbaba v. State* [2000] 14 NWLR [Part 687) 396 at 400. v. States
[82] *Kim v. State* [1992] 4NWLR (Part 233) 21 at 23
[83] Where there is a right, there is a remedy.
[84] [1996] 6 NWLR (Part 467) 437
[85] Ibid 439

3(2)(c)(d)(e) and (f) and 4 Administration of Justice Commission Act 1991. Cap A3 Laws of the Federation of Nigeria 2004 which is reproduced below:

> Section 3(2):- Without prejudice to the generality of subsection (1) of this section, the commission shall ensures that:
> (c) Criminal matters are speedily dealt with
> (d) Congestion of cases in courts is drastically reduced.
> (e) Congestion in prisons is reduced to the barest minimum
> (f) Persons awaiting trial are, as far as possible, not detained in prison custody.
>
> Section 4:- There is hereby established in each state of the Federation a body to be known as the Administration of Justice Committee (in this Act referred to as "the committee").

It is on the strength of this that periodic prison visit of the chief judge and members of the Administration of Justice Committee are held in various states of the federation. The task and purpose of that visit to include:

> (1) To release suspects who have served, though awaiting, the number of years that they would have served if they had been convicted.
> (2) To review cases, and if need be, release suspects detained for simple offences.
> (3) To review, and if need be, release suspects who are very old, sick or infirm.
> (4) To release those persons whose detention is manifestly unlawful.
> (5) To review, and if need be, release suspects whose case files or witness cannot be traced.[86]

CHALLENGES AND PITFALLS IN THE APPLICATION OF JUDICIAL DISCRETION BY JUDGES IN CRIMINAL MATTERS

This section of this paper captures in a realistic manner the challenges associated with the application of judicial discretion by judges in criminal matters. As laudable, as judicial discretion is, one of the challenges inherent in its applicability is that it breeds inconsistency and uncertainty. It is apparent that the exercise of judicial

[86] Report on the Joint Prison Visit of the Honourable Chief Judges, Hon. Justice M.I. Edokpayi and Members of the Administration of Criminal Justice Committee, Edo State to Benin Central Prison, Benin City, Ubiaja and Auchi Prisons, and Oko Medium Security Prison, on Tuesday 21st July, 2009, Wednesday 22nd July, 2009 and Thursday 23rd, July 2009 respectively, 5.

discretion by different judges on the same subject matter and facts can never be the same. This attracts criticism and allegation of bias or partiality against judges and the judiciary from members of the general public. The principle that a Judge should be impartial is supreme and sacred. In OBADARA V THE PRESIDENT, IBADAN WEST DISTRICT GRADE B CUSTOMARY COURT OF THE COURT said thus:

> "... The principle that a Judge must be impartial is accepted in the jurisprudence of any civilised country and there are no grounds for holding that in this, respect, the law in Nigeria differs..."

Another challenge bothers on the exercise of judicial discretion by judges on instinct and intuition instead of reasoned decisions. The observation of AMINA AUGIE, J.C.A in her paper "THE ROLE OF THE JUDICIARY IN THE MAINTENANCE OF LAW AND ORDER IN A DEMOCRACY" AT 2002 NBA Annual Conference clearly give credence to the contention that the central pillar in the concept of the Rule of Law is a judge and he performs his functions depending on the political situation of his state.

Judicial discretion exercisable by judges may be unfettered or fettered. The word "unfettered" means unchecked, unhampered and unrestrained, whereas, the word "fettered" denotes checked, restrained, and hampered. The question of whether the judicial discretion of a court are unfettered or fettered largely depends on if such judicial discretion can be reserved and unturned by an appellate court. If a judicial discretion is upturned by the appellate court, it is fettered. NIKI-TOBI J.S.C in BUHARI V OBASANJO [88], held while considering the unfettered judicial discretion of all judges in granting interlocutory injunction as follows:

> "It is a misnomer to invariably describe the exercise of discretionary power of a court as unfettered. The moment a trial court is called upon to exercise its discretionary power in accordance with enabling law, it is not correct to say that the court has unfettered discretion in the matters... The moment a discretionary power exercised by a trial court is quashed by an Appellate Court; the discretion is no more unfettered. The discretion can only be unfettered if it cannot be quashed on Appeal."

[88] (2003) F.W.L.R. pt 187, 202 at 218 Ratio 26.

Another challenge is that it can lead to the perpetuation of injustice, as this judicial discretion are certainly prone to abuse. An obvious consequence of an abuse of judicial discretion is injustice. Injustice is an unjust state of affairs, unfairness or an unjust act. It is the unfair and unequal treatment of people. Whenever, judicial discretion are exercised in favour of one party, to the detriment of the others, to the knowledge, or in the presence of a reasonable man, there is allegation of judicial bias. BLACK'S LAW DICTIONARY BY BRYAN A. GARNER[89] defines "bias" as

> "Inclination, bent, prepossession, a preconceived opinion predisposition to decide a concise or an issue in certain way which does not leave the mind perfectly open to conviction. To incline to one side, conditions of mind which sways judgement and renders a Judge unable to exercise his function impartially in a particular case".

The crux of the rule against bias is that judges should not ordinarily be fair, but above suspicion of unfairness. In AKINFE V STATE[90], the Supreme Court said:

> "In the administration of justice, whether by a recognised legal court or by persons, who although not a legal court are acting in a similar capacity, public policy requires that in order that there should be no doubt in the paucity of the administration any person who is to take part in it should be in such a position that he might be suspected of being biased or having improper motive".

This is fundamentally, because justice is anchored on confidence, and confidence is eroded when right thinking persons go away with the impression that a judge was biased. Injustice occasioned by judicial discretion at the lower court (court of first instance) remains in force, until it is set aside by an Appellate Court, which possesses another chance to look at the decision of the lower court upon an action by an unsatisfied party. On the contrary that decision remains valid and binding. Since judicial discretion enables a Judge to bring his individuality and personal initiatives into the proceedings, it is not impossible that such powers are more likely to be abused.

---

[89] (5TH edition) P.147.

[90] (1985) 3 N.W.L.R. PT 85, 729-732.

Another challenge can be seen for instance in the area of adjournment. If a court did not exercise its discretion judicially in an application for an adjournment and it results in a miscarriage of justice, an appellate court will reverse the decision or nullify the trial as was evidenced in YISI (NIG) LTD V TRADE BANK PLC[91], where the court stated as follows, on the usefulness of fair hearing in the administration of justice.

> "Before a court takes a decision affecting any of the parties in an action, it should afford both parties the opportunity of being heard. The right to fair hearing is basic to the administration of justice in Nigeria, and it is even a constitutional requirement vide Section 33 of the 1979 Constitution, now (S.36 of the 1999 Constitution) of the Federal Republic of Nigeria."

Regarding the effect of breach of the right to fair hearing, the court also noted that:

> "To accord with the principle of Natural Justice, each party to a dispute must have notice of the case it has to meet and must be given an opportunity of stating its case and answering if it wishes, any argument put against it. The right to fair hearing being a fundamental constitutional right, if breached, nullifies the trial" – PER OGBE JCA.

It is a settled principle of law, that all judicial discretion should be exercised in accordance with common sense and the dictates of justice. Where there is miscarriage of justice, it is within the powers of the Appellate Court to review it, as was held in IJEH V ONWUACHI[92].

Moreso, in ALHAJI KARIMU OKEWUNMI V MRS. F.A. SODUNKE[93], on the disposition of the Appellate court towards the exercise of judicial discretion, the Court of Appeal stated thus:

> "If the judicial discretion exercised bonafide by a lower court is uninfluenced, by irrelevant consideration and not arbitrary or illegal. The general rule is that an Appellate court would not ordinarily interfere. An Appellate Court <u>may</u> interfere with the exercise of judicial discretion. It is shown that there has been a wrongful exercise of the discretion, such as where the court acted under a

[91] (1999) 1 NWLR PT. 588, 464 at 646.
[92] (1993) 1 N.W.L.R PT 188, 467 at 496, Ratio 2.
[93] (2002) FWLR PT 97, 68,

> misconception of the law of under a misapprehension of fact that it gave weight to relevant or unproved matter or it omitted to take in to account matters that are relevant or where it exercised the discretion on wrong or inadequate materials and in all these cases where it is in the interest of justice to interfere."

The case of EZE V A.G. RIVERS STATE[94] is also helpful here. The Appellate Court is not under obligation to act otherwise in cases, where the lower court wrongly exercised its judicial discretion. But, where the Appellate Court chooses to interfere, it must be initiated by an aggrieved person, due to substantial miscarriage of justice as was apparent in OKO V IGWESHI[95] .Now, what is "miscarriage of justice". It means a grossly unfair outcome in a judicial proceeding. Hence, in KRAUS THOMPSON ORGANISATION LTD V UNIVERSITY OF CALABAR[96]. The Supreme Court said.

> "... There is a miscarriage of justice only where there are substantial errors in the adjudication, with the resultant effect that the party relying on such errors may likely have judgement in his favour."

The extent of miscarriage of justice depends extensively on the circumstances and facts of a given case, coupled with the discretion exercised therein.

The guiding principle in ascertaining whether a judicial discretion by a lower court should be tempered with or not rest essentially with the Appellate Court. The Appellate Court will not disturb the exercise of discretion by a court of first instance, because the Appellate Court should have exercised the discretion in a different manner.

The decision of the Court of Appeal in AYO OBEMBE v. BISSALAH EKELE[97] clearly illustrate this point, when it held as follows:

> "Now it is settled practice that an Appellate court will not and should not interfere with the exercise of discretion by a lower court on the ground that the Appellate court would have exercised the discretion differently."

The above principle was clearly re-stated in OLUMIGBON v. KAREEM by the Supreme Court[98].

---

[94] (2000) F.W.L.R PT 89 at 109.
[95] (1997) 4 N.W.L.R PT 467, 48 at 55 ratio 11.
[96] (2004) 9 NWLR RT 879, 631 at 642 ratio 12
[97] (2001) 8 W.R.N. 68 at 70, ratio 3
[98] (2002) 34 WRN 1 SC at 91

Thus:

> "It is settled law that the Supreme Court shall not substitute it's own discretion for that of the lower Court unless if the Court did not act in good faith or had been swayed by irrelevant consideration or had been arbitrarily or capriciously;"

Judicial discretion exercised by the Courts in criminal matters is done based on rules of reason, without strict adherence to laid down guidelines and principles. So, the decision of two diverse courts on the same subject matter and facts are likely to be divergent. Then, a reasonable man who witnessed both proceedings would believe that either of the judges was biased. Essentially, anything which makes a judicial officer, acting in a judicial capacity to decide otherwise, rather than on evidence adduced before him, or being partial is biased.

Another challenge is in the sphere of impartially and independence. The impartiality and independence of judicial officers in cases before them are useful component of fair hearing. The essence of impartiality is aimed at preventing them from adjudicating in cases, in which they have any interest. Such may be due to personal relationship with any of the parties, or based on their conducts/utterances during the determination of the case. Natural justice requires that persons whose interests are likely to be directly affected by such decisions and actions should be given prior notice and sufficient opportunity to be heard. The court or tribunals should be impartial and disinterested in cases pending before them. The principle of Natural Justice is well enshrined in the two pillars of justice; to wit. Audi alteram partem and Nemo judex in causa sua, which LORD CAMPBELL said is "external justice" in EXPARTE RAMSHE[99]. The rational of the rule against bias is that a Justice or Judge must not only be fair, he should be above suspicion. In AKINFE v. STATE[100], the Supreme Court of Nigeria said.

> "In the administration of Justice, whether by a recognised legal court or by persons who although not a legal court are acting in a similar capacity; public policy requires that in order that there should be no doubt in the paucity of the administration, any person who is to take part in it should

[99] (1852) 18 QBD 173 at 190.
[100] (1985) 3 N.W.L.R PT 85, 729 at 732.

> be in such a position that he might be suspected of being biased or having improper motives."

The above is very essential, as Justice is rooted in confidence and confidence is damaged or destroyed when right-minded people go away thinking the Judge was biased as stated in METROPOLITAN PROPERTIES CO LTD V LANNON[101].

No wonder, the observation of LORD HEWARD C.J in THE KING V SUSSEX JUSTICES EXPARTE MC CARTHY (1924) 1K.B. 256. Thus:

> "... Not merely of some importance, but it is of fundamental importance that Justice should not only be done, but should manifestly and undoubtedly be seen to have been done".

In Nigeria, judicial officers are barred from determining cases, if they are suspected of partiality, on grounds of friendship, affinity, consanguinity, or enmity, with a litigant or due to their subordinate status towards either of the parties, or because they were or had been advocates to such parties in the past, relying on UMENWAN V UMENWAN[102]. It is not in all situations, a Judge is barred. The onus is on the party who alleges bias to lead credible evidence to prove same, for it is not upheld in vacuum. In AKOH v. ABOH[103], the Supreme Court held that allegation of bias on the part of a trial Judge, other than on the basis of pecuniary interest must be supported by clear, direct, positive, unequivocal and solid evidence from which real likelihood of bias could reasonably be inferred and not mere suspicion. The test of determining real likelihood of bias which the court have applied, is the impression which would be given to it, by reasonable people or a right minded person. So, the remark of LORD DENNING M.R. in METROPOLITAN PROPERTIES CO LTD (F.G.C) LTD V LANNON & ORS is relevant here

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

[101] (1968) 3 ALL E.R. 304.
[102] (1987) 1 N.W.L.R Pt 65 407.
[103] (1988) 3 NWLR PT 85 696 Ratio 21.

> people. Even if he was impartial or could be nevertheless, if right minded people would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."

Suspicion, no matter how strong, cannot be enough or sufficient ground on which to disqualify on bias. The case of ATAKE V PRESIDENT FEDERAL REPUBLIC OF NIGERIA[104], manifestly buttressed the above position law. Nonetheless, the position canvassed in the case of THE FEDERAL REPUBLIC OF NIGERIA V CHIEF M.K.O. ABIOLA[105], is widely accepted. The Supreme Court in allowing the objection, BELLO C.J.N said as follows:

> "... Furthermore, the evidence shows that in the alleged libel complained of, the Weekend Concord accused the Justices of "gross irregularities" and corruption. Under the circumstances, it's reasonable to infer as Chief Ajayi (SAN) did, that the Justices have grievances against the respondents as publisher of the alleged libel. That being the case, I do not think it would surprise anyone if a reasonable man would think it likely or probable that there would be a real likelihood of bias on the part of the justices; and determine Chief Abiola's cases and particularly if they decide adversely against him. In that evet, right-minded persons will go with the impression. "What did you expect?" He accused them of "corruption". In other words, reasonable people would have the impression that the justices were biased and would loose confidence in the administration of justice. Indeed, justice is rooted in confidence and the court should abstain from doing anything that may erode the root of justice. The court should enhance confidence in the administration of justice."

From the totality of the above case, it is established that the rule against bias is dependent on a real likelihood of bias coupled with the impression of right-minded persons.

A critical analysis of the rule against bias depicts that judges may be prevented from determining cases, or their decisions will be reversed on appeal, if their decisions

---

[104] (1995) 31 L.R.C.N 265 at 266-7

[105] (1995) 31 L.R.C.N 265, 266-7

will be or have been affected due to the relationship existing between them and any of the parties, because of any of the under-listed:

(i) Affinity

(ii) Consanguinity

(iii) Because of their subordinate status to one of the parties

(iv) Enmity or friendship

(v) Because they were counsels to any of the parties before now in the same matter, as supported by UMENWA v. UMENWA[106].

Outside that, judges judicial discretion cannot be said to be biased within the province of the law. I hold that where the judges' personality and individuality comes into the fore, during the exercise of their discretion, and the decisions of such courts result in wanton, miscarriage of justice, bias cannot be levied against them.

Other inherent challenges in relation to the exercise of judicial discretion by courts in criminal matters are; The introduction of mandatory sentencing laws, for instance in strict liability offences, considerably limit judicial discretion in sentencing. Errors committed in the exercise of judicial discretion such as acting upon wrong principles, allowing extraneous or irrelevant matters to guide judicial discretion. Mistaking the facts and failing to take account of a material consideration. However, it will not be enough that the appellate court would have exercised the judicial discretion differently, rather, the discretion must involve an error of law, which has led to an unreasonable or plainly unjust result, or has involved a substantial wrong before the discretion will be taken to have been improperly exercised by the lower court[107].

A judge holding office over the course of multiple cases and selected by appointment is susceptible to undue influence. Judges abuse judicial discretion judges lawyers and others with punishment. That is those with the temerity to challenge judicial indiscretion. Use of contempt of court powers and coercive detention by judicial officials constitute abuse of judicial discretion[108]. Refusing or barring private criminal prosecutions by judges without just cause is an abuse of judicial discretion.

---

[106] (1987) 1 NWLR PT 65, 407.

[107] S.A. Desmith and Jm Evans (eds), De Smith's Judicial Review of Administrative Action (4th ed, 1980) P 278

[108] Ibid

In criminal cases, the elements of proof of a criminal charge are mens rea and actus reus. The first, mens rea is criminal intent, and judges are allowing criminal prosecutions to proceed and succeed without proof of it.[109]. Other challenges to judicial discretion are the writ of habeas corpus, certiorari, and quo warranto, which are remedies available to aggrieved parties constituting steps to reversing rulings. Any person has the right to petition for release of prisoner, if the official holding him does not have sufficient authority to do so. Complaints of judicial misconduct for such denial or in action are rampant. The problem is that judges are too often failing to act on habeas petitions on various pretexts, thereby reversing the presumption in favour of the government officials and the police.[110.]

Another challenge is stare decisis. Stare decisis is the doctrine whereby a judge in a current case treats decisions in past similar cases as authoritative precedents, and refuses to make a decision in a way that departs from such precedents, regarding all of them as correctly decided. But, it is an abuse of judicial discretion to treat precedents as though they are law, equal or superior to black letter law, especially when the black letter law is a written constitution, coupled with the Criminal Code, Criminal Procedure Code (C.P.C). Only the statute, the finding and the order, are law in a judicial decision, and only for the parties involved.[111]

The opinion concerning how the decision was reached may be persuasive on its merits, and indicative of how the same court might decide a similar case, but it dictum, or commentary, not laws and it is an abuse of judicial discretion to fail to exhaust textual analysis and legislative history before considering precedents and making sure that the chain of precedents has not wandered away from the bounds of the black letter law. However, where the exercise of discretion goes beyond constraints set down by legislation by binding precedent or by a constitution, the court may be abusing its discretion and undermining the rule of law. In that case, the decision of the court may be ultra-vires and may sometimes be characterised as

---

[109] Judicial Discretion And Its Exercise (Presidential Address at the Holdsworthy Club of the Faculty of Law, the University of Birmingham, Birmingham, UK (1962), PP 14 -15.

[110] Carl Schneider, "Discretion And Rules: A Lawyer's View" in Hawkins, The Uses of Discretion op cit pp 80-81.

[111] Gelsthorpe, Lovaine And Padfield Nicola "Exercising Discretion, Decision And Beyond (Witham publishing 2003) Retrieved from http://en.wikipedia.org/w/index/judicial discretion 03-06-13 at 9.00pm

judicial activism. The challenges are inevitable limitations on judicial discretion. It is very disheartening where the party that suffers the consequences of the miscarriage of justice has no means to seek redress at the appellate courts. Hence the countless number of innocent people that suffer under the crushing weight of injustice. Miscarriage of justice is a serious abuse in the exercise of judicial discretion by judges in criminal cases. It is an albatross in the administration of criminal justice system in Nigeria that can not just be dismissed with a wave of the hand.

POSITION /ATTITUDE OF APPELLANT COURTS TO EXERCISE OF JUDICIAL DISCRETION BY LOWER COURTS:-

Appellant Courts are empowered to entertain and determine appeals from the lower courts in exercise of their appellate jurisdiction. Appellate jurisdictions are granted the Supreme Court and Court of Appeal by virtue of Sections 233 and 240 of the 1999 Constitution of the Federal Republic of Nigeria respectively. High Courts of the states in Nigeria also have appellate jurisdiction by virtue of section 272(2) of the 1999 Constitution (as amended).

The Court of Appeal may exercise its judicial discretion while hearing cases on appeal pursuant to section 20 and 21 of the Court of Appeal Act 1976 Cap. LFN 2004.[112] The Supreme Court, possess, the finality of determination in all cases[113] and can also exercise judicial discretion based on the provisions of section 22 of the Supreme Court Act 1960 Cap. S15 LFN 2004. For emphasis, section 22 is reproduced below:

> The Supreme Court may, from time to time, make any order necessary for determining the case over direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgement in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary enquiries or accounts to be made or taken and generally. It shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such

[112] Cap 75 Law of the Federation of Nigeria 1990.

[113] Section 235 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

> rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the power of that court.

Appellate courts have always asserted that they will not interfere with the decisions of the lower courts made *bona fide*, judicially and judiciously. This position was widely stated by the court of appeal in the case of *Danbaba v. State*[114] . While speaking on the attitude of appellate courts exercise of judicial discretion by trial court, the court noted that:

> Where a judicial discretion has been exercised *bona fide* by a trial court uninfluenced by irrelevant considerations and not arbitrarily or illegally but judicially and judiciously an appellate court will not ordinarily interfere.[115]

Even when they choose to interfere, the judicial process is usually slow, while the accused persons in most cases languish in prison custody waiting for the cases to be decided. The Supreme Court also showed its hesitation to interfere in the decision of the lower court in the case of *Oyegun v. Nzeribe*[116] where it said that

> "where discretion is sound and guided by law, exercised judicially and judiciously, the court will not interfere..."[117]

The point here is that appellate courts will not interfere with the exercise of judicial discretion by the lower court even where the appellate courts would have exercised their judicial discretion differently to make a decision different from that of the lower court. This is a serious challenge and pitfall. It is possible that two (or more) lower courts are faced with criminal cases having the same (or similar) facts and circumstances, but they arrive at different decisions, yet both have acted *bona fide*, judicially and judiciously. Certainly, injustice would have been done in either case.

I submit that the attitude of the appellate courts to exercise of judicial discretion by the lower courts should be dictated and guided by the justice in the case and must act expeditiously. Injustice occasioned by the exercise of judicial discretion by the lower courts in criminal cases should be enough for appellate courts to interfere. Where an appellate courts fails, refuses and or neglects to substitute its own

---

[114] [2000] 4 NWLR (Part 687) 396.
[115] Ibid 401. See also *Erhahon v. Schahon* (1997) 6 NWLR (Part 510) 667 at 674.
[116] [2010] 180 LRCN 50
[117] Ibid 55. See also *Clement v. Iwuanyanwu* [1989] 3 NWNR (Part 17) 37 at 42.

decision for that of the lower court resulting to injustice, simply because it believes that the lower court has exercised its judicial discretion *bona fide*, judicially and judiciously, it can lead to an avoidable perpetration of injustice. While injustice should be the guiding principle that any injustice occasioned by the exercise of judicial discretion by a judge at the lower court remains binding and potent, until and or unless it is set aside b y an appellate court.

It is pertinent to now state the brilliant observation of the court in the case of *Oshinaya v. Commissioner of Police Lagos State*[118] that: where the exercise of such power is made on grounds which results in injustice, it is within the power and is indeed the duty of the Court of Appeal to ensure that justices prevails.[119] The totality of the foregoing discourse points to singular facts appellate courts should not be hesitant to interfere in the trial judge's exercise of judicial discretion in criminal cases. It is possible to act judicially, exercising care and arriving as seemingly good judgement, yet injustice is being perpetrated. So the consideration should not just be what the law provides only, but what the law is intended to achieve in its enactment.

Judicial discretion are exercised by judges in different manners; even in cases with the same (or striking similar) facts and circumstances'. This has, from time to time, resulted in a rape of justice. Thus judges have come under great criticisms bordering on allegations of bias. The Supreme Court, on the meaning of bias, in the case of Akinfe v. State,[120] said:

> What is bias? It is showing an act of partiality. What is poof of bias? It is what an ordinary reasonable bystander would regard as bias. What reasonable man would watch the trial as I have revealed who would go home and say that justice had been done to the accused. What reasonable man would not wonder what the concern of the judge was in his display of forensic ability against an accused person who seeks justice before him. What reasonable man would not wonder which of the two, the state counsel or the judge was the prosecutor in this case? It is with respect a sham of trial and with respect an immature approach to the administration of justice to set out

[118] [2004] 17NWLR (Part 904) 1.
[119] Ibdi 7
[120] [1998] 3 NWLR (Part 85) 729.

> for a kill against any party that stands in the imaginary scale held by a judge.[121]

The exercise of judicial discretion by judges in criminal cases is enormous. Judges are granted judicial discretion to act in certain circumstances in criminal cases without strict adherence to the rules. This is why people seeing the diverse decisions of courts will have the belief of bias on the side of either judge. "Bias is manifested in various ways... it means the trial of a case by a judge has been influenced. Judges in exercising their judicial discretion, sometimes fall into the temptation of acting with biased mind, especially when they have an axe to grind. A judge's individuality and personal idiosyncrasies may manifest in the exercise of his judicial discretion resulting to biased decision and injustice.

It is axiomatic that judges ought to exercise judicial discretion in accordance with the dictates of justice.[122] Where a judge has personal interest to serve, the tendency of the judge being biased in his judgement is not uncommon. This is why judges are advised not to put themselves in a position where their persons interest conflict with their duties and responsibilities, because of the binding effects of court decision unless and until they are revised by an appellate court. Hon. Justice Belgore SC has said that:

> The decision of any court, under our system of substantive law and procedure should be based on what has been elucidated by evidence in court only, plus the stand of the law on what has been revealed by the evidence. Anything not before the court should not form part of the judgement[123].

Bias also manifests in sentencing an accused person. When a judge is biased in sentencing an accused person. It constitutes an abuse of judicial discretion. The judge in exercising judicial discretion is obliged to weight all the circumstances of a particular case in the interest of Justice.[124]

---

[121] Ibid 736

[122] Ibid 288-289.

[123] Belgore S.M.A. JSC "hearing of Matters-Applications in Court, Interlocutory, Interim Injunction, Stay of Execution of Proceedings, etc", in Induction Course Lectures for Newly Appointed Judges and Kadis, Lagos MIJ Professional Publishers Limited 1993, 74.

[124] *Danbaba v. State* [2000] 14 NWLR (Part 687) 396 at 401

It is obvious that judges' likelihood of bias constitutes a serious abuse to judicial discretion of judges. Once a judge is swayed in the exercise of his judicial discretion by personal interest and other extraneous considerations, he cannot be unbiased in his decisions. This has the resultant effect of eroding the trust and confidence of the right-minded people on not only the judge, but the entire judicial system.

This view was expressed dearly by Lord Denning M.R in the case of *Metropolitan Properties Co Ltd v. Lannon*[125] as follows:

> There must be circumstances from which a reasonable man would think it likely or probable that the Justice or the Chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking 'the judge was baised.[126]

. Where a judge presiding over a proceeding leans towards one side of a cause for some reason other than a conviction of its justice, he cannot be exonerated from the grips of bias and partiality. Abuse of judicial discretion by a judge resulting to miscarriage of justice can be occasioned by a judge descending into the area of contest between the parties, not allowing an important witness of testify, making improper comment or bring garrulous, showing bias or making decision not based on the evidence before him, but on other extraneous circumstances. Thus he "becomes a party holding the scale of justice lopsidedly, and in serious danger of treading the path of injustice".[127] As observed by Nnamani JSC in *Akinfe v. State*[128] .

> In our system of criminal adjudication the judge has to hold the balance between the prosecution and the defence. To do anything which gives advantage to the prosecution is to tilt the balance of justice rather fatally. A trial in which such open and prolonged intervention by the judge takes place is everything

[125] [1978] 3 All E.E, 304, cited in Malami, E., *Nigerian Constitutional Law,* Lagos, Princeton Publishing co., 2006, 279.

[126] Ibid

[127] Omo Uche JSC, 'Judicial Ethics and Code of Conduct', cited in Induction Course Lectures for Newly Appointed Judges and Kadis, Lagos, MIJ Professional Publishers Ltd, 1993, 39.

[128] [1988] 3 NWLR (Part 85) 729

> other than fair for such proceedings induces in the accused person fear.[27]

CONCLUSION

The paper set out to assess, judicial discretion of judges in criminal matters, prospects and challenges. In criminal trials, the judges exercise enormous discretion. Undoubtedly, judicial discretion is one of the greatest weapons of the court. Despite the reasons adduced why judicial discretion are given to judges by statutes, such as permitting the marshalling of unique facts and circumstances to suit changes in the society, socio-economic and political exigencies. There is no gain saying, that it also helps to prevent unpleasant and harsh result procedurally. Notwithstanding its prospects, judicial discretion also have challenges associated with it.

In Nigeria, there is a gap in not following any procedural guide in the exercise of judicial discretion, save for the reason that it should be exercised judicially and judiciously. This creates an irrefutable presumption that the duty of determining the limitations of the law depends heavily on judges and the courts. The major challenges against the proper exercise of judicial discretion by the courts are complex and numerous, as underscored earlier. The exercise of judicial discretion breeds inconsistency. No two decisions of courts upon similar facts and circumstances can ever be in harmony with each another. Besides, the powers are prone to individual manipulation. No judicial system can be greater than the personnel who constitute the courts and administer the law.

In his book JUSTICE AKPATA JSC noted as follows:

> "... No one court is the same as the other, although, they are regulated by the same procedure, the judge brings his individuality and personal idiosyncrasies into the proceedings. He is in charge of the court. He is the central figure. Furthermore, it allows intuition instead of reasonableness in taking decisions. Courts are also swayed by the societal expectations and norms prevalent from time to time."[130]

Again, even in instances of abuse of judicial discretion resulting in arbitrariness, and gross miscarriage of justice. Though, aggrieved individuals adversely affected by

[27] Ibid 736-739

[130] Justice for all and by all, lagos, B & C Publishers Ltd, 1994, P.176.

Court decisions can always go on appeal. Such litigants must possess the financial means, time and patience. Preparation, filing, hearing and adjudication are unduly protracted and long as the victim suffers un-necessarily before such decisions are reversed eventually. The attitude of the appellate court to the issue of judicial discretion exercised by lower courts is not encouraging. In most cases, the appellate courts are very slow in overturning the judgement o the trial courts, unless in exceptional cases.

The discretion whether or not to order a retrial is that of the Court of Appeal, and unless the Supreme Court comes to the conclusion that the exercise is certainly wrong, arbitrary, reckless, injudicious or contrary to justice, it will not interfere even if it might have exercised the discretion differently if the discretion were that of the Supreme Court. The above is clearly supported by UNIVERSITY OF LAGOS v. AIGORO[131], as well as ANYAH V AFRICAN NEWSPAPERS OF NIGERIA LTD[132] An Appellate Court will not make it a habit to interfere with the exercise of discretion by a lower court, simply because if faced with a similar application, it would have exercised its discretion differently. An Appellate Court can only interfere if the lower court failed to apply the correct principles of law in reaching its conclusion[133].

In matters of judicial discretion, an Appellate Court is usually slow to interfere or intervene unless, satisfied that they were based on erroneously principles as was held in CLEMENT v. IWUANYANWU[134]. Now every court is the guardian of its own records and the master of its own practice. And the practice of a particular court is the law of that court. An Appellate court will however reverse an exercise of discretion by a trial court, where there has been a wrongful exercise of its discretion by trial court because, it did not give due weight to relevant consideration upon which judicial discretion is exercised. There is no hard and fast rule as to the exercise of judicial discretion by courts, for it that occurs, such discretion becomes fettered. Thus, judicial officers must be careful and circumspect matching two competing interests together in a given situation, before acting. In conclusion, judges possess enormous

---

[131] (1985) 1 NWLR (PT 88) 257.

[132] (1992) 6 NWLR (PT 247) at 319, Nwabueze v. Nwosu (1988) 4 NWLR PT 38, 254.

[133] See S & D Construction Company Ltd V Ayoku & Anor (2011) VOL 197 LRCN 1 at 8 ratio 7, Saraki V Kotoye (1990) 4 NWLR (PT 143) at 144, University of Lagos v. Olaniyan (1985) 1 NWLR (PT 1) 156.

[134] (1989) 3 NWLR (PT 107) 39 at 42 ratio 3.

judicial discretion in the administration of justice in criminal matters in Nigeria; But with its immense prospects and numerous challenges. The matter that arises now is whether judicial discretion should be removed from our statutes with regards to criminal cases?

I respectfully submit that the challenges inherent in the proper exercise of judicial discretion notwithstanding, the prospects of permitting the use of judicial discretion cumulatively overwhelmingly outweigh the challenges. Though, it can be conceded that there are cases of "judicial manipulations", and the eventual end result of such judicial decisions affected by personal considerations, whims and caprices, there are still many good and righteous judicial officers, who did not abuse their judicial discretion in the course of their work. These set of judicial officers and men of good conscience, for theirs are the Kingdom of GOD.

Judicial discretion by judges is a *sine qua non* in the administration of criminal justice in Nigeria. The exercise of discretion is one of the strongest weapons of a court of law.[135] This is why this paper is very relevant to contemporary Nigerian legal system. The prospects of judicial discretion of judges in criminal cases have been highlighted. They include granting/refusal of bail application, admissibility of evidence at trial, leave to file information and prefer a charge at high court and magistrate's court, contempt of court, granting/refusal of adjournments and judgement-sentencing of an accused person.[136]

Admission of evidence and the weight to be placed on it are at the discretion of the judge. Before a trial judge admits a piece of evidence, it has to be shown to be relevant to the fact or the facts in issue. This is so as the conviction or innocence of the accused rests squarely on the amount and relevant of the evidence against him.[137]

Another instance of exercise of a judicial discretion by judges in criminal cases is judgement with sentencing as the main focus. Where an accused is found guilty, judicial discretion granted to judges enables them to consider individual cases on their peculiar circumstances and pass the appropriate sentences. In sentencing the accused person, judges, in exercising their judicial discretion, may decide to temper justice

---

[135] *Ogunola v. NICON* [1999] 10NWLR (Part 23) 492 at 497
[136] *Danbaba v. State* [2000] 14NWLR (Part 687) 396 at 400
[137] *Olumegbon v. Kareem* (2002) 98 LRCN 1127 at 1158

with mercy towards meeting the course of justice in the case.. Using the words of Dambazau:

> Only judges have the authority to impose sentences, and this is the basis of judicial discretion. Sentencing is regarded as the responsibility of the judge, and perhaps nowhere else is legal proceedings in the power of the judge more evident. The discretion of judges on sentencing reflects the belief that sentences should be individualized and that punishment should fit the criminal.[138]

The judicial discretion of judges in criminal cases are of great importance. It enables judges to carry out their constitutional role of determining cases. In deserving cases, the letter of the law are not allowed to occasion injustice,... the judges, in exercise of judicial discretion, are able to apply the spirit of the law in meeting the course of justice and prevent absurdity and injustice.

Moreso, challenges and pitfalls which judicial discretion has been and is still being subjected to have been treated. The exercise of judicial discretion by judges in criminal cases has from time to tome resulted in biased court decisions and miscarriage of justice among others. The attitude of appellate courts in this regard is an unwholesome pitfall in the administration of criminal justice in Nigeria. Appellate courts are usually unwilling to interfere with the exercise of judicial discretion by lower courts and where they chose to interfere, it is often slow, such that the innocent party would have suffered some measure of deprivation and denial of his fundamental rights. Towards effective exercise of judicial discretion by judges in criminal cases, some useful recommendation has been advanced. They encompass the immunity and independence of judges on every respect, transparent process in the appointment of judges. The qualifications of person of judges should be enhanced. A well trained, knowledgeable, wise, confident and humble judge will appreciate how best to apply his judicial discretion in given situation.

It is strongly submitted that in spite of the challenges, judicial discretion of judges in criminal cases still remain an indispensable tool in the hands of judges. Its importance still makes it a relevant and desirable tool in the administration of criminal

---

[138] Dambazau A.B. *Criminology and Criminal Justice,* 2nd edition, Ibadan, Spectrum Books Ltd 2007, 196.

justice in Nigeria. May I comment to judges and would be judges the eternal admonition in the words of the highly revered prophet Isaiah:

> He that walketh righteously, and speaketh uprightly; he that depiseth the gain of oppressions, that shaketh his hands from holding of bribes, that stop peth his ears from hearing of blood, and shutteth his eyes from seeing evil; he shall dwell on high... Thine eyes shall see the king in his beauty.[139]

RECOMMENDATIONS

The consequences of abuse of judicial discretion in Nigeria have become so grave. How can the waters of fury be calmed? Since the courts represent the last bastion of. To prevent abuse and manipulations for personal gains, as well as guarantee that justice is always done for the good of the society and man, the under-listed should be done

1. There should be an impartial and independent judiciary. For judicial officers to successfully carry out their duties, the judiciary must be truly and completely independent.. Anything that represses a judge is most likely to hamper the efficient discharge of his duties. The judiciary must not depend on the executive to live that is a threat to the independence of the judiciary.

   In Nigeria, Magistrates and Area Customary Courts Presidents, perform their duties with mortal fear. They are mere glorified servants, who have no job security nor sure if their salaries burdened with shall bloated taxes ever be paid. The judiciary must continue to seek less assistance from the various state governors as well as the president of the country, which should be redressed now by making them judicial officers in the constitution. I hereby submit that where there is complete autonomy for the judiciary, intelligent, competent and highly judges would carry out their duties uprightly, thereby ensuring that justice is done at all times.

No wonder LORD DENNING in his book, while stating the role of a Judge said:

[139] Isaiah 33:15-17 (KJV)

> "My firm belief is that the proper role of Judge is to do Justice between the parties before him ...The constitution does not allow reasons of state to influence our judgement. God forbid it should we must not regard political consequences however formidable they might be. If rebellion were certain consequences, we are bound to say fiat justia rilat coelum[140].

2. The immunity and independence of judges have to be preserved. Lord Denning MR. in the case of *Sirros v. Moore*[141] clearly stated that:

> Every judge of the courts of this land-from the highest to the lowest-should be protected to the same degree if the reason underlying this immunity is to ensure that they may be free in though and independent in judgement, it applies to every judge whatever his rank Each should be able to do his work in complete independence and free from fear[142]

Oputa JSC re-echoing the words of John Marshall, the third Chief Justice of the United States of America over a century ago, said that 'a judge must be completely independent with nothing to influence him but God and his consceience."[143] Where immunity and independence of judges are ensured, they will be better disposed to exercise their judicial discretion impartially, without fear or favour. Where a judge is discovered to have been influenced by personal aggrandizement, pecuniary interest and other tainting extraneous things, he should not be spared, but such a judge be subjected to the relevant disciplinary action. As stated by the Court of Appeal in *Candid-Johnson v. Edigin*[144]

> In order to sustain the immunity of a judge or a magistrate under the prosecuting statutory provisions, the offending act must be shown to have been done in good faith. In this case, the respondents reaction to the conduct of the appellant was not in good faith. Consequently, it is indefensible and cannot be protected [145]

---

[140] The Family Story London Butter Worths 1981 at p 21.
[141] [1974] 3 All ER 776
[142] Ibid 785
[143] Oputa, C.A. "Independence of the Judiciary with Particular Reference to Appointment, Removal and Discipline", in Law Development and Administration in Nigeria, Vol. 1. Lagos. The Federal Ministry of Justice 1990, 498.
[144] [1990] 1NWLR (Part 129) 659
[145] Ibid 563

Lord Denning MR. bluntly stated the view that "if the judge has accepted bribes or be in the least corrupt, or has perverted the course of justice, he can be prosecuted in the criminal courts".[146]

3. There should be financial independence of the of the judiciary. The judiciary should have its annual budget and once it is approved, the judiciary should be given the money and be allowed to implement its own budget. The judiciary should be financially independent from the executive arm of government, both at the federal and state levels. Judiciary must seek less financial favour from the different state Governors, as well as the President. It is not enough to pay the salaries and allowances of judges from the consolidated revenue fund, the judiciary should have control of the finances of the judicial arm for the necessary running costs. It is very sad that the condition of service for magistrate leaves much to be desired. They receive their salaries from the state and they are paid at the same time with other public servants. This does not augur well for the judiciary. It is greatly recommended that magistrates should be classified among the judicial officers whose salaries and emoluments are charged on the consolidated revenue fund, and so provided in the Nigerian constitution.
4. Again, the qualification of lawyers who seek appointments to become judges and the method of such appointments need to be reviewed. Section 231(3), 238 (3) and 271(3) of the 1999 Constitution of the FRN (as amended) provide for the qualification of persons to be appointed as judges of the Supreme Court, Court of Appeal and judges of High Courts of the states 1 submit, that the number of years of person is qualified to practice as a legal practitioner in Nigeria is most inadequate. With increasing level of education, at least a postgraduate degree in law (LLM) should be among the requirements. For practicing lawyers, they must be shown to be serious minded practitioners who have done a reasonable number of contested cases at the various level of courts, while those in the magistracy who intend to be judges of the higher bench must

[146] Sirros v. Moore (supra) 71

be the ones that possess masters degree in law (LLM), and have handled reasonable number of contested cases and whose judgement have not been frequently reversed by the appellate courts.

5. There is an urgent need to review the mode of appointment of judges. Appointment of justices of the Supreme Court, Court of Appeal and High Courts of the various states is spelt out in section 231(2), 238(2) and 271(2) of the 1999 Constitution of the FRN (as amended). It is a common knowledge that some appointment are made to reflect the federal character principles. With these provisions it is not unlikely that it is those persons, who can be easily manipulated by those in the executive arm and the politicians in the corridors of power that are often appointed as judges. Thus merit, experience and competence are sacrificed at the alter of mediocrity. There is therefore the need to insulate judges from the influence of partisan politics and politicians. Appointment of judges should be left completely in the hands of National Judicial Council, Judicial Services Commission of the different states and the Bar, under the leadership of the Nigerian Bar Association.
6. There exist many statutory provisions for the realisation of justice in criminal justice system. Criminal Procedure Act 945 Cap. C41 LFN 2004 and Evidence Act 2011, amongst others stipulates provisions for criminal trial. Sections 33-44 of the 1999 Constitution of the FRN (as amended) provide for fundamental rights of the citizens. Of particular importance are sections 35 and 36, which provide for the right to personal liberty and right to fair hearing. All that is required is religious compliance with the statutory provisions. It may be important to have a legislation to give impetus to and stimulate section 3(2) (c)(d) (e) and (f) of the Administration of Justice Commission Act 1991 Cap A3 LFN 2004, which provide inter alia, for speedy trial of criminal matters. This may be done by legislating a definite time in to guarantee accelerated hearing of criminal matters, especially cases on appeal where wrongful exercise and or abuse of judicial discretion by a trial judge constitutes the ground for the appeal.
7. Integrity is also recommended as a basic requirement a person seeking to be appointed as a judge should possess. Courageous and people with integrity should be

made judges Black's Law Dictionary defines integrity as soundness of moral principle and character, as depicted by one person dealing with others in the making and performance of contracts and the fidelity and honesty in the discharge of trust[147]. It is the primary duty of judges to do justice to all parties. Justice demands that the innocent be assured of personal liberty and also that the guilty are punished. It also demands impartiality such that the law should be the same for all. It requires only judges with uncompromising integrity to meet the dictates of justice in applying the powerful weapon of judicial discretion in criminal matters and doing justice to all parties at all times. The Scriptures clearly portrays the importance of integrity in Proverbs chapter 19 verse 1(KJV) that "better is the poor that worketh in his integrity, than he that is perverse in his lips, and is a fool." As the Psalmist says "let integrity and uprightness preserve me ..." (Psalm chapter 25 verse 2, KJV)

8. Also, the issue of regular training and retraining of judges can not be ignored. This can be in form of continuous legal education, workshops, seminars, symposiums, in-house training, periodic peer review etc. Regular training and retraining will help in the stimulation of knowledge and thus eliminating avoidable mistakes and abuse of judicial discretion. In the process of regular training, judges are obliged to acquire new techniques skills and problem-solving ability that will facilitate enhanced performance and a high degree of effectiveness in the discharge of their duty

Justices Chukwudifu Oputa JSS, in his paper titled "Judicial Ethnics, Law, Justice and the Judiciary brilliantly said that:

> It is a known fact that lawyers have little respect but considerable contempt for any judge who is lacking in learning and who is not completely at home in and in charge of his court.
> A judge who lacks the salt of wisdom is insipid, according to Justinian. An insipid judge is not an asset to the due administration of justice. In the hands of an ignorant judge justice is sure to suffer. Hence Justinian was able to affirm that:
>
> *Ignorantia judicis est calamilas innicentis* – (the ignorance of the judge is the doom and undoing of the innocent).

[147] 6th edition

> It is thus incumbent on each and every judge to strive assiduously to improve his judicial skills and his legal education. The life of a judge is thus one of continuous and continued reading in order to keep abreast of the changing law and avoid avoidable mistakes. It has been said that no one can calculate the aggregate amount of evil inflicted on the community by a bad decision.[148]

Regular training and retraining will enhance the judges' knowledge which certainly will impact on their exercise of judicial discretion in handling criminal cases. It will help in minimizing abuses in the exercise of judicial discretion and help in containing the trust and confidence of the people in the judiciary. The bar and bench forum should be sustained regularly to discuss issues mutually beneficial to the legal profession.

[148] *Judicial Lecturers; Constituting Education for the Judiciary, Lagos, Institute of Advance Legal Studies,* 1990, 37