

## THE PRINCIPLE OF DOUBLE JEOPARDY VERSUS THE PRINCIPLE OF CONDONATION: REVISITING THE SUPREME COURT'S DECISION IN *NIGERIAN ARMY V AMINUN KANO*<sup>1</sup>

### Abstract

*The Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantees the rights of every person in Nigeria, including persons accused of the commission of any crime. These rights are classified as 'fundamental rights', and they include: the right not to be subjected to double trial for the same offence, popularly referred to as right against double jeopardy<sup>2</sup> and the right not to be tried for an offence for which one has been pardoned.<sup>3</sup> These two rights formed the bedrock of the decision of the Supreme Court in *Nigerian Army v Aminun Kano*.<sup>4</sup> This paper critically examines and reviews the decision and observed that had the Supreme Court considered the meaning of double jeopardy under the Constitution of the Federal Republic of Nigeria, on the one hand, and condonation and pardon on the other, the court would have discovered that these triumvirate concepts do not exactly mean the same thing and consequently may have varied legal outcomes when applied, and as such, the court may have provided a different reason for their judgment in the case. This paper finds that since the principle of the right against double jeopardy requires a judicial trial and a judgment to inure, while pardon and condonation is wholly administrative action, the principle of double jeopardy should never have been invoked in the case under review because there was no prior judicial decision that exculpated or incriminated the respondent. The paper recommends that in future, if the Supreme Court is faced with the same scenario, it should make a clear distinction between the principles of right against double jeopardy and pardon and condonation so as to clarify the jurisprudential perspectives of these principles.*

**Key words:** *Judicial, Double Jeopardy, Condonation, Pardon, Court Martial, Fundamental Rights, Constitution.*

### 1. Introduction

Every person who is charged with a criminal offence shall, notwithstanding any dent to his integrity in the public view, be entitled to some rights, while he is being tried in any court of law<sup>5</sup>. These rights include the right not to be subjected to double trial for the same offence, popularly referred to as the right against double jeopardy<sup>6</sup> and right not to be tried for an offence for which one has been pardoned<sup>7</sup>. Section 36 (9) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), provides:

No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.

Section 36 (10) of the same Constitution provides that 'No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.' The Constitution makes a further provision, with respect to pardon, in sections 175 (1) (a) and 212 (1) (a), which state that:

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<sup>1</sup> (2010) 5 NWLR (PT. 1188) 429

<sup>2</sup> Section 36 (9)

<sup>3</sup> Section 36 (10)

<sup>4</sup> Supra

<sup>5</sup> See sections 36 of the Constitution of the Federal Republic of Nigeria, 1999, as amended; 215 of the Criminal Procedure Act and 187 of the Criminal Procedure Code.

<sup>6</sup>Section 36(9) of the Constitution of the Federal Republic of Nigeria, 1999, as amended; sections 181(1)(a) and 221 (1) of the Criminal Procedure Act; 223 (1) of the CPC and 173 of the Administration of Criminal Justice Law of Lagos State, 2011.

<sup>7</sup>Section 36 (10) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

175 (1) The President may-

- (a) Grant any person concerned with or convicted of any offence created by an act of the National Assembly a pardon, either free or subject to lawful conditions;

212(1) The Governor may-

- (a) Grant any person concerned with or convicted of any offence created by any Law of a state a pardon, either free or subject to lawful conditions;

Section 36 (9) of the Constitution provides the legal basis for the principle of double jeopardy in law, namely, that where an accused is arraigned before a court of law, for an offence for which the accused has records that he has been tried on the same case with the same subject matter, same issues and the same set of facts, and a judgment of acquittal or conviction arrived at, such a person cannot be tried again<sup>8</sup>. The conditions are that the accused must have been previously acquitted or convicted by a court of competent jurisdiction of the same offence both in fact and in law.<sup>9</sup> This means that the doctrine of double jeopardy also referred to as estoppel by record *autrefois acquit* or *autrefois convict* can only be invoked by an accused person that is arraigned for a crime for which he has been tried before and either discharged and acquitted or convicted. Again, for pardon to be invoked by an accused person as provided for in section 36 (10), the conditions as adumbrated in section 175 (1) (a) and section 212 (1) (a) of the 1999 as laid out above must exist<sup>10</sup>. The point here is that the moment a convicted offender is granted state pardon, his criminal records would appear as if he was never convicted of any crime.

## 2. Pardon, Prerogative of Mercy and Amnesty

It may be necessary to examine the meanings of pardon, prerogative of mercy and amnesty. This are related concepts but require slight semantic analysis. Pardon<sup>7</sup> is the act or instance of officially nullifying punishment or other legal consequences of a crime. Hornby describes pardon as ‘to forgive’ or ‘excuse’.<sup>11</sup> The concepts of pardon, prerogative of mercy and amnesty received judicial interpretation in the Nigerian Courts<sup>12</sup> in *Ojukwu v Obasanjo*<sup>13</sup> where Musdapher (JCA as he then was) opined as follows:

A pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and the privileges forfeited on account to the offence....The effect of a pardon is to make the offender a new man, to acquit him of all corporal penalties and forfeiture annexed to the offence pardoned. A critical view of the definitions denotes that a pardon is an official act and it is given after an offence has been committed. Similarly, we also hold the view that while both prerogative of mercy and Amnesty are pardon in nature, the legal implication of both is different. Black Law Dictionary (1999: 1137) has also differentiated Amnesty from the general pardon referred to in constitution by stating that unlike an ordinary pardon, amnesty is addressed to crimes against state sovereignty that is, to political offences with respect to which forgiveness is received and which is more expedient for the public welfare than prosecution.

Having known what amnesty stands for and the connotation of prerogative of mercy, can it be said that prerogative of mercy contemplated by the Constitution is the same or could incorporate amnesty since

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<sup>8</sup> See the case of *NafiuRabiu v. The State* (1986) 1 NCLR 293- Section 36(9) of the 1999 Constitution considered- *Mohammed Abacha v. Federal Republic Of Nigeria*, 2014(1) LEDLR-7

<sup>9</sup> See the case of *FRN v. Igbini and Ors* (2014) LPELR P.17

<sup>10</sup> See *F.R.N. v. Ifekwu* (2003) 15 NWLR (PT. 842)113

<sup>11</sup>See Generally J.O.Olatoke; An Examination of the Constitutionality of the Amnesty Programme in the Niger Delta Region of the Federal Republic of Nigeria published in the *Journal of Law, Policy and Globalization* www.iiste.org Vol 5, 2012, p. 22

<sup>12</sup>ibid

<sup>13</sup>(2004) FWLR, (pt 222) 1666 see also *F.R.N. v. Ifekwu* (2003) 15 NWLR (PT. 842)113; *Jammal Steel Structure v A.C.B.* (1973) ALL NLR 823

both means pardon? The court when looking at the applicability of the prerogative of mercy by the President in *Amanchukwu v Federal Republic of Nigeria*<sup>14</sup> where Udow-Azogu (JCA) held inter alia that:

...by virtue of section 175 (i) of the CFRN 1999, the president has power in consultation with Council of State to grant a pardon to any person convicted of any offence or to remit the whole or any part of any imposed on that person for such an offence there is need for the president to exercise his powers of reprieve through the Attorney General of the Federation in favour of the convicts.

The Supreme Court of Nigeria states in *Solola v The State*<sup>15</sup> some situations where the president or the governor as the case may be cannot exercise the power of prerogative of mercy when Edozie (JSC) held thus:

a person convicted of murder and sentenced to death by a High Court and whose appeal is dismissed by the Court of Appeal is deemed to have lodged a further appeal to the Supreme Court and until that appeal is finally determined the head of state or the governor of a state cannot pursuant to section 175 and 212 of the CFRN 1999 as the case may be exercise his power of prerogative of mercy in favour of that person. In the same vein such person cannot be executed before his appeal is disposed of...

The implication of the provisions of Sections 175 and 212 of the Constitution relates to pardon or a prerogative of mercy:<sup>16</sup>

- (a) The person to be granted prerogative of mercy must have been charged for an offence before a competent court of law or a lawful tribunal and convicted of an offence.
- (b) The president or the governor must have consulted the council of state or the advisory council of state as the case may be;
- (c) The prerogative of mercy cannot be granted to a person under trial not yet convicted or convicted, appealed to the court of appeal and his conviction confirmed but the appeal is still before the Supreme Court,
- (d) Such person granted pardon here is immune from re-prosecution as same was held by the court in *Ibori v F.R.N*<sup>17</sup> to amount to double jeopardy.

The idea behind the above careful elucidations of the constitutional principles of double jeopardy and pardon is to point out the error mixing up the principle of double jeopardy and in tying the principle of pardon with condonation in the case under review. These constitutional rights came into play and, in fact, formed the basis of the decision of the Supreme Court in the case of *Nigerian Army v Aminun Kano*<sup>18</sup>, where it was held, per Muhammad, J.S.C, that:

In its ordinary usage, double jeopardy connotes the unlawful procedure of subjecting a person to a trial on two separate occasions for the same offence. In law also, it connotes the act of being prosecuted or tried twice for substantially the same offence...<sup>19</sup> (underlining, ours for emphasis.)

The Court further held that:

Section 36 (10) of the Constitution of the Federal Republic of Nigeria, 1999 lays down the principles of criminal law that where a person accused of committing a criminal offence which is recognized by law and where he has shown that he

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<sup>14</sup>reported in (No.2) (1999) 4 NWLR (pt. 599)479 at 495

<sup>15</sup>(2007)6 NWLR (Pt.1029)1 at 24)

<sup>16</sup>See generally J.O. Olatoke op cit. p6.

<sup>17</sup>(2009) 3 NWLR (pt 1127) 94

<sup>18</sup>Supra

<sup>19</sup> At pages 461-462

has either been pardoned of the offence by the appropriate authority or that he has been tried by a court of law or a tribunal set up by law, then he cannot be subjected to any further trial by any court or tribunal on that same offence. A bar to further prosecution has been placed between him and the offence.<sup>20</sup>(underlining, is ours for emphasis).

In understanding the justification for our argument, the following questions need to be answered from the facts of the case of *Nigerian Army v Aminun Kano*<sup>21</sup>:

1. Was Aminun Kano, the respondent and the beneficiary of the judgment, facing a second trial or second prosecution at the trial Court Martial?
2. Was Aminun Kano, the respondent and the beneficiary of the judgment, tried, convicted or acquitted, and pardoned before his trial or prosecution at the trial Court Martial?

The answers to these questions are, as the facts of the case will subsequently show, apparently in the negative since the conditions for double jeopardy or pardon are not fulfilled in this case. To the extent that General Aminun Kano, '(the Respondent)', was not facing a second trial or second prosecution at the Court Martial and also that the respondent was never tried, convicted or acquitted and pardoned before his trial at the Court Martial, to that extent, double jeopardy is inapplicable. It should be noted that his trial before the Court Martial, gave birth to the appeal to the Court of Appeal and subsequently to the Supreme Court. The facts before the court did not indicate that the respondent faced or was facing double trial to ground the invocation of the principle of double jeopardy.

### **3. Facts and Review of *Nigerian Army v Aminun Kano***

The respondent, Aminun Kano, a Brigadier-General in the Nigerian Army, was the Commander of the Nigerian Army School of Finance and Administration (NASFA). In September, 2005, an order convening a General Court Martial to try him was signed by one Major General N.N Madza, Commander, Army Headquarters Garrison, Abuja. The Court Martial was accordingly set up pursuant to the provisions of the Armed Forces Act<sup>22</sup>. The seven counts of offences for which the respondent was charged were contained in the convening order for the General Court Martial and the charge sheet. The respondent pleaded not guilty to the charges. Consequent upon that, trial commenced with the prosecution calling eight (8) witnesses. After that, the respondent raised an objection to the jurisdiction of the trial court on the ground that the convening authority lacked the competence to convene the court martial in that the respondent was under the 81 Division of the Nigerian Army and the offences for which he was being tried were committed in Lagos whilst the convening authority was based in Abuja. In addition, the respondent also made a plea in bar of trial on the ground that by virtue of a document in which the charges against him were withdrawn and substituted with a 'final warning letter', which was admitted by the trial court as Exhibit P45<sup>23</sup>, the respondent could not have been subject to trial any more as that letter, i.e Exhibit P45, amounted to 'condonation' by respondent's Commanding Officer, as provided by section 171 of the Armed Forces Act. The objection was overruled and the plea was dismissed by the trial court and the respondent was called upon to open his defence. A no-case submission was made on behalf of the respondent by his counsel. The submission was also overruled. The respondent then opened his defence. He testified as defence witness No.1 (DW1) and called three (3) additional witnesses. At the close of the case, learned counsel for the respective parties, each addressed the trial court. The Court Martial then invited the Judge Advocate to sum up the case and he

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<sup>20</sup> At pages 467 and 469

<sup>21</sup> Supra

<sup>22</sup> Cap. A20, Laws of the Federation of Nigeria 2004.

<sup>23</sup> The Exhibit P45, which was the basis of the judgment of both the Court of Appeal and Supreme Court is a letter written by the Respondent's commanding officer and was basically a letter of warning and advice to the respondent on the same allegations subject matter of the eventual trial at the Court Martial. The letter was written right after charges were preferred against the Respondent at the Court Martial. In spite of the letter however, the Court Martial still proceeded to try the Respondent. The Respondent cited the letter as an exoneration and basis for invoking condonation to challenge the jurisdiction of the court. The letter was therefore the fulcrum of the case and was subject of intense scrutiny by both the Court of Appeal and the Supreme Court.

did so. After considering the evidence before it and the summing up, the Court Martial found the respondent guilty on all the charges. It convicted and sentenced him to various terms of imprisonment. He was also sentenced to a reduction in rank for each count. The respondent was subsequently retired by the Army Council. Dissatisfied, the respondent appealed to the Court of Appeal against the conviction, sentence and confirmation as well as the compulsory retirement. His appeal was allowed and the conviction was quashed. The sentence and compulsory retirement were all set aside. Dissatisfied, the Nigerian Army as appellant appealed against the decision of the Court of Appeal to the Supreme Court. The Supreme Court unanimously dismissed the appeal.

In the case, the Appellant and the Respondent each formulated five issues for determination before the Supreme Court. The Court decided the appeal based on two of these issues as formulated by the Appellant (issues Nos. 1 & 2), which read as follows:

1. Whether, having regard to the content of exhibit P45 and the circumstances of the case, the Court of Appeal was right when it held that the said exhibit constituted a condonation of the offence committed by the respondent thus precluding the appellant to court-martial him.
2. Whether the Court of Appeal was right in holding that following the issuance of exhibit P45, proceedings against the respondent at the court-martial amounted to double jeopardy when that issue was never raised by any of the parties in the appeal before it.

The Supreme Court unanimously dismissed the appeal and held that: Any serving person or officer of the Nigerian Armed Forces who is subject to service law especially the prevailing law as is now contained in the Armed Forces Act, Cap. A20, Laws of the Federation of Nigeria, 2004, who has been alleged to have committed some crimes and has been condoned by his commanding officer, under the Act, cannot be subjected to double jeopardy by standing trial before a court or tribunal of whatever nature and howsoever. To allow that would tantamount to making a mockery of that Act especially section 171 thereof.

Section 171 of the Armed Forces Act<sup>24</sup>, provides:

- (1) Where a person subject to service law under this Act –
  - (a) has been tried for an offence by a competent civil court or a court-martial under service law;
  - (b) has been charged with an offence under service law and has had the charge dismissed, or has been found guilty on the charge on summary trial under this Act; or
  - (c) has had an offence condoned by his commanding officer, he shall not be liable in respect of that offence to be tried by a court martial or to have the case dealt with summarily under this Act.

The reference heading of Exhibit P45 the letter written by the commanding officer of the respondent while the case was already before the Court Martial, reads; the import of this is that the letter was indeed intended from all purposes to be a substitute for the trial and was to be used to withdraw the charge before the Court Martial. The argument here is whether having regards to the nature of the allegation and the fact that the charges have already been preferred before the Court Martial, the commanding officer still has powers at that stage to withdraw the charges, and also whether the commanding officer can indeed sanction such withdrawal either by way of compounding the case by a pardon, plea bargain or condonation. Section 171 (1) (c) of the Armed Forces Act<sup>25</sup> provides for offences already disposed of not to be tried where 'it is an offence condoned by his commanding officer, he shall not be liable in respect of that offence to be tried by a court martial or to have the case dealt with summarily under this Act'. So at what stage would Section 171 (1) (c) of the Armed Forces Act be operational, before, or after the initiation of the action?

The import of Section 171 (1) (c) of the Armed Forces Act is that the accused shall not be liable in respect of that offence once there is evidence of condonation by the commanding officer. In other words,

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<sup>24</sup> Cap A 20, Laws of the Federation of Nigeria, 2004.

<sup>25</sup> Cap A 20, Laws of the Federation of Nigeria, 2004.

the accused cannot be liable *ab initio* once it is shown that the offence has been condoned by his commanding officer. Due to this remarkable difference in the provisions, it may be correct to conclude that condonation is not the same with double jeopardy and may only confuse the situation if treated as the same. It may also not be exactly correct in the strict sense of the law to construe condonation as provided in section 171 (1) of the Armed Forces Act with powers to compound cases. Although in the final analysis the outcome may appear similar. There was no existence of any evidence of a plea bargain intended to pave a path for the case to be compounded although prosecutors now have powers under the extant laws to compound cases following deals in accordance with the respective statute.

#### **4. Condonation, Double Jeopardy and Pardon**

On the present case of *Nigerian Army v. Aminun Kano* and the Exhibit P45 that forms the basis for judgments of both the Court of Appeal and the Supreme Court; manifests a case of condonation and not double jeopardy, for instance, paragraphs 1 and 2 of the exhibit states;

1. Reference A-F above are antecedent to reference G requesting the DAFA to stand down the disciplinary action against you on the grounds that you have already appeared for COA (A)'s interview. I have to register my utmost displeasure for your misdemeanor and hereby warn you seriously to desist forthwith in all forms; content and structure from acts already documented against you vide Reference F.
2. You are seriously warned against the following:
  - a. Disobedience to particular orders punishable under section 65(1) of the AFD 1993 (as amended) for failing to comply with the directive to withdraw a letter you initiated directly to NACOL without clearance from HQ NAFC.
  - b. Conduct to the prejudice of service discipline punishable under section 103(1) of the AFD 1993 (as amended), for disregarding proper channel of communication by corresponding directly with AHQ Dept. of MS on your complaint about posting within the NAFC.
  - c. Disobedience to particular orders punishable under section 56(2) of the AFD 1993 (as amended), for failure to comply with a directive to withdraw the letter to AHQ Dept. of MS.

The Commanding Officer then concluded in Exhibit P45 with the following words: 'The foregoing is presented hopefully for ease in your change process. You are seriously warned'. The import here is that the respondent should not in the first place have been charged since there was evidence of such condonation; also it may be deduced that even after the commencement of the trial, where such record of condonation is presented, the trial should have been terminated solely on the basis of Section 171 (1) (c) of the Armed Forces Act only. It is our submission that the decision in *Aminun Kano's* case, in the manner given, does not represent the correct position of the law for the following reasons: One, the court in its judgment took the provision of section 36 (9) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, as if it is one and the same thing with the provision of section 171 (1) (c) of the Armed Forces Act. The Court also concluded that by the facts of the case under review, the proceedings and sentence of Court Martial amounted to double jeopardy. The Court, in its leading judgment, per Muhammad, JSC, held that:

In its ordinary usage, double jeopardy connotes the unlawful procedure of subjecting a person to a trial on two separate occasions for the same offence. In law also, it connotes the act of being prosecuted or tried twice for substantially the same offence. In the instant case, the Court of Appeal rightly found that the respondent had been condoned by his commanding officer for the offences for which he was tried. Applying section 171 of the armed Forces Act to the facts of this case, the condonation in law was a bar to subsequent prosecution. Thus once an offence had been condoned, any subsequent trial of the same offence (s) would amount to double jeopardy<sup>26</sup>

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<sup>26</sup> At pages 461-462

It is trite law that for the constitutional provision of right against double jeopardy to apply, certain conditions must be satisfied.<sup>27</sup> These are:

- i. There must be a first trial which must be on a criminal charge;<sup>28</sup>
- ii. The first trial must have been before a court of competent jurisdiction;<sup>29</sup>
- iii. The first trial must have ended with a conviction or an acquittal;<sup>30</sup> and
- iv. The offence for which the accused is now being charged must be the same, or have the ingredients, as the first offence for which he was tried.<sup>31</sup>

In the case of *State v. Duke*,<sup>32</sup> the court described double jeopardy as: 'a doctrine which provides that no person shall be in jeopardy of life or limb twice for the same offence. The elements of jeopardy are the hazards of a criminal trial—the ordeal, anxiety, embarrassment and expenses of prosecution together with the fear of possible conviction'.<sup>33</sup> In *R v. Jinadu*<sup>34</sup>, the accused person was a Police officer who was tried in a Police orderly room for use of violence on persons in his custody. He was acquitted of the offence but ordered to be downgraded in rank. Subsequently, he was tried for assault under the Criminal Code based on the same set of facts. His plea of *autrefois acquit* (that there was trial and acquittal) was refused on the ground that the trial before the orderly room was for indiscipline and not a criminal charge.<sup>35</sup> In the case under review, there was no evidence of any previous trial. This is notwithstanding the fact that the Court, in its judgment as cited above, used the phrase *for the offences for which he was tried*. So the issue of double trial or jeopardy should not have arisen. In the circumstance, reference to section 36 (9) of the Constitution and basing the court's decision on same was out of context and wrong, in the circumstance.

Two, the decision of the court wrongly, in our view suggested that the provision of section 36 (10) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, is the same thing with section 171 (1) (c) of the Armed Forces Act, as well as the right against double jeopardy as contained in section 36 (9) of the same Constitution. The Court held that:

Section 36 (10) of the Constitution of the Federal Republic of Nigeria, 1999 lays down the principles of criminal law that where a person accused of committing a criminal offence which is recognized by law and where he has shown that he has either been pardoned of the offence by the appropriate authority or that he has been tried by a court of law or a tribunal set up by law, then he cannot be subjected to any further trial by any court or tribunal on that same offence. A bar to further prosecution has been placed between him and the offence. In the instant case, by subjecting the respondent to another series of punishments, convictions, sentences before another body, whether sitting as a panel, a tribunal, a court of law including the Court martial, in spite of all the warnings, reprimands in strong terms, which were capable of portraying the respondent as an 'irresponsible' senior officer of the Nigerian Army, would mean subjecting the respondent to double jeopardy.<sup>36</sup>(Underlining, ours for emphasis.)

The questions to ask at this stage are:

- a. Is it appropriate to use or link the principle of double jeopardy to the principle of pardon even in situations where there was no earlier trial or prosecution, as in the instant case?

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<sup>27</sup>Hambali, U.D.U (2012) Practice and Procedure of Criminal Litigation in Nigeria; Feat Print and Publish Ltd., Lagos, Nigeria. P.421

<sup>28</sup>Imade v. I.G.P (1993) 1 NWLR (PT. 271) 608 at 617-618

<sup>29</sup> R v. Hodge 6 NLR p.56; Umeze v. State (1973) 6 S.C p.221

<sup>30</sup> Section 36 (9) of the Constitution, op cit

<sup>31</sup> *ibid*

<sup>32</sup> (2003) FWLR (PT. 171) 1654

<sup>33</sup> *Ibid* at 1685-1686

<sup>34</sup>(1948) 12 WACA 368. See also Imade v. I.G.P (Supra)

<sup>35</sup> See also Chief of Air Staff v. Iyen (2005) ALL FWLR ( PT. 252)

<sup>36</sup> At pages 467 and 469

- b. Was Aminun Kano prosecuted earlier on by the Army or howsoever, to warrant the use of the phrases: ‘further prosecution’ and ‘further trial’, in the above quoted judgment of the Court in the case under review?
- c. Is the pardon being referred to in the name of condonation in the Armed Forces Act<sup>37</sup> one and the same thing with that being referred to in the Constitution?<sup>38</sup>

There is no doubt that section 36 (10) of the Constitution, if read in conjunction with sections 175 (1) (a) and 212 (1) (a) of the same Constitution, can accommodate the provision of section 171 (1) (c) of the Armed Forces Act, in the sense that a person can be pardoned even where he was never tried and convicted. A learned author, Hambali<sup>39</sup>, while interpreting these sections, opined that it is clear from the effect of the above provision that the term pardon relates to-

- i. An offence that has been charged (e.g. with which a person is concerned) which is known as amnesty or general pardon.
- ii. An offence that has been charged for which no conviction has been secured (e.g. with which a person is concerned) which is also known as amnesty or general pardon;
- iii. An offence for which a conviction has been secured (e.g. of which a person has been convicted) which is known as pardon.<sup>40</sup>

However, what is disturbing about the case under review is the findings of Court in mixing up the principles of double jeopardy and pardon as if they mean one and the same, and also in the use of the phrases: ‘further trial’ and ‘further prosecution’, suggests that the respondent was once tried for the same offences before being tried by the Court Martial. Osamor<sup>41</sup> opined that:

... This forms the basis of the plea of pardon to a criminal charge. The plea differs from autrefois acquit or convict. In a plea of pardon, the accused person is saying that the appropriate authority has pardoned his conviction, while an accused person who pleads autrefois acquit or convict is saying that having been tried by a court of competent jurisdiction, he should not be tried again for the same offence.

In the circumstance, if the honourable court, in the case under review, had confined itself to the provision of section 171 (1) (c) of the Armed Forces Act, dealing with condonation which was given the same meaning as pardon, as the Court of Appeal did in *Asake v Nigerian Army Council*<sup>42</sup>, without taking a voyage to the Constitution, it would have been better and neater, and the need for this paper might not have arisen. In *Asake v Nigerian Army Council*<sup>43</sup>, the Court of Appeal, per Fabiyi, J.C.A (as he then was), held: ‘In the instant case, since P.W 1 had asked the appellant to pay and that there would be no trouble, he condoned the alleged act of the appellant.’<sup>44</sup>

## 5. Conclusion

There is no doubt that the right not to be subjected to double trial, otherwise known as the right against double jeopardy and the right not to be tried for an offence for which one has been pardoned, are among the fundamental human rights enshrined in the Constitution of the Federal Republic of Nigeria, 1999, as amended. It is also true that the Armed Forces Act<sup>45</sup> in section 171 (1) (c), also recognizes and makes provision for the right not to be tried for an offence condoned by a commanding officer. These rights came

<sup>37</sup> Op cit at Section 171 (1) (c)

<sup>38</sup> Section 36 (10) of the Constitution, Op cit

<sup>39</sup>Hambali, Y.D.U (2012) Practice and Procedure of Criminal Litigation in Nigeria, Feat Print and Publis Ltd., Lagos, Nigeria.

<sup>40</sup>Op cit, at page 425

<sup>41</sup>Osamor, B. (2012) Criminal Procedure Laws and Litigation Practices (2<sup>nd</sup> Edition) Dee-Sage (Books+Prints), Manchester, U.K. Pp.321-322

<sup>42</sup>(2007) 1 NWLR (PT. 1015) 408 at 427. This case was also cited and relied upon by the Supreme Court in the case under review.

<sup>43</sup> Supra

<sup>44</sup> Supra

<sup>45</sup> Op cit



into play in the Supreme Court's decision in *Nigerian Army v Aminun Kano*.<sup>46</sup> However, the Court in its application of these rights missed the point when it concluded that 'by the facts of the case, what the Court Martial did in that case amounted to double jeopardy and in violation of the provision of section 36 (9) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, among others' because of the fact that there is no evidence of any previous trial or prosecution of the respondent prior to his arraignment and trial by the Court Martial. It was the holding of the Supreme Court that in the instant case, the Court of Appeal rightly found that the respondent had been condoned by his commanding officer for the offences for which he was tried. Applying section 171 of the Armed Forces Act to the facts of this case, the condonation in law was a bar to subsequent prosecution. Thus once an offence had been condoned, any subsequent trial of the same offence (s) would amount to double jeopardy

With respect to the honorable court, this conclusion is wrong, and the Court, if faced with similar facts in future, should be wary of mixing up and treating as same, the principle of double jeopardy as enshrined in the Constitution of The Federal Republic of Nigeria, 1999, as amended, with condonation as provided for in section 171 (1) (c) of the Armed Forces Act. It will be more accurate to adopt the perspective and reasoning of the Court of Appeal in the case of *FRN v. Igbidion*<sup>47</sup> where each one of the principles identified and discussed above as invoked or connected thereto the case under review where in careful details distilled and explained. As explicated in this paper, the Courts have brought out the definitions and the distinctions between double jeopardy on the first hand, pardon on the second and condonation on the other. The Court of Appeal in *FRN v. Igbidion*<sup>48</sup> defined condonation in the following words:

Condonation according to Black's Law Dictionary 8th Edition at page 315 is defined as: 1. A victim's express or implied forgiveness of an offence, especially by treating the offender as if there had been no offence. 2. Condonation is not usually a valid defence to crime. 3. One's spouse's express or implied forgiveness of a marital offence by resuming marital life and sexual intimacy. Also, Itse Sagay in his textbook – Nigerian Family Law at page 393 defined legal condonation as: 'In law, there is condonation when one spouse, with full knowledge of the matrimonial wrong committed by the other spouse, reinstates the offending spouse to his or her earlier marital position, with the intention of forgiving or remitting the wrong on the condition that the spouse whose wrong is so condoned does not hence, forth commit any further matrimonial offence. Condonation has two essential ingredients: 1. Forgiveness by the wronged spouse, and 2. Reinstatement of the offending spouse to his former position.

The Court of Appeal per Ogunwimiju JCA (as he then was) also went on and provided the framework for the application of the principle of condonation and whether it can be applied in criminal cases:

...I am of the humble opinion that a serious crime can only be condoned by the victim. This is due to the fact that even though the crime is committed against individuals and the State, it is the State that prosecutes the offender and not the victim of the offence. Of course condonation can apply to any civil matter as may be deduced from the conduct of the parties and in situations where the statute specifically provides for it. I agree with learned appellant's counsel that by virtue of the provision of S.33 of the Federal High Court Act, criminal proceedings before the Federal High Court shall be conducted substantially in accordance with the provisions of the Criminal Procedure Act and the Federal High Court Act. See *Alamieyeseighav. FRN* (2006) 16 NWLR Pt. 1004 Pg.1 at 60 - 62, 65, 92 and 96. There is no provision in the CPA or the Federal High Court Act empowering the court to apply the doctrine of condonation. I am of the humble view that

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<sup>46</sup> Supra

<sup>47</sup> Supra

<sup>48</sup> Supra p.4.

condonation is NOT and CANNOT apply as a principle, to criminal acts and trials except when the statute allows it.

The underlined aspect of His Lordship's finding is for emphasis, and in order to relate it to the case under review in which section 171 of the Armed Forces Act, which provides for condonation in law as a bar to prosecution *ab initio* is applicable. It is our submission that the applicability of section 171 of the Armed Forces Act is exclusive and unrelated to the principles of double jeopardy and pardon and we urge the Supreme Court to so hold where confronted with the same set of facts in the future.