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Judicious Exercise of Judicial Discretion – Meaning, Extent and Exceptions Through Decided Cases

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Abstract

The phrase “judicial discretion must be exercised judiciously” is regularly employed in the adjudicatory system although its exact meaning, extent and exceptions remain largely misunderstood. In many instances, this ageless phrase is interpreted to mean that a Court that has discretion over a matter can decide anyhow it pleased. Deploying the doctrinal research method, this paper showcased many ways in which Courts are conferred with discretion under their respective Rules including the Court of Appeal Rules, 2021 and Supreme Court Rules, 2024. Following critical analysis of relevant judicial decisions, the paper found that these decisions are unanimous that exercise of discretion is almost sacred and inviolable although it is circumscribed by the guiding principle that judicial discretion must be exercised judiciously. Hence, where judicial discretion is injudiciously exercised, the appellate Court will intervene. The paper recommended that a trial Court must ensure at all times that its exercise of discretion is logical and within the law in order to prevent its discretionary decision from being set aside on appeal. In the same wise, appellate Courts should not be too quick in fettering the exercise of judicial discretion since it is an indispensable tool in the administration of justice.

Keywords: Judicial discretion, judicious, court, appellate, interfere.

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1. Introduction

Judicial discretion is an invaluable stratagem or scheme in the administration of justice ecosystem. Judicial discretion is a sacred power which avails a Judge to enable him dispense justice dispassionately. Owing to the importance of discretion, Courts do not make it a practice to lay down rules and principles that would fetter the exercise of its discretion or the discretion of the lower Courts. In matters of discretion, no one case is an authority for the other. Likewise, the fact that the appellate Court would have exercised its discretion differently from that of the lower Court is not sufficient reason to interfere with the exercise of discretion by the lower Court. A Court cannot be bound by a previous decision to exercise its discretion in a regimented way because that would be putting an end to discretion. The Court will not interfere with the exercise of discretion

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in the absence of proof that it was wrongly exercised. No hard and fast rules can be laid down as to the exercise of judicial discretion by a Court, for the moment that is done, the discretion is fettered.¹ The relevant question at this stage is whether the above restatement of the principles that provide the justification for exercise of discretion should be interpreted to mean that a Court cannot be guided by discernible principles when exercising judicial discretion? This query becomes highly relevant given that it is also trite that the exercise of judicial discretion must be judicious.

Against this backdrop, the aim of this paper is to examine what judicial and judicious exercise of discretion connotes and what a Court of law will be permitted to do in the exercise of its discretion, and conversely, what it will not be allowed to do in the guise of exercise of discretion. Put differently, this paper will be examining how the different Rules of Courts confer discretion on a Court and what established general principles should guide a Court in the exercise of its discretion.

2. Meaning of “judicial discretion” and exercise of judicial discretion judiciously

Rules of Court often confer discretion on Courts over certain matters. That is judicial discretion. Ordinarily, “discretion” is the power or right to decide according to one's judgment. In *Pere v Ajuwa*² the apex Court relied on the old English case of *State v William*³ to define discretion as “a power or right conferred upon public functionaries by law of acting officially in certain circumstances according to the dictates of their own Judgment and conscience, uncontrolled by the judgment and conscience of others.” Jurisprudence has emerged that discretion simpliciter is different from judicial discretion. In *INEC v Advanced Congress of Democrats (ACD) & Ors*,⁴ Saulawa, JSC, interpreted the terms “discretion” and “judicial discretion” as follows:

The term discretion denotes a conduct and management exercised devoid of any restraint; the ability or tendency to act with reasonable degree with prudence and propriety. 'Judicial discretion' connotes the exercise of decision by a Court or tribunal (judge) based on what is fair under the circumstances, and guided by the rules and principles of law. Judicial discretion has been aptly defined as: ‘A Court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right...Also termed legal discretion...A Court's discretionary act may be overturned only after a showing of abuse of discretion.’ See *Black's Law Dictionary*, 11th Edition 2019 @ 585 - 586.

Furthermore, in *Ajuwa & Anor v SPDC Nig Ltd*,⁵ it was held among other things that

...in the New International Comprehensive Dictionary of the English Language - Encyclopedia Edition at page 365, the word "discretion" was defined as - "the act or the liberty of deciding according to justice and propriety, and one's idea of what is right and proper under the circumstances without willfulness or favour.

Succinctly stated, "discretion" is the power or right to decide according to one's judgment, while "judicial discretion" is the exercise of judgment 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 act

¹ These principles were enunciated in cases like *Anyah v African Newspapers (Nig) Ltd* (1992) LPELR (511) 1 at 20-21, *Ajuwa v SPDC* (2011) 12 SCNJ 596, *Nwadiogbu v Anambra Imo River Basin Development Authority* (2010) 12 SCNJ 212 and *Unity Bank Plc v Eleson Investment Ltd* (2022) LPELR-59045(CA) (Pp. 45-46 paras. C), per Ogakwu, JCA.

² (2011) LPELR-8243(SC).

³ R.II, 431 A.2d 1229, 1233.

⁴ (2022) LPELR-61068 (SC) (Pp. 56-57 paras. C).

⁵ (2011) LPELR-8243(SC) (Pp. 51-52 paras. D) per Muntaka-Coomassie, JSC.

when a litigant is not entitled to demand the act as a matter of right.⁶ Although it is a requirement of law that judicial discretion should be exercised judiciously but no Rule of Court has affixed specific meaning or interpretation to what it means to act judicially and judiciously. However, these two or twin phrases delimit how discretion should be exercised by a Court. There is discretion to exercise where the law does not prescribe any particular and mandatory/obligatory procedure or style to be adopted by a trial Court in the discharge of its primary duty of assessment or evaluation of the evidence adduced before it or application made to it. In such situation, the manner, way, method or style or procedure for assessment or evaluation of evidence or grant or refusal of application by a trial Court is not rigid or fixed but flexible and entirely at its discretion. However, like all other judicial discretion, it is subject to being exercised judicially or judiciously. In *Jagundina & Anor v Okedairo*,⁷ it was held that the phrase "acting judicially" simply imports the consideration of the interests of both sides in a case and weighing them in line with established principles of law in order to arrive at a just decision." In addition, in *Eronini v Iheuko*⁸ it was held that to act judiciously means to proceed from or show sound judgment marked by discretion, wisdom and good sense. Once a trial Court is shown on the record to have evaluated the evidence in line with established principles of law and justice by placing it on the imaginary scale of justice no matter the style, manner or procedure used, the evaluation would be proper and this Court would have no justification to interfere with such a method merely because it would have used a different manner in the evaluation or assessment of the evidence.

Conclusively, the meaning of "judicially" and "judiciously" was aptly summated per Affen, JCA, in *Diamond Bank Plc & Anor v Topbrass Aviation Ltd*⁹ when held in that 'judicially' means the discretion must be exercised within the precincts of law, whilst 'judiciously' implies that the exercise of discretion must take into cognisance all the facts and surrounding circumstances of the case at hand and be replete with intellectual candour and tenacity of mind and purpose.

3. Why judicial exercise of discretion is a nebulous concept

The segment above illustrated that it is an irreducible minimum requirement that judicial discretions must be exercised judiciously but it did not disclose that the phrase "judicious exercise of judicial discretion" is a nebulous concept. Exercise of judicial discretion judiciously may arguably be said to clash with known principles of binding precedence for a number of reasons such as the underlisted namely:

- (a) The facts of two cases are not always the same. Hence, Courts do not make it a practice to lay down rules and principles that would fetter the exercise of its discretion or the discretion of the lower Courts.
- (b) In matters of discretion, no one case is an authority for the other.
- (c) The fact that the appellate Court would have exercised its discretion differently from that of the lower Court is not sufficient reason to interfere with the exercise of discretion by the lower Court.

⁶ Per Augie, JSC in *INEC v Advanced Congress of Democrats (ACD) & Ors* (2022) LPELR-1068(SC) (Pp. 44-45 paras. D).

⁷ (2022) LPELR-57149(CA) (Pp. 29 paras. E) per Ojo, JCA.

⁸ (1989) 2 NWLR (Pt. 101) 40. See also *ACB v Nnamani* (1991) 4 NWLR (Pt. 786) 486 and *Enakhimion v Edo Transport Services* (2006) All FWLR (Pt. 334) 7882.

⁹ (2022) LPELR-59317(CA) (Pp. 21-22 paras. E).

- (d) A Court cannot be bound by a previous decision to exercise its discretion in a regimented way because that would be putting an end to discretion.
- (e) The Court will not interfere with the exercise of discretion in the absence of proof that it was wrongly exercised.
- (f) No hard and fast rules can be laid down as to the exercise of judicial discretion by a Court, for the moment that is done, the discretion is fettered.

These principles were enunciated in a long line of cases like *Anyah v. African Newspapers (Nig) Ltd*,¹⁰ *Ajuwa v SPDC*¹¹ and *Disa v Oyinwola*.¹² Notwithstanding the foregoing, as will be shown below, Rules of superior Courts are often couched in many different ways to authorise the Court to exercise discretion on sundry matters.

4. Examples of provisions in Rules of Courts that allow for exercise of discretion

Rules of practice and procedure in superior Courts often make provisions that allow for the discretion of the Court. As shown below, these are usually couched in different phrases or terms all of which connote discretion of the Court over the subject matter. Examples include but are not limited to the following –

- (i) “Court may deem just”

In the Supreme Court of Nigeria, under Order 11, Rule 4 of the Supreme Court Rules, 2024, it is provided regarding Grounds outside notice that “The Appellant shall not without the leave of the Court urge or be heard in support of any ground of appeal not mentioned in the Notice of Appeal, but the Court may in its discretion allow the Appellant to amend the Notice of Appeal upon payment of the fees prescribed for making such amendment and upon such terms as the Court may deem just”. (Emphasis supplied).

- (ii) “As the court may deem fit” or “as he deems fit”

Regarding Non-compliance with condition of appeal in the Supreme Court, Order 11, Rule 17(3) of the Supreme Court Rules, 2024 provides that “If the Respondent alleges that the Appellant has failed to comply with any part of the requirements of Order 6 Rule 3 of these Rules, the Court, if satisfied that the Appellant has so failed, may dismiss the appeal for want of diligent prosecution or make such other order as the Court may deem fit”. (Emphasis supplied).

In the National Industrial Court of Nigeria, with respect to setting aside judgment in default, Order 35, Rule 7 of the NICN Civil (Procedure Rules) 2017 enacts that “Any judgment by default whether under this Order or under any Order of these Rules shall be final and remain valid and may only be set aside upon application to the Court on grounds of fraud, non-service or of lack of jurisdiction and upon such terms as the Court may deem fit”. Furthermore, Order 38, Rule 6 of the NICN Civil (Procedure Rules) 2017 provides that “(1) Where a cause is struck out under rule 1 of this Order either party may apply for the cause to be re-listed on the Cause List on such terms as the Court may deem fit. (2) Any judgment obtained where a party did not appear at the trial may be set aside by the Court upon such terms as it may deem fit”. (Emphasis supplied).

¹⁰ (1992) LPELR (511) 1 at 20 -21.

¹¹ (2011) 12 SCNJ 596.

¹² (2000) 10 NWLR (Pt. 746) 116,

On the other hand, in the High Court of Benue State, with respect to Originating Summons, it is provided under Order 6 of the Benue State High Court (Civil Procedure) Rules, 2021 that “A Judge shall not be bound to determine any such question of construction if in his opinion it ought not to be determined on originating summons but may make any such orders as he deems fit”. (Emphasis supplied).

(iii) *“Court may deem appropriate”*

Order 11, Rule 17(4) of the Supreme Court Rules, 2024 provides regarding non-compliance with condition of appeal that “An Appellant whose appeal has been dismissed under this Rule may apply by motion on notice within sixty (60) days from the date of dismissal that his appeal be restored. Any such application may be made to the Court and the Court may, where exceptional circumstances have been shown, cause such appeal to be restored upon such terms as it may deem appropriate”. (Emphasis supplied).

(iv) *“Court may deem reasonable in the circumstances of the case”*

Regarding power of the Supreme Court to accelerate hearing in exceptional circumstances, Order 16, Rule 12 of the Supreme Court Rules, 2024 provides that “The Court may, where it considers the circumstances of an appeal to be exceptional, or that the hearing of an appeal must be accelerated in the interest of justice, waive compliance with the provisions of this Order in so far as they relate to the preparation and filing of brief of argument, either wholly or in part, or reduce the time limit specified in the Order, to such extent as the Court may deem reasonable in the circumstances of the case”. (Emphasis supplied).

(v) *“Court may, if it thinks it fit” or “make such order as it thinks fit”*

Regarding the powers of the Court of Appeal to New Trial, Order 4, Rule 9(1) of the Court of Appeal Rules, 2021 provides that “On the hearing of any appeal, the Court may, *if it thinks fit*, make any such order(s) as could be made, pursuant to an application for a new trial or to set aside a verdict, finding or judgment of the lower court.” In addition, Order 10, Rule 3 of the Court of Appeal Rules, 2021 provides regarding effect of Non-compliance with Rules on preliminary objection that “Where the Respondent fails to comply with this Order, the Court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the Respondent or may make such other order as it thinks fit”. (Emphasis supplied).

(vi) *“Court may deem effective and just”*

Order 7, Rule 9 of the NICN Civil (Procedure Rules) 2017 provides regarding substituted service that “Where prompt service of notice or documents authorized to be served by these Rules cannot be effected in any manner provided in this Rule, a party may by motion ex-parte move the Court for an order of substituted service to be effected by way of posting, publication in the media or any other means possible as the **Court may deem effective and just.**” (Emphasis supplied).

(vii) *“Court may deem proper”*

Under Order 12, Rule 3 of the NICN Civil (Procedure Rules) 2017, “Where either of the parties fails or refuses to initiate a pre-trial conference as required by sub-rule 2 of this Rule, the Court may order that a pre-trial conference be held within such specified time as the Court may deem proper”. (Emphasis supplied).

(viii) “Court may deem right”, “as the court shall direct” or “deem fit to give”

Regarding Fees and costs that are payable in the National Industrial Court of Nigeria, Order 52, Rule 4 of the NICN Civil (Procedure Rules) 2017 provides that “Court fees payable by a person admitted to sue or defend in forma pauperis may be remitted in whole or in part as the Court may deem right, and a person so admitted to sue or defend shall not, unless the Court otherwise orders, be liable to pay or to be entitled to receive any costs”. On the other hand, Order 37, Rule 7(3) of the NICN Civil (Procedure Rules) 2017 enacts that “All monies so recovered or adjudged or ordered or awarded or agreed to be paid shall be dealt with as the Court shall direct. The directions thus given may include any general or special directions that the Court may deem fit to give, including directions on how the money is to be applied or dealt with and as to any payment to be made either directly or out of money paid into Court to the Claimant or to the guardian of the claimant in respect of money paid or expenses incurred or for maintenance or otherwise for or on behalf of or for the benefit of the person under legal disability or otherwise or to the claimant’s counsel in respect of costs.” (Emphasis supplied).

5. Principles that guide the exercise of the court’s discretion – How Judicial discretion is exercised

It must be accentuated that no matter how the clause that confers discretion on a Court is couched as shown in the foregoing segment, judicial authorities are unanimous that the guiding principles on exercise of judicial discretion are trite and settled. Mohammed, JSC, in *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Limited*¹³ adumbrated the principles as follows:

Judges and Courts exercise their discretion in accordance with rules of Court and justice and not according to private opinion. An exercise of discretion is a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of law.

The apex Court has repeatedly held that it is trite law that a valid exercise of discretion is one that is exercised judicially and judiciously having regard to the facts and circumstances of the case. This ageless principle was reiterated in *Aboseldehyde Laboratories Plc v Union Merchant Bank Ltd & Anor*¹⁴ and lately in *El-Asbab Hotel & Investment Ind (Nig) Ltd & Anor v ECO Bank*.¹⁵ Waziri, JCA, admirably stated in *Bello & Ors v Odofin & Ors*¹⁶ that judicial discretion is not an indulgence of a judicial whim. It is the exercise of judicial judgment based on facts and guided by the law or equitable decision which must be exercised judicially and judiciously.

Against the foregoing, the relevant question at this juncture is, how is judicial power is exercised? First point to be noted is that judicial power is the foundation of jurisdiction. In *Osadebay v A-G Bendel State*,¹⁷ the Supreme Court, per Belgore JSC, pronounced on the relationship between the exercise of judicial powers and the exercise of jurisdiction as follows:

If a court cannot exercise judicial powers, it cannot exercise jurisdiction. In other words, if it has no judicial powers, whatever jurisdiction the Constitution or law

¹³ (2003) 15 NWLR (pt. 844) 469 at 488.

¹⁴ (2013) LPELR-20180(SC) (Pp. 47 paras. A).

¹⁵ (2024) LPELR-62448(SC) (Pp. 19-20 paras. F).

¹⁶ (2021) LPELR-55941(CA) (Pp. 28 paras. D).

¹⁷ (1991) LPELR-2781(SC) (Pp. 29 paras. C).

vests in it cannot be exercised. This is because the jurisdiction conferred, is an area mapped out by the Constitution or law for the exercise of judicial powers.

Judicial power must be exercised judiciously and never arbitrarily. In *Eye v FRN*,¹⁸ it was held that the essential difference between an arbitrary or wrongful exercise of discretion, on the one hand, and judicial cum judicious exercise of it on the other is that whereas the former is the exercise of it with either no reason at all or with wrong or insufficient, correct and convincing reason. While judicial and judicious exercise of discretion is acceptable in law, an arbitrary exercise of it is not. The following principles reinforce the judicious exercise of discretion namely-

(a) Court is dominus litis (master of the suit or proceedings)

The question is often asked whether exercise of discretion is a matter exclusively for the Court and whether it is for Counsel to determine for the Court how to exercise the discretion. The Supreme Court answered the question in the negative in the case of *State v Moses*¹⁹ when it held that in civil Law, the Court is recognized as the *dominus litis*, meaning "the party who makes the decision in a lawsuit, usually, as distinguished from the attorney". Upon the facts of that case, it held that the trial Court should not have left the decision as to whether or not to admit the alleged confessional statement at the discretion of the Learned counsel appearing before it. The decision whether or not to admit the statement in evidence was purely for the trial Court to make and in doing so, it ought to have exercised its discretion judicially and judiciously.

(b) Court must be fully appraised of facts relevant for the exercise of its discretion

Much as where there is discretion to exercise, the Court is *dominus litis*, however, as held by the Supreme Court, per Uwaifo, JSC, in *Planwell Watershed Ltd. & Anor v Ogala*²⁰ "a court of equity must be fully appraised of facts relevant for the exercise of its discretion otherwise it will be in breach of the principles upon which it can properly act if it were to exercise that discretion".

(c) Application for adjournment

Grant or refusal of an application for adjournment is discretionary. It is within the discretion of the Court. Hence, as held in *Ogunsanya v State*,²¹ in exercising its discretion, no case can be authority for the other because that in effect would be an end to discretion. Each case has its own peculiar facts which cannot be the same with the others although there may be similarities. In exercising its discretion, the Court must consider the totality of the cases. There is no dispute in the fact that the power of the Court to decide whether or not a pending case will be adjourned is a discretionary power, and that being so, any party who wants the Court to grant an adjournment in his favour must proffer before the Court sufficient material facts upon which the exercise of that discretion can be predicated.

6. Where discretion may not be exercised, and if exercised improperly, may be impeached by the appellate court

As already noted, judicial discretion is not exercised as a matter of fancy. Although exercise of discretion belongs to the trial Court, discretion may exist but must never be exercised injudiciously

¹⁸ (2018) LPELR-43599(SC) (Pp. 19 paras. C).

¹⁹ (2024) LPELR-62577(SC) (Pp. 15 paras. A).

²⁰ (2003) LPELR-2920(SC) (Pp. 14 paras. B-B).

²¹ (2011) 12 NWLR (Pt. 1261) 401 cited with approval in *Bello & Ors v Odofin & Ors* (2021) LPELR-55941 (CA) (Pp. 8-9 paras. E).

and wantonly. That will be invalid and inappropriate and this will be impeached by the appellate Court. Hence, discretion may not be exercised under the following circumstances namely:

(a) *Where condition precedent for exercise of discretion has not been met or satisfied, the jurisdiction of the Court has not been activated*

Discretion is not exercised in vacuo (in vacuum or isolation). For example, although the Court is vested with the discretion over application for extension/enlargement of time to appeal, however, an application for enlargement of time to appeal or to seek leave to appeal is not granted as a matter of mere routine. Every such application is to be granted or refused at the discretion of the Court. The Court must exercise its discretion judicially and judiciously. Therefore, every application for extension of time to appeal or to apply for leave to appeal which is not supported with an affidavit, setting out good and substantial reasons for the failure to appeal or apply for leave to appeal within the prescribed period or time, and grounds of appeal *prima facie* showing why the appeal should be heard, amongst others is bound to fail. Failure by an applicant to satisfy these two conditions would result in the dismissal of such application. This principle was upheld by the Supreme Court in the cases of *Sebastian Adigwe v Federal Republic of Nigeria*,²² *Virgin Atlantic Airways v Mrs. Francisca Pablo Amaran*²³ and in *C & N Investment Ltd v Sterling Bank Plc & Anor*.²⁴ Thus, where an appeal is to be with leave but none was obtained, the condition precedence for the validity of such appeal has not been fulfilled and as a result, the appeal is in law, said to be incompetent and the appellate Court is in consequence without jurisdiction to entertain same.

(b) *Application for bail, bail pending trial in capital offences and bail pending appeal*

There are mainly, two types of bails namely - (i) bail pending trial and (ii) bail pending appeal. The right of bail, a Constitutional right, is contractual in nature. The effect of granting bail is not to set the accused free for all times in the criminal process but to release him from the custody of the law and to entrust him to appear at his trial at a specific time and place. The object of bail pending trial is to grant pre-trial freedom to an accused whose appearance in Court can be compelled by a financial sanction in the form of money bail. The freedom is temporary in the sense that it lasts only for the period of the trial. It stops on conviction of the accused. It also stops on acquittal of the accused. In *Suleman & Anor v COP Plateau State*²⁵ the Supreme Court, per Tobi, JSC, held as follows regarding the contractual nature of bail

The contractual nature of bail is provided for in section 345 of the Criminal Procedure Code. The section provides that before any person is released on bail, he must execute a bond for such sum of money as determined by the police or the court on the condition that such a person must attend at the time and place mentioned therein until otherwise directed. And if the person is released on bail, the sureties must execute the same or another bond or other bonds containing conditions to the same effect. See generally *Local Government Police v Abiodun* (1958) WRNLR 212.

Different considerations attach to application for bail pending trial, application for bail pending trial in capital offences and bail pending appeal. The general rule is that bail pending trial, meaning before conviction, is a constitutional right although it is at the discretion of the Court. This principle

²² (2015) SC 115.

²³ (2021) 12 NWLR (Pt. 1789) 91.

²⁴ (2024) LPELR-62863(SC) (Pp. 8-9 paras. F).

²⁵ (2008) LPELR-3126 (SC) (Pp. 19-20 paras. E).

was expatiated by the Supreme Court in the case of *Patience Oko Eye v The Federal Republic of Nigeria*,²⁶ as follows:

Section 118(2) of the Criminal Procedure Act, in my view makes the grant of bail to an accused person standing trial before a High Court, purely a discretionary matter in the hands of the trial judge. The trite position of the law is that in exercising the jurisdiction given to him by the law in the grant or refusal of bail, the trial judge is bound to consider the weight of facts pleaded to, in an affidavit evidence placed before him. The determination of the criteria is quite important because the liberty of the appellant stands or falls by the decision of the Court. In performing the judicial function, the Court wields a very extensive discretionary power, which must be exercised judicially and judiciously. See *Bamaiyi v The State* (2001) 8 NWLR (Pt. 715) 270, *Ekwenugo v FRN* (2001) 6 NWLR (Pt. 708) 171 and *Dantata v Police* (1958) NRNL 3.

In exercising its discretion, the Court is bound to examine the evidence before it without considering any extraneous matter. The Court cannot exercise its whims indiscriminately. Similarly, there is no room for the Court to express its sentiments. I must say that, it is a hard matter of law, facts and circumstances which the Court considers without being emotional, sensitive or sentimental.

It was held in *Ekwenugo v FRN* (supra) that the issue of grant of bail by a trial Court calls for due exercise of discretion which entails the application of common sense based on a given set of facts and attendant circumstances in accordance with justice. The discretion must be exercised not only judicially, but judiciously as well.

With respect to bail pending trial in capital offences, it has been held in *Aliyu v C.O.P.*,²⁷ that under the section 35(7) of the Constitution of the Federal Republic of Nigeria, 1999 as amended, bail pending trial is not normally granted as a matter of course where the offence for which the applicant is charged is a capital offence punishable with death. However, special circumstances may arise in any particular case to warrant the exercise of discretion by any High Court trying such an accused person, to release him on bail pending his trial. The grant of bail pending trial in such circumstances is usually mainly on account of where there is no formal charge as required by law. In the instant case the trial Judge had referred to the charge before the Magistrate Court, that had no jurisdiction to try an offence of armed robbery, murder, and kidnapping, but that the Court still had the discretion whether or not to admit him to bail. Apart from the fact that, there was no formal charge as required by law, there was also no proof of evidence before the trial Judge, where he considered the Appellant's application for bail. It was held that it is from the proof of evidence that a Court will be persuaded whether or not to grant bail to an accused person, especially in an armed robbery charge; murder charge, and kidnapping charge so as to ascertain whether or not there is *prima facie* evidence. Thus, where the prosecution as in this case merely paraded to the Court the words "armed robbery, murder and kidnapping", and the trial Court accepted it and went ahead to refuse bail, it cannot be said to be fair. Trial Courts must always examine thoroughly the surrounding circumstances of each allegation of "armed robbery, murder, and kidnapping" before coming to a decision one way or the other because it is so easy for an enemy to make a false allegation of murder or robbery against a citizen to keep him "out of circulation". A Court that fails to look into

²⁶ (2018) LPELR-43599 (SC) per Sidi Bage, JSC. See also *University of Lagos v Olaniyan* (1985) 1 NWLR (Pt. 1) 156, *Saffidine v COP* (1965) 1 All NLR 54, *Ugboma v Olise* (1971) All NLR 8 and *Odusote v Odusote* (1971) All NCR 219.

²⁷ (2018) LPELR-45940(CA).

the facts relied on in support of a charge cannot be said to have exercised its discretion judiciously. Therefore, a situation where there is no material before the Court to show that an accused person is facing a charge of armed robbery, murder, and kidnapping including proof of evidence certainly qualifies as a special circumstance in which the Court can grant bail.²⁸

With respect to bail pending appeal, a convict who has lodged an appeal may be admitted to bail pending the determination of the appeal. Under section 28(1) of the Court of Appeal Act, 2004 as amended, it is provided that the Court of Appeal may, if it thinks fit, on the application of an appellant admit the appellant to bail pending the determination of his appeal. The cardinal principle here is that before conviction there is a presumption of innocence. After conviction, the convict, save under exceptional circumstances, has no right at all to bail.²⁹ Thus, the circumstances for bail pending appeal vary in from consideration of bail pending trial. This useful clarification was duly made in *Abubakar v State*.³⁰

Notwithstanding the above circumstances, the Supreme Court has often reiterated that it does not condone a situation where an earlier decision is capable of fettering the exercise of judicial discretion.³¹ In matters of judicial discretion, since the facts of two cases are not always the same, Courts do not make it a practice to lay down Rules and principles to fetter the exercise of its discretion or the discretion of the lower Courts. Thus, in matters of discretion, no one case is an authority for the other. Also, the fact that the appellate Court would have exercised its discretion differently from that of the trial Court is not sufficient reason to interfere with the exercise of discretion by the trial Court. A Court cannot be bound by a previous decision to exercise its discretion in a regimented way, because that would be, as it were, putting an end to discretion.³² To put into perspective the almost sacredness and inviolability of the exercise of discretion by a Court, Rhodes-Vivour, JSC, in *NNPC v Clifco Nig. Ltd*³³ stated as follows: “this court will not interfere with the way a trial court or the Court of Appeal exercises its discretion, but would be compelled to interfere if the discretion was wrongly exercised, or the exercise was tainted with some illegality or it is in the interest of justice to do so”.³⁴

7. Conclusion and recommendations

This paper established among other things that judicial discretion is an invaluable scheme but it is not an indulgence of judicial whim. To strike the required balance, where judicial discretion has been exercised bonafide uninfluenced by irrelevant considerations and not arbitrarily or illegally by the lower Court, an appeal Court will not ordinarily interfere. However, where injudiciously exercised, the appellate Court is entitled to impeach the exercise of judicial discretion by the lower Court. The circumstances which will warrant an appellate Court to interfere with exercise of judicial discretion include where it is shown (a) that there has been a wrongful exercise of the discretion such as where the trial Court acted under misconception of law, or under misapprehension of fact, in that it either gave weight to irrelevant or unproved matters or it omitted

²⁸ This was the kernel of the decision in *Emmanuel Chinemelu v COP* (1995) 4 NWLR (Pt. 390) 467 and *Anaekwe v COP* (1996) 3 NWLR (Pt. 436) 320.

²⁹ *Muri v I-GP* (1957) NRNLR 5 cited with approval in *Monye v Federal Republic of Nigeria* (2012) LPELR-14845(CA) (Pp. 15-16 paras. G), per Bada, JCA. (2013) LPELR-22188(CA) (Pp. 13-14 paras. E).

³⁰ See *Ajuwa v SPDC Nig Ltd* (supra); *Adisa v Oyinwola* (2000) 10 NWLR (Pt. 746) 116.

³² See *Nwadiogbu v Anambra/Imo RBDA* (2010) 12 SCNJ 212; *AG Rivers v Ude* (2006) 17 NWLR (Pt. 1008) 436 at 461; *Okeke v Oruh* (1999) 6 NWLR (Pt. 606); *Akujinwa v Nwaonuma* (1998) 13 NWLR (Pt. 583) 632 at 647.

³³ (2011) 4 SCNJ 107 at 127-128.

³⁴ See also *Vandighi v Hale* (2014) LPELR-24196 (CA) 52-53 paras. A, Per Sankey, (J.C.A).

to take into account matters that are relevant or (b) where it exercised or failed to exercise the discretion on wrong or inadequate materials and (c) in all other cases, where it is in the interest of justice to interfere. It is therefore recommended that a trial Court must ensure at all times that its exercise of discretion is logical and within the law. On the other hand, the appellate Courts should not be too quick in fettering the exercise of judicial discretion since it is an indispensable tool in the administration of justice.

Finally, "judicial discretion is a sacred power which inures to a Judge. It is an armour which the judge should employ judicially and judiciously in order to arrive at a just decision. Same should not be left to the whims and caprices of a party to the action."³⁵

³⁵ See B. Gardner (ed), *Black's Law Dictionary*, (Sixth Edition 1999) 466.