ATTORNEY-GENERAL OF KADUNA STATE V. MALLAM UMARU HASSAN (1985) NWLR (Pt.8) 483

In The Supreme Court of Nigeria

On Friday, the 12th day of July, 1985

Suit No: SC.149/1984

Between

ATTORNEY-GENERAL OF KADUNA STATE Appellants

And

MALLAM UMARU HASSAN Respondents

A.G. IRIKEFE, J.S.C. (Delivering the Leading Judgment):

Following upon an outbreak of communal violence at JIKAMSHI VILLAGE, in the KANKIA LOCAL GOVERNMENT AREA OF KADUNA STATE, one ABDUL RASHID UMARU lost his life, and arising therefrom, certain villagers were arrested and charged with the culpable homicide not punishable by death of the said ABDUL RASHID UMARU. After a preliminary hearing at the Magistrate's Court, some of those arrested were committed for trial at the High

Court. After arraignment at the High Court and the recording of pleas, the Solicitor-General of Kaduna State, MR. J. B. MAIGIDA who was leading the prosecution on behalf of the State, entered a note prosequi in respect of the charges, stating that he did so, in reliance upon Section 130(1) C.P.C. and Section 191(2)(c) of the Constitution of Nigeria, 1979. Thereupon, the learned trial Judge, AROYEWUN, J. struck out the charges, resulting in the discharge of the accused persons.

The respondent to this appeal Mallam Umaru Hassan, the father of the deceased ABDUL RASHID UMARU, being aggrieved by the action of the Solicitor-General, initiated the instant proceedings by means of an originating summons seeking a declaration on the incompetence of the Solicitor-General to terminate the criminal proceedings as he had done. For ease of understanding, I shall set out in full the affidavit grounding the originating summons as well as the summons itself.

Affidavit in support of originating summons.

I, Mallam Hassan Umaru (m) Moslem, Farmer, Nigerian citizen of Jikamskhi Village, Kankia Local Government Area, Kaduna State make oath and say as follows:-

1. That I am the plaintiff in the above suit.

2. That one Abdul Rashid Umaru now deceased is my son.

3. That the said Abdul Rashid Umaru died on 1/2/81 in suspicious circumstances.

4. That on 4/2/81 I identified the corpse of my said son at the Ahmadu Bello University Hospital Kaduna to the doctor who performed the post-mortem examination.

5. That following the death of my said son, the police arrested the following persons namely:-

Alhaji Idi Shugaba, Alhaji Dogara Aliyu, Alhaji Garba Abdullahi, Alhaji Balla Keffi and Alhaji Yaro Tella amongst others and charged them before the Chief Magistrate Court, Kaduna for the homicide of my said son.

6. That on 21/4/81 in Suit No. KMD/13x/81, I testified as a witness for the prosecution during the Preliminary Inquiry conducted by the court in respect of my said son's death.

7. That at the end of the Preliminary Inquiry, the enquiring magistrate held that a prima facie case in respect of the culpable homicide of my said son has been made out against the following persons namely:- Alhaji Idi Shugaba, Alhaji Dogara Aliyu, Alhaji Garba Abdullahi, Alhaji Balla Keffi and Alhaji Yaro Tella and committed them for trial at the High Court, Kaduna.

8. That the case came up for hearing before the High Court on 29/3/82 as Suit No.KDH/28/81.

9. That when the case came up before the High Court, the Solicitor-General of Kaduna State invoked powers of the Attorney-General of the State under Section 191(2) of the Constitution of the Federal Republic of Nigeria, 1979 and applied to withdraw the charges against the aforesaid accused persons.

10. That on 30/3/82, the trial Judge struck out the case on the ground that since the Solicitor-General represents the Attorney-General of the State, and as the State does not intend to continue with the trial that he has no choice other than to strike out the charges against the aforesaid accused persons and the charges were struck out accordingly. A copy of the proceedings before the court is hereby annexed as appendix 'A' to this affidavit.

11. That I know as a fact, that there is no person occupying the office of the Attorney-General of Kaduna State of Nigeria and to the best of my knowledge, the powers of the Attorney-General of Kaduna State have not been delegated to the Solicitor-General of Kaduna State.

12. That I swear to the contents of this affidavit conscientiously and sincerely believing the same to be true by virtue of the Oaths Act, 1963"

The annexure to the affidavit reads:-

"In the High Court of Kaduna State of Nigeria

Judicial Division

Holden At Kaduna

KDH/28/81

29th March, 1982

THE STATE

v.

1. IDI SHUGABA

2: ALHAJI DOGARA ALIYU

3. GARBA ABDULLAHI

4. ALHAJI BALA KEFFI

5. ALHAJI YARO TELLA

All the 5 accused persons in Court. Mr. MAIGIDA J. B., Solicitor-General for the State. Mr. Pat Aigbogun for all the accused persons.

COURT:- Charge read and explained to each of the accused persons and each asked whether he is guilty or not guilty of the offence or offences.

1st accused:- I understand the charges.

I am not guilty of them.

2nd accused:- I understand the charges.

I am not guilty of the 1st charge.

I am not guilty of the 2nd charge.

3rd accused:- I understand the charge.

I am not guilty of the 1st charge.

I am not guilty of the 2nd charge.

4th accused:- I understand the charge.

I am not guilty.

5th accused:- I understand the charge.

I am not my guilty.

Maigida:- I have exhaustively read the P.1 and the statement in the case diary made by each accused. From the evidence adduced at the lower court i.e. at the P.1. no reasonable tribunal should have preferred a charge against any of the accused persons. There is no evidence to support the basis on which the trial Magistrate at the lower court based his charges against the accused. There are conflicting evidence before the Ministry of Justice came in and after that no reasonable tribunal should have framed any charge. In view of the contradiction before the court below we have no evidence to offer as this would be a waste of the time of both the court, the accused and everyone connected with the administration of justice. I submit that we are not prosecuting the accused persons and they should be discharged. I apply under Section 130(1) C.P.C. and Section 191(2)(c) of the Constitution.

PAT AIGBOGUN:-

On one hand I have no objection to the application of the Solicitor-General and on the other hand I do not propose to make a cross application to protect the liberty of the accused persons. The provisions of Section 187, 185 and 189 have been met. The prosecution has told the court that evidence with which he is unable to continue to prove the guilt of the accused persons. I urge the court to apply Section 191(3) C.P.C. I urge the court to discharge the accused persons.

(JUSTICE KOLA AROYEWUN)

29/3/82

30TH MARCH, 1982

All the accused persons present.

J. B. Maigida, Solicitor-General for the State.

Pat Aigbogun for defence.

Ruling

This is a case of culpable homicide not punishable with death and abetment of the same against some of the accused persons.

At the hearing of this case the learned Solicitor-General informed me that he does not intend to prosecute any of the accused persons for the alleged offences since he was unable to adduce

any sufficient evidence in support of the charges against the accused persons due to contradictions in the evidence adduced at the lower court during the preliminary investigations. He cited Section 130 C.P.c. which to my mind is inapplicable. In any case he went further to say that he is applying under Section 191(1)(4) of the Constitution which provides to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person. As the learned Solicitor' General represents of course, the Attorney General of the State and since the State does not intend to continue with the trial I have no choice other than to strike out the charges against all the accused persons. The charges are hereby struck out.

(Sgd.)

JUSTICE KOLA AROYEWUN

30/3/82

The originating summons itself seeks a determination of the following questions:-

"1. Whether the Solicitor General, Ministry of Justice, Kaduna State can validly exercise the powers conferred on the Attorney General of Kaduna State by Section 191 of the Constitution of the Federal Republic of Nigeria 1979 when no person has been appointed to the office of the Attorney'97General of the State, and when any or all of such powers have not been specifically delegated to him by any persons holding the office of the Attorney-General of Kaduna State of Nigeria?

2. Whether the Solicitor-General of Kaduna State can in purported exercise of the powers of the Attorney-General under paragraph (c)

of sub-section 1 of Section 191 of the Constitution of the Federal Republic of Nigeria 1979 discontinue criminal proceedings against accused persons committed for trial at the High Court after preliminary inquiry by a magistrate when the powers conferred on the Attorney-General of the State by the said section have not been delegated to the Solicitor-General of Kaduna State by any person holding the office of the said Attorney-General of Kaduna State. ?

Claims against the defendant

A declaration that any purported exercise of the powers conferred upon the Attorney-General of Kaduna State, by the Solicitor-General of Kaduna State, under the provisions of Section 191 of the Constitution of the Federal Republic of Nigeria, 1979, in the absence of an incumbent to the office of the Attorney-General of Kaduna State is unconstitutional, unlawful, null and void and of no effect whatsoever."

It is common ground that, at all times relevant to the issues raised in the originating summons, no Attorney-General had been appointed for Kaduna State. The position remained the same until the inception of this military administration. The reason for this state of affairs is not, however, an issue in this case.

Two issues fell to be determined by the Kaduna High Court as could be seen from the reserved judgment of CHIGBUE, J., delivered on 30th August, 1982 at the end of submissions in the originating summons application. These were -

(a) Did the applicant Mallam Umaru Hassan have legal competence to bring the originating summons in order to challenge the action of the Solicitor-General in Suit KDH/28c/81 - in short, did he have locus standi?

(b) Did the Solicitor-General have competence to terminate the said criminal proceedings without such powers being expressly vested in him by an incumbent Attorney-General?

The learned judge, CHIGBUE, J., ruled that Mallam Hassan had locus standi to initiate the proceedings and went further to rule that the action which the Solicitor-General purportedly took under Section 191 of the Constitution of the Federal Republic of Nigeria, 1979, was 'incompetent, unconstitutional, unlawful, null and void and of no effect whatsoever.'

Being dissatisfied with the above decision, the Kaduna State Government went or appeal to the Court of Appeal on a number of grounds. I will refrain from setting these grounds down as the issues raised in them were raised again before us in this final appeal. The decision of the Court of Appeal was split, Nasir, P., Wali and Maidama, JJ.C.A. giving the majority opinion (and thus the judgment of the court) while Coker and Karibi-Whyte, JJ.C.A. gave the minority opinion. The two dissentient opinions were not, however, identical. Coker, J.C.A. (as he then was) took the view that the respondent to this appeal had no locus standi and preferred to rest his decision on this. He, however, as an obiter dictum, concluded that the Solicitor-General had competence to terminate the criminal proceedings. Karibi-Whyte, J.C.A. (as he then was) while holding that the respondent had no locus standi to intiate the proceedings yet came to the conclusion that the appeal by the State nevertheless succeeded on the ground that the Solicitor-General could exercise the powers of an Attorney-General under Section 191 of the Constitution of the Federal Republic of Nigeria 1979, the absence of an incumbent Attorney-General notwithstanding.

We took the view that the legal issues raised in this appeal are so fundamental that an opportunity should be given to all the State Attorneys-General (19 in number) as well as the Attorney-General of the Federation to make known their views as amici curiae. This court is extremely indebted to the Attorneys-General, for their

several contributions, which have assisted in no small measure, in putting into proper focus, the issues with which this appeal is concerned.

The grounds argued before us read as follows:-

1. The Federal Court of Appeal erred in law in holding that the respondent had locus standi to institute the civil suit No. KDH/130/82.

Particulars

(i) The originating summons does not disclose any real controversy between the respondent and the appellant.

(ii) If it can be said that the action instituted by the respondent relates to any particular subject, the subject matter could only be the criminal charge KDH/28/82 and the respondent had not shown he had any interest in that criminal charge.

2. The Federal Court of Appeal erred in law in holding that the learned trial judge of the Kaduna High Court had jurisdiction to hear and determine civil suit No. KDH/130/82

Particulars

(i) The originating summons taken out by the respondent does not disclose any cause of action or actionable dispute between the respondent and the appellant over which the learned trial judge could have exercised jurisdiction.

(ii) If it can be said that there is such actionable dispute between the respondent and the appellant that dispute can only be found on the criminal charge No. KDH/28/82 in respect of which there was a competent order of MR. JUSTICE KOLA AROYEWUN and over which the learned trial judge cannot exercise any power of review in the light of the provisions of Sections 284 and 285 of the Criminal Procedure Code.

(iii) In the absence of any actionable dispute between the respondent and the appellant the respondent could only be inviting the learned trial judge to engage in a mere academic exercise as any declarations made will turn out to be declarations in a vacuum.

3. The Federal Court of Appeal erred in law in holding that the civil Suit No. KDH/130/82 was not in the nature of an appeal.

Particulars

(i) The originating summons did not disclose any actionable dispute between the appellant and the respondent.

(ii) In the absence of any real controversy between the appellant and the respondent the learned trial judge by entertaining suit KDH/130/82 sat as a reviewing authority over a competent decision of a court of co-ordinate jurisdiction.

(iii) In the absence of a disclosed cause of action the learned trial judge should not have invoked his powers of jurisdiction.

4. The learned judges of the Federal Court of Appeal erred in law in holding that the Solicitor-General of Kaduna State cannot validly exercise the powers conferred on the Attorney-General of

the State under Section 191 of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter called the Constitution) in the absence of an incumbent in the office of Attorney-General of the State.

Particulars

(i) As no Attorney-General has ever been appointed for Kaduna State since the inception of the Constitution the Solicitor-General of Kaduna State can validly exercise the powers of the Attorney-General of Kaduna State by virtue of Section 191 of the Constitution and the doctrine of State necessity.

The learned Federal Court of Appeal judges erred in fact and law in holding that the doctrine of necessity does not apply in Kaduna State.

Particulars

(i) Since the coming into force of the Constitution an Attorney-General has never been appointed for Kaduna State because the Kaduna State House of Assembly has twice rejected nominations made by the Governor of Kaduna State.

(ii) In the absence of an Attorney-General for Kaduna State the Solicitor-General and the entire law officers of the State would not have been able to undertake criminal prosecution but for the provision of Section 191 of the Constitution."

Mrs. Donli, the learned Attorney-General for Kaduna State in making her case before us, as would be expected in an appellant - situation, stressed that she was relying on the dissent by Coker, J.C.A. (as he then was) and Karibi-Whyte, J.C.A. (as he then was).

These two opinions, as I had stated earlier on in this judgment, did not necessarily head in the same direction. Be that as it may, it was clear that the learned Attorney-General was making two points, namely:-

(a) that the respondent had no locus standi to bring the instant proceedings and

(b) that the Solicitor-General in the absence of an incumbent in the office of Attorney-General can do what the Attorney-General can.

The learned Attorney-General also, in the alternative, urged us to apply the doctrine of necessity to the Kaduna situation, as in her submission, law and order would completely break down, if, due to non-availability of an Attorney-General, the State was forced to place an embargo on criminal prosecutions and criminals were allowed to roam at large, unhindered. If indeed such a situation were permitted, then argued the learned Attorney, there would in fact be no government, as all activities of government would grind to a halt. Virtually, the same points were made in the brief filed by the learned Attorney which she also relied upon.

Mr. Akinyili, for the respondent, repeated with greater emphasis the submissions he had made in the two lower courts, to the effect that the respondent had locus standi to come by way of an originating summons for the purpose of construing the provisions of Section 191 of the Constitution of the Federal Republic of Nigeria 1979, in order to show that the Solicitor General of Kaduna State lacked competence to terminate the criminal proceedings.

The amici-curiae were also equally divided, some expressing support for the views put across on behalf of the respondent, while others supported the appellant.

Before proceeding with an examination of the two issues raised, I should like to state, in passing, that all the opinions of the Court of Appeal both major and minor are agreed that in exercising jurisdiction over the originating summons, Chigbue, J. was not invoking an appellate jurisdiction over the earlier ruling in the criminal matter given and was not a nullity and as such, could not be set aside by another judge of co-ordinate jurisdiction. See SEIFAH v. FORFIE (1958) AC. 59; MACFOY v. U.A.C. (1962) AC. 152; and SKENCONSULT (NIG.) LTD. AND ANOR. v. UKEY (1981) 1 SC. 6.

On locus standi, that is the right or competence to institute proceedings in a court of law for redress or assertion of a right enforceable at law, it would be difficult to resist the conclusion that the respondent had locus standi. While I agree that, in terms with the provisions of Section 213(5) of the Constitution of the Federal Republic of Nigeria, 1979, he would not qualify for admission into the category of 'aggrieved persons' in a criminal matter, the same cannot be said in relation to his civil rights and obligations as enshrined in the Constitution. Section 213(5) of the Constitution 1979 reads:-

'Any right of appeal to the Supreme Court from decisions of the Court of Appeal conferred by this section shall be exercisable in the case of civil proceedings at the instance of a party thereto or, with the leave of the Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter, and if the case of criminal proceedings at the instance of an accused person or, subject to the provisions of this constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney-General of a State to take over and continue or to discontinue such proceedings, at the instance of such other authorities or persons as may be prescribed.'

Section 6(6)(b) of the Constitution 1979 reads:-

'The judicial powers vested in accordance with the foregoing provisions of this section 97 shall extend to all matters between any persons or between government or authority and any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person:'-

If as the record shows, the respondent's son was killed in circumstances warranting the commencement of a criminal prosecution against those alleged to have been involved in the killing, he (the respondent) would be entitled to hold as an infringement of his civil rights the arbitrary termination of the said criminal prosecution by someone such as the Solicitor-General in this case, who is alleged to be incompetent to do so. He would, in my view, be able to go to court by way of an originating summons seeking a declaration that what the Solicitor-General did in withdrawing the charges was beyond his competence. There was a lot of discussion by this court in the case of SENATOR ADESANYA v. PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA AND ANOR. (1981) 2 NCLR. 358 as to circumstances under which a person litigating a cause would have locus standi. In this connection, I would respectfully adopt the views of my learned brother BELLO, J.S.C. in the said case when he stated as follows:-

'It seems to me that upon the construction of the subsection, it is only when the civil rights and obligations of the person, who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the courts may be invoked. In other words, standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.'

See also - OLAWOYIN v. A.G. N.R (1961) ALL NLR. 270; GAMIOBA AND ORS. v. ESEZI AND ORS. (1961) ALL NLR. 586; GOURIET v. UNION OF POST OFFICE WORKERS (1977) 3 ALL E.L.R. 70; R. v. GREATER LONDON COUNCIL, Ex Parte BLACKBURN AND ANOR. (1976) 1 WLR. 550.

The appropriateness of the procedure by originating summons has not been seriously contested in this appeal. What took the respondent to court was the interpretation of the constitutional provision raised in these proceedings.

It is still trite that 'no action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed.' Order 15 R. 16 (English Rules of the Supreme Court, 1979). See- GUARANTY TRUST CO. OF NEW YORK v. HANNAY (1915) 2 KB. 536. Accordingly I rule that grounds 1, 2 and 3 have failed.

The remaining grounds of appeal are concerned with the powers of the State Attorney-General under Section 191 of the Constitution. Section 191(1) provides:-

"The Attorney-General of a State shall have power

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any Law of the House of Assembly;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person."

Section 191(2) provides:-

'The powers conferred upon the Attorney-General under sub-section (1) of this section may be exercised by him in person or through officers of his department. (Italics mine)

Section 191(3) provides:-

'In exercising his powers under this section the Attorney-General shall have regard to the public interest, interests of justice and the need to prevent abuse of legal process.'

Before considering the above provisions in detail, I should like to set out the provisions which deal with the qualifications of the person to be appointed Attorney-General. This is to be found in Section 176 of the Constitution.

Section 176(1) provides:-

'There shall be an Attorney-General for each State who shall be a Commissioner of the Government of that State.'

Section 176(2) provides:-

'A person shall not be qualified to hold or perform the functions of the office of the Attorney-General of a State unless he is qualified to practise as a legal practitioner in Nigeria and has been so qualified for not less than 10 years.'

A short historical and anecdotal excursion at this stage in relation to the office of Attorney-General may not be entirely out of place.

With the inception of PAX-BRATANICA, in this country towards the end of the last century, there was always a Legal Department with the Attorney-General as its head. This Attorney-General was stricto-sensu a civil servant and pari of the executive arm of the British Colonial Administration. In the Attorney-General's Department or Legal Department were serving legal officers designated as CROWN COUNSEL. With the introduction of the 1960 Constitution which brought into being the concept of ministerial or cabinet form of government with the Prime Minister as the head of a Cabinet of Ministers, the Attorney-General continued to be a civil servant, while a new cabinet post of Minister for Justice was created. The Constitution of 1963 made the office of Attorney-General unmistakably political either at the centre or in any of the three regions of Nigeria at that time. The various constitutions provided that the Attorney-General shall be a member either of the House of Parliament or Senate or of a Legislative House of a region.

The constitution of 1960 made provisions for the office of a DIRECTOR OF PUBLIC PROSECUTIONS who was not under the MINISTER OF JUSTICE. This state of affairs subsisted until the coming into force of the 1963 Constitution which placed the Director of Public Prosecutions under the Attorney-General and Minister for Justice. Thus we had under the 1963 Constitution, an Attorney-General who was a politician with the portfolio of Justice and thus the head of that Ministry. Under him was the Solicitor-General and Permanent Secretary of that Ministry and the Director of Public Prosecutions both of whom were civil servants. With the advent of the military administration of 1966, Decree No. 55 of that year effected a restructuring of the status of the Attorney-General as follows:-

'(1) The Head of the National Military Government may, if he thinks fit, appoint a person to be Attorney-General of the Republic.

(1a) The functions of the Attorney-General of the Republic shall include the exercise, subject to the authority of the Executive

Council, of general direction and control over the National Ministry of Justice,

(1b) Whenever and so long as no person holds the office of Attorney-General of the Republic, any function which is conferred by this Constitution or any other law upon the Attorney-General of the Republic shall vest in the Solicitor-General of the Republic and may be performed by him notwithstanding anything in sub-section (4) of this section.'

Identically worded modification were inserted in the Constitutions of the Regions and later of the States. All these provisions operated within the framework of the 1963 Constitution modelled after the West minister Cabinet form of government as amended by the various decrees of the intervening military administrations up to 30th September, 1979. On the coming into force of the Presidential form of civilian administration on 1st October, 1979, a new office of Attorney-General was created for the Federation who was also a minister in the government. Section 138 of the Constitution makes provision for this. Similarly section 176 makes provisions for the appointment of an Attorney-General for a State, who shall be a Commissioner of the government of that State.

Within the period covered by our own experience in representative government, I shall set out the provisions dealing with the powers vested by the Constitutions in those charged with the prosecution of crime in order to focus attention on some of the similarities in wording.

As I had indicated earlier, the 1960 Constitution clothed the Director of Public Prosecution with something in the nature of autonomous powers. Section 97(1) of the 1960 Constitution reads:-

'There shall be a Director of Public Prosecution for the Federation, whose office shall be an office in the public service of the Federation.

Section 97(2) reads:-

'The Director of Public Prosecutions of the Federation shall have power in any case in which he considers it desirable so to do

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any Act of Parliament;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.'

Section 97(3) reads:-

'The powers of the Director of Public Prosecutions of the Federation under sub'97section (2) of this section may be exercised by him in person or through members of his staff acting under and in accordance with his general or special instructions.'

Section 97(5) reads:-

'The powers conferred upon the Director of Public Prosecutions of the Federation by paragraphs (b) and (c) of subsection (2) of this

section shall be vested in him to the exclusion of any other person or authority.'

Paragraphs (b) and (c) refer to the powers to take over a prosecution or to terminate same. These issues are germane to those raised in the case in hand and if the constitutional provision, that is Section 191 of the 1979 Constitution had been similarly clearly worded, the need for construing it might not have arisen.

Section 97(6) reads:-

'In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions of the Federation shall not be subject to the direction or control of any other person or authority.'

The above powers compare with those vested in the ATTORNEY-GENERAL of the Federation by the 1963 Constitution, with this difference, that the Director of Public Prosecutions has now lost his autonomous status by being brought under the control of the ATTORNEY-GENERAL. Section 104 (1) of the 1963 Constitution reads:-

'There shall be a Director of Public Prosecutions for the Federation, whose office shall be an office in the public service of the Federation and, without prejudice to the provisions of this Constitution relating to the Public Service Commission, an office in the Federal Ministry of Justice.'

Section 104(2) reads:-

"The ATTORNEY-GENERAL of the Federation shall have power in any case in which he considers it desirable so to do "(a) to institute and undertake criminal proceedings against any person before any

court of law in Nigeria other than a court-martial in respect of any offence created by any law in force in Nigeria or any part thereof;

(b) to take over and continue any such criminal Proceedings that may have been instituted by any other person or authority;

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

Section 104(3) reads:-

'The powers of the ATTORNEY-GENERAL of the Federation under subsection (2) of this section may be exercised by the ATTORNEY-GENERAL in person and through the Director of Public Prosecutions of the Federation, acting under and in accordance with the general or special instructions of the ATTORNEY-GENERAL, and through other officers of the department mentioned in subsection (1) of this section, acting under and in accordance with such instructions.'

Section 104(5) reads:-

'The powers conferred upon the ATTORNEY-GENERAL of the Federation by paragraphs (b) and (c) of subsection (2) of this section shall be vested in him to the exclusion of any other person or authority.'

Section 104(6) reads:-

'In the exercise of the powers conferred upon the ATTORNEY-GENERAL of the Federation by this section, the ATTORNEY

GENERAL shall not be subject to the direction or control of any other person or authority.'

Section 104(6) above re-echoes the position of the ATTORNEY-GENERAL right from the inception of that office under the Common Law up to and inclusive of the recent constitutional provisions. He is said to be a law unto himself and subject to direction and control from none. Implicit in this provision is the need that the ATTORNEY-GENERAL should be seen as an even-handed functionary of the executive arm of government. See the decision of this court in STATE v. ILORI & ORS. (1983) 1 SCNLR. 94. It is plain that the powers vested in the ATTORNEY-GENERAL by paragraphs (b) and (c) of Section 104(2) are exercisable by him personally and not delegable. These are the powers of taking over and terminating prosecutions. What he can delegate to the Director of Public Prosecutions and other officers is the power to institute and undertake criminal proceedings under paragraph (a) of the same section. By 1967- Act No.8 (Decree No.8) of that year made the following significant amendment to the powers of the ATTORNEY-GENERAL under Section 88 of the Constitution of 1963. That new section 88(1a) provides as follows:

'The functions of the ATTORNEY-GENERAL of the Federation shall include the exercise, subject to the authority of the Supreme Military Council, of general direction and control over the Federal Ministry of Justice.'

The new section 88(1b) provides as follows:-

'Whenever and so long as no person holds the office of ATTORNEY-GENERAL of the Federation, any function which is conferred by this Constitution or any other law upon the Attorney-General of the Federation shall vest in the Solicitor-General of the Federation and may be performed by him notwithstanding anything in subsection (4) of this section.' For subsection (3) there shall be substituted the following subsection -

(3) If the person holding office as Attorney-General of the Federation is for any reason unable to perform the functions conferred upon him by this Constitution or any other law, those functions may be performed by such other person as may be designated in that behalf by the Supreme Military Council.'

Corresponding amendments were incorporated in the Constitutions of the States and thus in a situation where there was no incumbent Attorney-General in a State, a Solicitor-General would have been competent to terminate criminal proceedings as had happened in this case. The above was the legal and constitutional position until 30th September, 1979. The argument for the appellant would hold true, if I can be persuaded that the framers of the 1979 Constitution intended that, in enacting Section 191 of the said Constitution, they were thereby laying the foundation for a continuation of the powers vested in the ATTORNEY-GENERAL or the Solicitor-General under the 1963 Constitution as set out hitherto.

I think it is trite that in construing a constitutional document there is the need to look at its provisions as a whole and where possible, give such provisions their ordinary and natural meaning. See BANK OF ENGLAND v. VAGLIANO BROS. (1891) AC. 107 at 144where Lord Herschell put the position thus:-

'I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.'

As I had stated earlier in this judgment, the Attorney-General under the 1963 Constitution was by that constitutional arrangement a member of one or other of the legislative houses created by the said constitution. This was the position until 1966 when several provisions of that Constitution were suspended as the result of the military intervention of that year. The military in government amended the provisions relating to the office of ATTORNEY-GENERAL. This they did by the amendment to Section 88 as I had shown above. The further amendment making it possible for the Solicitor-General to perform the duties of an ATTORNEY-GENERAL which came about in 1967 by Act No.8 of the year was also done by the military.

Whereas the 1963 Constitutional arrangement was made to reflect the Westminister pattern of government wherein executive power lay in the Prime Minister who was the leader of the party commanding the majority in the legislature, the 1979 Constitution is a prototype of the American Constitution, where executive power was vested in an elected President. Under the 1963 Constitution the President was a ceremonial figure-head with no powers. The executive President under the 1979 Constitution had exclusive access to executive power. His was the prerogative to nominate his ministers and other office holders. Having nominated them, he sent their names to the Senate where that august body would arrange a hearing for the candidate by one of its committees in order to determine his fitness for appointment to that office by being confirmed.

The executive powers exercisable by the ATTORNEY-GENERAL would be such as is assigned to him under Section 136(1) of the 1979 Constitution which reads:-

'The President may, in his discretion, assign to the Vice-President or any Minister of the Government of the Federation responsibility for any business of the Government of the Federation, including the administration of any department of government.'

Section 174(1) deals with the like situation in relation to the States.

The provisions in the 1979 Constitution are thus unique in the sense that they are intended to deal with the peculiar circumstances of Nigeria. A foray into the Constitutions of other nations, useful, though it may be, cannot be of much assistance. It is therefore of paramount importance when construing the Constitution, that one should look closely at the provisions themselves, in order to discover their object. This approach cannot be dogmatic and I seem to be in agreement with the versatile approach advocated by UDOMA, J.S.C. when in RABIU v. THE STATE (1980) 8/11 SC. 130 he had this to say:-

'Where the question is whether the Constitution has used an expression in the wider or in the narrower sense the court should always lean where the justice of the case so demands to the broader interpretation unless there is something in the content or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.'

One significant difference in the wording of Section 104 of the 1963 Constitution and Section 191 of the 1979 Constitution is the omission of the phrase:-

'acting under and in accordance with the general or special instructions of the Attorney-General' in the latter provision. The importance of the personal role that has to be played by the Attorney-General is underscored by the penultimate provision of Section 191 - that is 191(3) which I am constrained to reproduce again. It reads:-

'In exercising his powers under this section the Attorney-General shall have regard to the public interest, the interests of justice and the need to prevent abuse of legal process.'

The exercise of the powers vested in the ATTORNEY-GENERAL under the section cannot bear a mechanical or automatic approach, particularly in a situation where issues of high state policy are involved, which would require to be balanced one way or another, before action is taken. This is the more so, as the ATTORNEY-GENERAL is answerable to no one with regard to any decision taken under the section. See THE STATE v. ILORI & ORS. (Supra). I am in no doubt that the powers entrusted to the ATTORNEY-GENERAL by the express provisions of Section 191 of the 1979 Constitution must be an incumbent in the office to act as donor and an appropriate officer in his department or ministry who can be a donee of the power. If the powers can be exercised without being donated, then the officers in the ATTORNEY-GENERAL'S Department would have access to the powers on the footing of equality with him and the draftsman could easily have inserted 'and' instead of 'or' between person and through. This would surely be a recipe for chaos and would make nonsense of the ensuing provision under Section 191(3). With all the foregoing in mind, I have no doubt that the learned judge of the Kaduna High Court was right in saying that the Solicitor-General was incompetent to terminate the proceedings in the criminal prosecution.

The point made on behalf of the appellant that, unless there is equality of access to the powers treated under the section as between the ATTORNEY-GENERAL and the SOLICITOR-GENERAL, at a time when there IF is no incumbent ATTORNEY-GENERAL, there would be an embargo on crime prosecution and termination, cannot be valid. The office of Solicitor-General and that of Director of Public Prosecutions are existing offices, that is, offices carried over from the old Constitution by virtue of the provisions of Section 275 of the 1979 Constitution. Section 275(2) thereof provides:-

'Any person who immediately before the date when this section comes into force holds office by virtue of any other Constitution or

law in force immediately before the date when this section comes into force shall be deemed to be duly appointed to that office by virtue of this Constitution or by any authority by whom appointments to that office fall to be made in pursuance of this Constitution.'

It is routine for criminal prosecutions on information to be undertaken at the High Court by the office of the Director of Public Prosecutions. It is equally routine for such prosecutions to be terminated before judgment by the same department. It is also not unusual for the Solicitor-General to represent government in important or complicated civil actions. In the event of an application being made to terminate proceedings, it seems to me that the court before which it is made would be justified in asking for the grounds for the application and in ruling on it. This would not be the case if the application were made by the ATTORNEY-GENERAL pursuant to Section 191 of the 1979 Constitution. He cannot be asked by the court to ascribe reasons for the application.

Section 105 of the High Court Law (Cap 49 - LAWS OF NORTHERN NIGERIA) makes provision for representation of the State by law officers, Director of Public Prosecutions, State Counsel, the police and others. Indeed most prosecutions in the magistrate courts are conducted by the police who, in very many cases for one reason or other, apply to have some of such cases withdrawn. There is also power under Section 258(2) of the Criminal Procedure Code (CAP 30 - LAWS OF NORTHERN NIGERIA) for terminating prosecutions. It would therefore, not be true that the inability of the Solicitor-General to terminate proceedings under Section 191 of the 1979 Constitution would create a vacuum in the dispensation of criminal justice. The doctrine of necessity as to which there was discussion by the Attorney-General of Kaduna State and some other STATE ATIORNEYS did not properly arise as an issue in this case.

On the whole I am satisfied that there is no merit in the views urged upon us in this appeal with regard to grounds 4 and 5.

Accordingly, this appeal fails and it is hereby dismissed with N300.00 costs in favour of the respondent herein.

IRIKEFE J.S.C. for SOWEMIMO C.J.N.:

All judgments are handed down. The Chief Justice of Nigeria, who is not now in court, had agreed with all the conclusions in the judgment at conference.

M. BELLO, J.S.C.:

I have had the advantage of reading the judgment just delivered by my learned brother, Irikefe, J.S.C. I adopt his reasoning and conclusions therein. I hold that the Respondent as the father of his deceased son, who was the victim of culpable homicide, has standing in civil proceedings to challenge the purported exercise of the constitutional power under section 191 of the Constitution by the Solicitor-General in the termination of the criminal prosecution of the persons accused of having committed the culpable homicide of the Respondent's son. I also hold that the powers conferred on the Attorney-General by the provisions of section 191 of the Constitution can only be exercised by the Attorney-General in person or by any officer in his department to whom the Attorney-General has expressly delegated the powers. In the absence of express delegation to him by the Attorney-General, the Solicitor-General or any other officer in the department has no constitutional right to exercise the powers under the said section. For the

purpose of amplification, I would only add few words to the answer on the question that has been vigorously debated, to wit, what civil right or obligation for the Respondent has been or is in danger of being violated or adversely affected by the executive action of the Solicitor-General in terminating the criminal prosecution that entitles the Respondent to be accorded standing to invoke the judicial power of the court under section 6(6)(b) of the Constitution?

In Adesanya v. President of the Federal Republic of Nigeria (1981) 2 N.C.L.R. 358 this Court exhaustively considered and determined the scope and extent of the judicial power of the Court within the ambit of section 6(6)(b) of the Constitution. To reiterate my stance in that case, I said at pages 385 to 386:

'It seems to me that upon the Construction of the subsection, it is only when the civil rights and obligations of the persons, who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the courts may be invoked. In other words, standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.'

I still maintain the foregoing construction of section 6(6)(b) of the Constitution. It follows therefore that to accord standing to the Respondent in the case on appeal to challenge the purported constitutional action of the Solicitor-General, the Respondent must show that he has sufficient interest within the principle of the subsection. The facts established by the Respondent in the trial court are: that he is a Moslem and father of the deceased: that the accused persons in the criminal case which was terminated by the Solicitor-General were alleged to have committed culpable homicide of his son and that the termination of the criminal case was unconstitutional, null and void. The question that may be asked is: have these facts disclosed standing to allow the Respondent to prosecute his complaint? I think, upon a proper examination of the civil rights of the Respondent in his capacity as

the father of his deceased son, the answer to the question is certainly in the affirmative.

Now, if the culpable homicide of the Respondent's son falls within the scope of the Fatal Accidents Law, Cap. 43 of the Laws of Northern Nigeria 1963 then members of the immediate family of the deceased Including the Respondent have a vested right of action for damages under sections 3 and 4 of the Law, which provide:

'3. Notwithstanding any rule of law, practice or procedure heretofore in force to the contrary, whenever the death of a person shall be caused by a wrongful act, neglect or default of another person and the act, neglect or default is such as would, if death had not ensued, have entitled the person injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

4(1) Every such action shall be for the benefit of the members of the immediate family of the person whose death shall have been so caused and shall be brought -

(a) by and in the name of the executor or administrator of the deceased person;

or

(b) in the case of a deceased person who was subject to any system of native law and custom immediately before his death, at the option of his immediate family by and in the name of such person or persons as the court may be satisfied is or are entitled or

empowered to represent the deceased person or his estate according to such native law and custom.'

Section 2 of the Law defines 'immediate family' as meaning:

'(a) In relation to a deceased person who was not subject to any systems of native law and custom the -

(i) wife or wives;

(ii) husband;

(iii) parent, which shall include father and mother, grand-father and grand mother and stepfather and stepmother; and

(iv) child, which shall include son and daughter, grandson and granddaughter and stepson and stepdaughter, of such deceased person; and

(b) in relation to a deceased person who was subject to any system of native law and custom other than Moslem Law, the persons specified in paragraph (a) and, in addition, his brother and sister which shall include stepbrother and stepsister;

(c) in relation to a deceased person who was subject to the system of native law and custom know as Moslem Law, the persons who are entitled to share in the award of diya prescribed by Moslem Law for involuntary homicide.'

Thus, in the case of a deceased Moslem, any member of his immediate family can sue for damages and the measure in

damages to be awarded is the diya prescribed by Moslem Law: see section 7(1)(b) of the Law and Zuwaira Samba & Ors. v. Alhaji Bashir (1969) N.N.L.R. 87 at 94. Under Moslem Law Diya is treated as part ofthe estate of the deceased: see Al-Muwatta by Imam Malik p.408 paragraph 434 and a father is entitled to inherit a portion of the estate of his deceased son: see Maliki Law by F. H. Ruxton, First Reprinted 1978, p. 379.

It is clear from the foregoing that whatever is the personal law of a deceased person, Fatal Accidents Law confers on his father a statutory right of action for damages for the benefit of the immediate family of the deceased including the father on account of culpable homicide of the deceased person envisaged by the provisions of section 3 of the Law. That being the case, if the culpable homicide of the Respondent's son in this case on appeal falls within the provisions of the said section, then the Respondent has a statutory right of action in tort against the accused persons in the criminal case which was terminated by the Solicitor-General.

Again, under Moslem Law the blood-relatives of a victim of culpable homicide punishable with death including his father have the right of election to seek either (a), the avenging of the murder, or (b), compensation, or (c), the waiver of (a) and (b). In Babalola John v. Zaria N. A. (1959) N.R.N.L.R 43 at page 45 Hurley, SPJ, while dealing with the father's election for death penalty for the murder of his daughter, stated Moslem Law as follows:

"The blood-relative's discretion to choose between retaliation,

blood money, and pardon is, Mr. Pickford argues, in the Itature of a judicial discretion, and its exercise otherwise than in the accused's presence and upon full information about all the facts would therefore be contrary to natural justice. We do not think that the blood-relative's election involves the exercise of a judicial discretion or need be made judicially. Homicide in Moslem law, as has been often said, partakes more of the nature of a tort than a

crime. The object of proceedings for homicide in Moslem Law is to ensure that the blood-relatives of the deceased should obtain satisfaction, rather than that the ruler should exact punishment at the hands of the court. In making his election, the blood-relative says no more than what will satisfy him; he need consult only his own wishes, and there is nothing of a judicial nature in the exercise of his choice.'

In consequence of the constitutional changes brought about by the Constitution of the Federation 1960 and the enactments of the Penal Code Law 1960 and the Criminal Procedure Code Law 1960, criminal law under Moslem Law ceased to operate in the former Northern Nigeria. Nevertheless, the blood-relatives' right of election under the Moslem Law was partially retained and was given statutory recognition in section 393 of the Criminal Procedure Code in these terms:

'393. A native court having jurisdiction over capital offences shall before passing a sentence of death, invite the blood-relatives of the deceased person, if they can be found and brought to court, to express their wishes as to whether a death sentence should be carried out and shall record such wishes in the record of the proceedings.

The significance of the blood-relatives' right to express their wishes was highlighted in Banana v. Bornu N.A. (1961) N.N.L.R. 79 where a native court passed sentence of death without first complying with section 393 of the Code. The High Court of Northern Nigeria held compliance with the section to be mandatory. It set aside the sentence and remitted the case to the trial court for compliance with the section.

Following the judicial reforms of 1967 to 1968 when the Area Courts, formerly known as Native Courts, ceased to have jurisdiction to try the offences of culpable homicide (for example see section 3(d) of the Criminal Procedure Code Law (Amendment)

Edict 1968 of the former North-Central State of Nigeria which abolished the jurisdiction of Area Courts to try homicide offences), section 393 of the Criminal Procedure Code became spent since the section applied to trials in the Native Courts only: see Chapter XXXIII of the Criminal Procedure Code. Accordingly, the requirement of the wishes of the relatives of a deceased person before passing a sentence of death is no longer relevant.

I think, in cases not covered by the Fatal Accidents Law, the repeal of Moslem Criminal Law by the 1960 and 1979 Constitutions has not affected the civil right of the blood-relatives of a victim of culpable homicide for compensation under Moslem Law against the offender if the State fails to avenge the offence. Section 21(10) of the 1960 Constitution provides:

'10. No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law.

Provided that nothing in this subsection shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act of omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.'

While section 33(12) of the 1979 Constitution as modified by Decree No.1 of 1984 reads:

'(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Decree or the Law of a State or an Edict, any subsidiary legislation or instrument under the provisions of a law.'

It is clear the constitutional prohibition has been against 'conviction of a criminal offence'. and not civil liability arising from the criminal offence. It appears the civil right of the blood-relatives for compensation remains unabated and may be sought in a civil action. It follows from the premises that the Respondent in the case on appeal has a legal right of action for compensation for the culpable homicide of his son, whether the offence is punishable with death or not. His right is statutory if the homicide falls within the Fatal Accidents Law and it is under Moslem Law if the homicide is outside the Law. For the avoidance of any doubt, it may be pointed out that the right for compensation, as shown by Babalola John v. Zaria N.A. (supra), is not confined to Moslems only. It is the privilege of all persons irrespective of their religion.

It may be observed that in substantive law the public right of the State to prosecute the offence of culpable homicide under the Penal Code is independent of the Respondent's civil right to sue for compensation. Nevertheless, the rule of practice as laid down in Smith v. Selwyn (1914)) 3 KB 98 where it was held that an action based upon a felony is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted makes the exercise of the civil right of the Respondent dependant on the public right of the State to prosecute.

Although the rule in Smith v. Selwyn (Supra) no longer prevails in England since the enactment of their Criminal Law Act 1967: the White Book, Vol.2, 1979 page 950 paragraph 3357, it still operates within the Northern States. In Nwosu v. Chima (1966) N.N.L.R. 155 at 157 Holden J. stated:

'I rule that the principle laid down in Smith and Wife v. Selwyn is still very much alive and is to be applied whenever there is allegation of an offence not ordinarily bailable as the foundation of the claim in civil proceedings.'

But in Oyewale v. Okoli (1974) N.N.L.R. 40 Uwais J., as he was then, held that the rule in Smith v. Selwyn no longer applies. Since the conflicting decisions of the two courts of co-ordinate jurisdiction are persuasive only and not binding, the High Courts of the Northern States are at liberty to follow either until the matter is settled by the Court of Appeal or this Court. Now, the affidavit of the Respondent shows that the persons accused of having committed culpable homicide of his son have not been prosecuted. The Respondent further deposed that the termination of the criminal case was unconstitutional. If such allegation is correct then, in my opinion, it cannot be said that reasonable excuse has been shown for the non-prosecution of the persons against whom the Respondent has a right of action. The rule in Smith v. Selwyn, if it still applies, has not been complied with. Consequently, the Respondent may not be allowed to maintain his legal right to sue for compensation. That being the case, it is apparent that the civil right of the Respondent has been adversely affected by the action of the Solicitor-General. In the circumstances, the Respondent has made out a case within the principle stated in Adesanya v. President. He has standing to question the constitutionality of the termination of the criminal case by the Solicitor-General.

A. N. ANIAGOLU, J.S.C.: I have had a preview of the judgment just read by my learned brother, Irikefe, J.S.C., and I am in agreement with him that this appeal should be, and is hereby, dismissed.

The problem which triggered off these proceedings was the absence of an Attorney-General in the Kaduna State brought about by the vacancy in the incumbency upon failure to appoint an incumbent.

In the meantime, one ABDUL RASHID UMARU was allegedly murdered resulting in the arrest of five persons who were arraigned before an inquiry Magistrate who, upon a preliminary inquiry, held, it was stated, that a prima facie case of culpable homicide had been made out against the five persons. The case, having been committed for trial in the High Court for culpable homicide, was pending in the High Court in the criminal charge No. KDH/28/81. On 30th March 1982, upon an application to discontinue the case (nolle prosequi) made by the Solicitor-General of Kaduna State, one J .B. Maigida, who purportedly exercised the powers conferred upon the Attorney-General of Kaduna State under section 191 of the Federal Republic of Nigeria, 1979, the accused persons were discharged. Faced with this situation the father of the victim of the alleged murder - the Respondent in this appeal, MALLAM UMARU HASSAN - took out an originating summons, dated 21st May 1982, in the Kaduna High Court, seeking a determination by Court of the following questions and of a declaration:

"A. (1) Whether the Solicitor-General, Ministry of Justice, Kaduna State can validly exercise the powers confered on the Attorney-General of Kaduna State by section 191 of the Constitution of the Federal Republic of Nigeria, 1979 when no person has been appointed to the office of the Attorney-General of the State, and when any or all of such powers have not been specifically delegated to him by any person holding the office of the Attorney-General of Kaduna State of Nigeria?

(2) Whether the Solicitor-General of Kaduna State can in purported exercise of the powers of the Attorney-General under paragraph (c) of the sub-section] of Section 191 of the Constitution of the Federal Republic of Nigeria, 1979 discontinue criminal proceedings against accused persons committed for trial at the High Court after preliminary inquiry by a Magistrate when the powers conferred on the Attorney-General of Kaduna State by the said section has not been delegated to the Solicitor-General of Kaduna State by any person holding the office of the said Attorney-General of Kaduna State?

B.(1) A declaration that the purported exercise of the powers conferred upon the Attorney-General of Kaduna State, by the Solicitor-General of Kaduna State, under the provisions of section 191 of the Constitution of the Federal Republic of Nigeria, 1979 in the absence of an incumbent to the office of the Attorney-General of Kaduna State is unconstitutional, unlawful null and void and of no effect whatsoever."

I have no doubt that the course taken by the Respondent in applying, by originating summons, for a determination of those questions and declaration, was a permissible course to take (See: THE STATE v. ILORI And Ors. (1983) 2 S.C. 155 at 197-199;.(1983)1 S.C.N.L.R. 94 at 116. Whether he has a locus standi in the murder case to justify his initiating these proceedings, is another issue.

Where then lies his locus? The answer obviously is that it lies in the parental and filial relationship between him and his alleged murdered son; that the law must see in that relationship a right in the father to seek after, defend, and inquire into, his son's affairs and interests and prosecute proceedings in relation thereto.

That this relationship is recognised by our Law is seen, by way of illustration, in some provisions of the Criminal Code Act. Section 283 of the Criminal Code Act which defines provocation has included in the term 'provocation' a wrongful act or insult of such a nature as to be likely when done.

'In the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial, or fraternal, relation, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.'

The section continues and provides that:

'when such an act or insult is done or offered by one person to another or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid the former is said to give to the latter provocation for assault'.

Section 284 then makes provocation a defence by making the person not criminally liable for the assault committed up on the person who give him the provocation subject to the limitations set out in that section. While Section 285 makes provision for preventing a repetition of an act or insult giving offence or provocation, Section 286 provides for a defence against unprovoked assault and section 288 gives a right for any other person, acting in good faith, to come to the aid of that person.

With regard to Northern Nigeria, the Criminal Code was also in force throughout Northern Nigeria before the coming into force of the Penal Code Cap.89 Vol. III the Laws of Northern Nigeria 1963 on 30th September 1960 (See for example, the judgments in: BABALOLA JOHN v. JOSIAH ONYEAMAIZU (1958) NR.N.L.R. 93).

After the coming into force of the Penal Code, there was no exact equivalent of sections 283 to 288 of the Criminal Code, in the Penal Code. But the same principle, although in a wider context, remained. Whereas section 283 of the Criminal Code talks of 'conjugal, parental, filial, or fraternal relation', there was no equivalent section in the Penal Code. What the Penal Code has is to be found in sections 60 to 67 providing for the 'right of private 'defence'. Section 60(a) of the Penal Code provides that

'Every person has a right, subject to the restrictions hereinafter contained, to defend -

(a)'his own body and the body of any other person against any offence affecting human body', (Italics mine)

While section 222(1) deals with provocation, and the substituted section 399 (substituted by No.13 of 1965) provides for insults and abusive language.

All the above are in addition to section 213(5) and section 6(6) of the Constitution referred to, rightly in my view, by my learned brother, Irikefe, J.S.C., in his lead judgment. I am, therefore, in complete agreement with the view expressed in the lead judgment that the Respondent had locus standi to initiate these proceedings.

What this Court said in THE STATE v. ILORI And Others (supra) is sufficient for the statement that the powers of the Attorney-General of a State (and therefore of the Kaduna State in this appeal) are personal to him and are exercisable personally by him. Ideally, I think the makers of the Constitution were wise to make it so, because whereas the Solicitor-General, the Director of Public Prosecutions and all the other officers down the line, in the Ministry of Justice, are by designation, civil servants who are not answerable politically for acts done in the Ministry, the Attorney-General is both the legal as well as the political officer who is answerable politically for acts done in that Ministry and since the powers exercisable under section 191 of the Constitution, in many cases, may have political over-or-under tone, even though those powers have to be exercised with due regard

'to the public interest, the interests of justice and the need to prevent abuse of legal process',

it is only right that the person who has to bear the brunt and responsibility of the political 'fall-outs' of any decision taken under that section, should solely be responsible for taking the legal

decisions required under the section. Put in another way, it is he who has to take the rap for the decisions taken; it is only fair that he should be left solely with the juridical power to take the steps resulting in those decisions, so that whatever may be the political effect of the legal steps he has taken, he is fully and personally answerable for it for good or for evil.

FINALLY, the Hon. Attorney-General of Kaduna State, Mrs. Donli (and some other Counsel appearing Amici-Curiae), had put forward the virtual intimidatory suggestion that without it being decided that the Solicitor-General was constitutionally empowered to exercise the power of the Attorney-General under section 191 of the Constitution, the prosecution of criminal cases in the Kaduna State would virtually come to a stand still, with its adverse effect on maintenance of Law and Order in the State, I do not think that that cry of 'wolf is justified by the state of the law in that State. Prosecutions are validly carried on in the State by the Police and State Counsel under the Criminal Procedure Code of the North and the Penal Code. Both the Police and the State Counsel have the power of withdrawal of cases under the Criminal Procedure Code without reference to the Attorney-General's powers under section 191 of the Constitution. A normal hearing of a case would fully be conducted before the Magistrate's Courts and the Native Courts under the Criminal Procedure Code. Sections 130, 131, 159, 235, and 253 of the Criminal Procedure Code are but examples of sections under that Code which could be called in aid by a prosecuting Police, or a State Counsel or the Attorney-General, in the conduct of their cases before those Courts. The law will certainly not come to a stand still because there is no Attorney-General to exercise the powers conferred under section 191 of the Constitution and, in my view, no necessity or emergency would have arisen (as submitted by Mrs. Donli) to justify the Solicitor-General investing upon himself a jurisdiction, under section 191, which he does not possess. Accordingly, for the above reasons and for the apt and wider reasons given by Irikefe, J.S.C., in his lead Judgment, I must dismiss, and hereby dismiss, this appeal by the Attorney-General of Kaduna State and in doing so restore the judgment of the High Court Kaduna (per CHIGBUE, J.) and confirm the majority judgment of the Court of Appeal (Nasir,

P.C.A.; Wali and Maidama, JJ.C.A.). I abide by the order for costs as prescribed in the lead judgment of Irikefe, J.S.C.

M. L. UWAIS, J.S.C.:

I have had the advantage of reading in draft the Judgment read by my learned brother, Irikefe, J.S.C., and I entirely agree with the reasons and conclusion therein...

Following our decision in The State v. S. O. Ilori & Ors., (1983) 1 SCNLR 94 at pp. 111; 116 and 119, it is settled, that where a nolle prosequi is entered in a criminal case, by an Attorney-General, under the provisions of either section 160 or 191 of the Constitution of the Federal Republic of Nigeria, 1979; the propriety of exercising the power may be questioned in a civil action which can be brought by a person whose civil rights and or obligations have thereby been affected. It follows a fortiori that the exercise of the same power by a legal officer employed in the Ministry of Justice, as in the present case, can be the subject of similar proceedings.

The difficult question raised in this appeal is: whether the respondent father, has the capacity or locus standi to challenge the exercise of the power, by a Solicitor-General, to terminate the criminal proceedings instituted against suspects who were accused and charged of killing his son. By section 6(6)(b) of the 1979 Constitution, the exercise by superior courts of their judicial powers extends 'to the determination of any question as to the civil rights and obligations' of litigants. Therefore, for a plaintiff to be properly before the superior courts he must be able to show that

his civil rights or obligations have been or are in danger of being infringed - see Senator Abraham Adesanya v. President of the Federal Republic & Anor., (1981) 2 NCLR 358.

Now, it has been variously argued, in this case, that the respondent was not a party to the criminal proceedings terminated by the Solicitor-General of Kaduna State; that Kaduna State and not the respondent was the prosecutor in the criminal case. Therefore, the respondent, not being a party to the criminal case, could not have been legally aggrieved (as opposed to being morally aggrieved) by the termination of the criminal case, to the extent that he (respondent) could claim that he had any civil right or obligation to protect. In other words he had no locus standi to institute the present case.

I have said in Senator Adesanya's case that the determination by a court of the civil rights and obligations' of a party will always depend on the peculiar circumstances of each case. I still hold that view. Here is a father, whose son has been killed, and the proceedings to bring to justice the suspected assailants of the deceased are terminated, and the assailants set free by the trial court, at the instance of a legal officer with doubtful authority. Should the father fold his arms and do nothing? It is very clear from the opinion expressed by the Solicitor-General that-

'There is no evidence to support the basis on which the trial magistrate at the lower court based his charges against the accused. In view of the contradiction before the court below we have no evidence to offer as this would be a waste of the time of both the court, the accused and everyone connected with the administration of justice.' the State, as the prosecutor, had lost interest in the case and was not likely to re-institute the proceedings. I think it is not far-fetched to assume that any private prosecution which could have been brought by the respondent against the suspects, would stand the chance of being terminated under the provisions of section 191 sub-section (1)(c) of the 1979 Constitution, since it was the opinion of the Solicitor-General that

the case 'would be a waste of the time...of everyone connected with the administration of justice.'

The question is: if, in the circumstances of this case, the deceased's father (i.e. respondent) has no locus standi, as it has been argued, then who has? The deceased is dead, and, if he is the only one that could challenge the termination of the proceedings, because it was his civil right and obligation that had been affected, he cannot be brought to life again to do so. Should the infringement of the Constitution by the Solicitor-General, therefore, be allowed to stand? To my mind the law appreciates the special relationship between persons and their next-of-kin. It is in recognition of this that some of our customary laws and indeed statutory laws confer certain rights and obligations on parents or members of immediate family. See, for instance section 4 of the Fatal Accidents Law, Cap. 43 (The Laws of Nothern Nigeria, 1963) and sections 8, 10, 27(2)(b) and 30(1) of the Children and Young Persons Law, Cap. 21 (The Laws of Nothern Nigeria, 1963). I am therefore of the opinion that the respondent had the right and obligation to institute this case, asking for a declaration that the Solicitor-General had no power under S.191 of the Constitution to terminate the criminal proceedings in question.

There can be no doubt that the powers given to the Attorney-General of a State under section 191 of the Constitution belong to him alone and not in common with the officers of the Ministry of Justice. Such Officers can only exercise the powers when they are specifically delegated to them by the Attorney-General. The delegation usually takes the form of a notice in the Official Gazette. As there was no Attorney-General appointed for Kaduna State at the time mate rialto this case, his powers under section 191 could not have been delegated to the Solicitor-General. The appellant has also failed to show that there was no provision of the Constitution or indeed any Law, which conferred upon the Solicitor-General the authority to exercise the powers of the Attorney-General when the incumbent of that office had not been appointed.

For the foregoing and the reasons ably stated in the lead judgment of my learned brother, Irikefe, J.S.C., I too will dismiss this appeal with N300.00 costs to the respondents.

B. O. KAZEEM, J.S.C.:

The present appeal was sequel to a complaint by the respondent whose son was allegedly killed by certain persons who were indicted for the killing, but the charge was later struck out. The circumstances which gave rise to the complaint may be set out briefly thus: Sometime in March 1982, five persons were arraigned for trial before the High Court of Justice in Kaduna for offences of culpable homicide not punishable with death and abetment. The charges which had been framed by the Magistrate after the Preliminary Inquiry came before the High Court for trial; but at the time when there was no incumbent Attorney-General for the State. The pleas of the accused persons were then taken and they all pleaded 'Not Guilty' to the charges. The Solicitor-General who appeared for the prosecution thereafter informed the Court that because of the contradiction in the testimonies of the prosecution witnesses during the preliminary Inquiry at the Magistrate Court, he would not offer any evidence against the accused persons. He therefore applied under Section 130(1) of the Criminal Procedure Code and Section 191(2) of the Constitution of the Federal Republic of Nigeria (hereinafter called 'the Constitution'), and urged the Court to discharge the accused persons. The learned trial judge after considering that application, ruled that since the State did not intend to continue with the trial, he had no other choice than to strike out the charges against all the accused

persons, and he did so. Consequent upon that striking out, the respondent (as plaintiff) instituted an action in another High Court within the same Judicial Division, and by way of an Originating Summons in the following terms:-

'By this summons the Plaintiff:-

(A) Seeks the determination of the Court of the following questions namely:-

(1) Whether the Solicitor-General, Ministry of Justice, Kaduna State can validly exercise the powers conferred on the Attorney-General of Kaduna State by section 191 of the constitution of the Federal Republic of Nigeria 1979 when no person has been appointed to the office of the Attorney-General of the state, and when any or all of such powers have not been specifically delegated to him by any persons holding the office of the Attorney-General of Kaduna State of Nigeria.

(2) Whether the Solicitor-General of Kaduna can in purported exercise of the powers of the Attorney-General under paragraph (c) of subsection 1 of section 191 of the constitution of the Federal Republic of Nigeria 1979 discontinue criminal proceedings against accused persons committed for trial at the High Court after preliminary inquiry by a magistrate when the powers conferred on the Attorney-General of the state by the said section has not beed delegated to the Solicitor-General of Kaduna State by any person holding the office of the said Attorney-General of Kaduna State.

Claims against the Defendant:-

(i) A declaration that any purported exercise of the powers conferred upon the Attorney-General of Kaduna State, under the provisions of section 191 of the Constitution of the Federal

Republic of Nigeria, 1979, in the absence of an incumbent to the office of the Attorney-General of Kaduna

State is unconstitutional, unlawful, null and void and of no effect whatsoever.'

In support of the Originating Summons, the Respondent filed an affidavit wherein he averred inter alia that the deceased who was the subject of the indictment that was struck out was his son; that he died in suspicious circumstances; that he had testified as a witness for the prosecution during the preliminary Inquiry; that he knew as a fact that no person had been appointed as the Attorney-General for Kaduna State, and that to his knowledge also, the powers of the Attorney-General of the State had not been delegated to the Solicitor-General of the State.

The matter was tried by Chigbue J, and three issues were canvassed before him:-

(i) that the court had no jurisdiction generally to entertain the matter because it was founded on a criminal cause over which an earlier order of a court, of the same jurisdiction was made; and in the circumstances the court would not be assuming an appellate jurisdiction on its decision;

(ii) that the respondent (as plaintiff) had no locus standi to bring the action; and

(iii) that because there was no incumbent Attorney-General of the State and the powers of the Constitution had not been delegated to the Solicitor-General of the State, the power exercised by the Solicitor-General by terminating the proceedings at the trial court under section 191(1)(c) of the Constitution was invalid, null and void.

After considering the submissions of both parties in the section, the learned trial judge ruled that he had jurisdiction to entertain the matter; that the Respondent (as Plaintiff) had locus standi to institute the action; and that the powers exercised by the Solicitor-General of the State in terminating the criminal proceedings was unlawful, null and void and of no effect whatsoever.

Against that decision, the appellant appealed to the Court of Appeal in Kaduna where by a majority of three to two, the appeal was dismissed; and the decision of the trial judge was affirmed. The Appellant further appealed to this court against that decision. Five grounds of appeal were filed, and because of the constitutional nature of the matter, the court not only sat with a full panel of seven Justices, but also invited all the Attorneys-General in the country to appear as Amici Curiae. Many of them responded to the invitation and filed briefs. They also either appeared personally or sent law officers of their Ministries to make submissions on the issues raised in the matter.

However, the three main issues on which submissions were made before us were:-

(a) whether the trial court had jurisdiction to try the action;

(b) whether the respondent had locus standi to institute the civil suit; and

(c) whether the Solicitor-General of Kaduna State validly exercised the powers conferred on the Attorney-General of the State under section 191 of the Constitution in the absence of an incumbent Attorney-General of the State.

There was not much controversy over the issue of jurisdiction as it was generally agreed that the trial court was competent to entertain the action which came before it on an originating summons and that he was not exercising any appellate jurisdiction in the matter. But on the other two issues Various submissions were made by learned counsel which may be summarised thus:

On the question of locus standi, it was submitted that having regard to the principle laid down in the case of Senator Adesanya v. The President of the Federal Republic of Nigeria & Anor (1981) 2 NCLR.358, it is only when within the meaning of section 6(6)(b) of the Constitution, the civil rights and obligations of the person, who invokes the jurisdiction of the Court, are in issue for determination, that the judicial power of the court may be invoked; and since the respondent had failed to show that he had any special interest; or some justiciable interest which may be affected by the action of the Solicitor-General in terminating the criminal proceedings; or that he would suffer injury or damage as a result of that action, he had no locus standi to institute the civil proceedings. Conversely, reference was made by some learned counsel to the decision of this court in The State v. S. O. Ilori & 2 Ors. (1983) 2 S.C.155 where it was held that a person who has suffered from the unjust exercise of his powers by an unscrupulous Attorney-General can invoke other proceedings against the Attorney-General. It was then submitted that since the issue before the trial court for determination on the originating summons was whether the Solicitor-General had validly exercised the powers to terminate the criminal proceedings in accordance with section 191(1)(c) of the Constitution, the respondent had locus standi to institute the civil proceedings. Moreover, it was contended that a father's interest in the life of his son coupled with his filial relationship as a father gave the respondent sufficient interest to see that justice was done in the trial of those suspected of killing his son

institute the civil proceedings. Moreover, it was contended that a father's interest in the life of his son coupled with his filial relationship as a father gave the respondent sufficient interest to

see that justice was done in the trial of those suspected of killing his son

With respect to the issue of whether the powers of the Attorney-General of Kaduna State under section 191(1) of the Constitution was validly exercised by the Solicitor-General of the State, when there was no incumbent Attorney-General, it was submitted that;

(a) Where there is an incumbent Attorney-General, the powers conferred on him by section 191(1) shall be exercised by him in person or through officers of his department acting under and in accordance with his general or specific instructions.

(b) Where there is no Attorney-General or there is one who is unable for any reason to exercise the powers, such powers may be exercised by the Solicitor-General or any other officer of his department provided the Solicitor-General or such other officer is qualified to practise as a legal practititioner in Nigeria and has been so qualified for not less than 10 years; and as such he is qualified to perform the functions of the Attorney-General under Section 176(2) of the Constitution.

I have had the privilege of reading the draft of the lead judgment just delivered by my learned brother Irikefe J.S.C in which all the issues canvassed before this court in this matter were carefully considered; and I am in complete agreement with the conclusions reached therein. I, however, wish to add these few points to emphasis my views on the issue of locus standi.

In my view, an individual has no right to insist that a criminal offence should be prosecuted by the State or that a private criminal prosecution brought by him cannot be terminated by the State. That such has been settled by this Court in the case of The State v. S.O. Ilori & Ors. (1983) 2 S.C. 155 in which the exercise of the power of entering a Nolle Prosequi by an Attorney-Generalm

private criminal proceedings was questioned. The view was however expressed in that case, with which I agree, that a person who had suffered from the unjust exercise of his powers by an unscrupulous Attorney-General can invoke other proceedings, but certainly not to ask the court to question or review the exercise of the powers of the Attorney-General.

In this case, it is quite clear that the Solicitor-General of Kaduna State purported to exercise the powers conferred upon the Attorney-General of the State by section 191(1) of the Constitution, at a time when no Attorney-General was appointed for the State, and no such powers could have been delegated to him. And consequent upon the exercise of those powers, the accused persons who had been arraigned for trial, were discharged.

What the respondent has therefore sought mainly in his suit was not to challenge the exercise of those powers so as to revive the prosecution of those accused persons. Rather, he had by an originating summons, applied for the interpretation of section 191 of the Constitution which is a written document by which every Nigerian citizen is governed. Moreover, he had also disclosed in the affidavit in support of his Originating Summons, his interest in having the section of the Constitution interpreted by the court. He had shown that the person allegedly killed by the discharged accused persons, was his son; that his son was killed in very suspicious circumstances; that he testified as a prosecution witness during the preliminary inquiry prior to the trial; that no Attorney-General was appointed in the State at that time; and that the powers of the Attorney-General to enter a Nolle Prosequi was not delegated to the Solicitor-General. This is therefore not a case where, as in Senator Adesanya's case (Supra) the Senator was said not to have a personal interesl in the matter even though he challenged the appointment of Hon. Justice Ovie-Whiskey as unconstitutional. This Court decided in that case that Senator Adesanya had no locus standi because he was challenging the exercise of the powers of the President and the confirmation powers of the Senate, matters which were not in any way related to his civil rights and obligations as a person. But it is to be noted

that a father's interest in the life of his son is of paramount importance; and that filial relationship was enough, in my view to give the respondent special interest in knowing the correct interpretation to be given by the court to section 191 of the Constitution vis-a-vis the purported exercise of the powers by the Solicitor-General. One should therefore take the liberal view advocated by Fatayi-Williams C.J.N. in Senator Adesanya's case to ascribe locus standi to the respondent. In the circumstances, I am satisfied that the respondent had locus standi in instituting the civil action. I will therefore for those reasons and the more detailed ones contained in the lead judgment, dismiss the appeal and affirm the majority judgment of the Court of Appeal with N300.00 costs to the respondent.

C. A. OPUTA, J.S.C.:

I had the advantage of reading the draft of the lead judgment just delivered by my learned brother, Irikefe, J.S.C. The antecedent facts - the communicable violence, the killing of one Abdul Rashid, the son of the Respondent, the prosecution of those alleged to be responsible for the unlawful death of the said Abdul Rashid and the withdrawal of the said prosecution by the Solicitor-General under Section 191(2) of the 1979 Constitution - were fully set out. The subsequent action by the Respondent seeking a declaration that:-

'Any purported exercise of the powers of the Attorney-General of Kaduna State, by the Solicitor-General of Kaduna State under the provisions of Section 191 of the Constitution of the Federal Republic of Nigeria, 1979, in the absence of an incumbent to the office of the Attorney-General of Kaduna State is unconstitutional, unlawful, null and void and of no effect whatsoever.'

has been the bone of contention in the court of first instance, the Court of Appeal, Kaduna State Division, and it is still the crux of the appeal to this Court.

In the court of first instance, Chigbue, J., in a well considered judgment held that:-

'The Solicitor-General of Kaduna State cannot validly exercise the powers of terminating the Criminal Charge No. KD/28/81' The State v. Idi Shugaba and 4 ors. when such power has not been specifically delegated to him and when no person was appointed to the office of the Attorney-General of Kaduna Stale to give such directives. In the circumstance, I declare that the purported exercise of the powers conferred upon the Attorney-General of Kaduna State, by the Solicitor-General of Kaduna State under the provision of Section 191 of the Constitution of the Federal Republic of Nigeria 1979, in the absence of an incumbent in the office of the Attorney General Kaduna Stale is unconstitutional, unlawful, null and void and of no effect.'

On the issue of the locus standi of the Respondent to initiate the action at all, the account given in the judgment of the trial court is very brief indeed. At page 10 of the Record, it simply said:-

'when the case came up for hearing on the 8th June, 1982, Mallam Aliyu, Deputy Solicitor-General, Kaduna State contended in limine that:-

(1) This court has no jurisdiction generally to entertain the matter because it was founded on a criminal cause over which an earlier order of this Court was made, the essence being that this Court will be assuming an appellate jurisdiction on its decision.

(2) That the applicant has no locus standi to bring the action.

After hearing arguments on both sides, lover-ruled all the points canvassed by the Deputy Solicitor-General and then assumed jurisdiction to hear and determine all the points in controversies. It will be needless to reproduce herein the ruling so made.'

Since the present appeal is not against the judgment of Chigbue, J. but against the majority judgment of the Court of Appeal, one need not probe deeply into the reasons for over-ruling the learned Deputy Solicitor-General on the issue of locus standi.

Only two issues were argued before the Supreme Court, namely:

(i) The locus standi of the Respondent.

(ii) The constitutionality or otherwise of the Solicitor-General of Kaduna State withdrawing a criminal case pursuant to Section 191 without the specific mandate of the Attorney-General.

These two issues were among the issues also argued and hotly contested in the Court of Appeal. What was the result? The Court below was divided. The President of the Court, Nasir P. with Wali and Maidama JJ.C.A. concurring held that he Respondent had a locus standi. In his lead judgment, Nasir, P. held:-

'I am convinced that in the present appeal the learned trial judge was right; to open the gates of the Court for the Respondent to air his grievance and make the application he did. The Respondent's son was killed in circumstances which made it necessary to start a culpable homicide trial. The relationship of father and son ought to be sufficient to give the father interest to see that justice is done in

the trial. The interest is greater if there is suspicion that the case was unlawfully terminated.'

On the second issue - whether in the absence of an incumbent Attorney-General, the Solicitor-General of Kaduna Stale could have acted under Section 191 of the 1979 Constitution to withdraw a criminal charge pending before the court, the learned President of the Court of Appeal held:-

'I am satisfied that the powers of the Attorney-General under Section 191 of the Constitution are vested in him in 'person' and he remains responsible for the exercise of such powers even where he himself has delegated such powers to other officers or has exercised such powers through other officer of his department. It follows therefore that without specific authority of the Attorney-General no other officer of his department however eminent can exercise such powers. To hold otherwise will lead to the ridiculous result of each and every officer of the department having power to terminate criminal prosecution with or without the knowledge of the Attorney-General in whatever case they so wish irrespective of the seriousness of the offence or the possible consequence of such termination and the courts will be powerless to intervene.'

Coker, J.C.A. (as he then was) and Karibi-Whyte, J.C.A. (as he then was) both dissented. Both held that the respondent had no locus standi to bring a civil proceeding in respect of the discontinuance of the criminal trial of those alleged to have unlawfully killed his son. Coker, J.C.A. (as he then was) on the issue of the standing of the respondent held at page 82;-

'The duty to prosecute is a public one and no person has a legal right to demand that the State should prosecute a particular case. As earlier stated any individual has the right to initiate a private prosecution. If the plaintiff had initiated one and the Solicitor-General attempted to discontinue it purporting to exercise the powers of the Attorney-General under S.191 of the Constitution,

the question whether he had such power could properly have been raised before the trial court, and if not satisfied, he could, as the prosecutor, have appealed"

And at page 83, the learned Justices continued:-

'The right or interest of a father in ensuring the prosecution by the State of the killer of his son is natural or moral, but not enforceable by him against the State. It cannot be compelled. His interest may be special, but that does not elevate that interest into a legal right. On Section 191 of the Constitution, the learned Justice held:-

'I would prefer a broad rather than a narrow interpretation of that Section. I would adopt the liberal interpretation that if there is an incumbent Attorney-General, he alone could exercise the power to discontinue a prosecution....But in his absence, say there is no incumbent of that office, whosoever that is constitutionally qualified and performing the functions of that office could exercise the power to discontinue any criminal prosecution initiated by the State. In the circumstances of this case, I hold that the Solicitor-General could properly discontinue the criminal charge before Aroyewun, J.'

This is one of the dissenting judgments in the case when it was before the Court of Appeal.

Karibi-Whyte, J.C.A. (as he then was) held that:-

'Not being a person subject to prosecution or deriving any right from such prosecution.... the respondent has no special legal right or proprietory interest in the prosecution of those accused of the murder of his son and their discharge from prosecution in my view does not affect his civil rights and obligations'.I am therefore in no doubt that the respondent has no locus standi to initiate the

proceedings since there was not before the court a justiciable issue between contending parties.

On the construction of Section 191 of the 1979 Constitution and the issue whether in the absence of an incumbent Attorney-General, the Solicitor-General can validly withdraw criminal proceedings pending before the courts, the learned Justice held:-

'In my opinion therefore, the Solicitor-General being one of the officers in the Department of the Attorney-General is by S.191(2) empowered to exercise the powers vested in the Attorney-General under S.191(1) in the absence of an incumbent Attorney-General.'

I have on purpose set out briefly the view - (divergent views) of the Justices of the Court of Appeal who heard this case because they were as divided as the Attorneys-General both of the Federation and of the States who appeared, at the request of the Supreme Court, as amici curiae.

I have no doubt whatsoever that Section 191(1)(c) vests in Attorney-General of a State, and in no one else, the power 'to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person'. I am also fully satisfied that under Section 191(2), the powers conferred on the Attorney-General to withdraw proceedings under S.191(1)(c) can be exercised by the Attorney-General personally or by anyone he specifically delegated that power to withdraw any case. In the absence of such specific delegation, which is usually gazelled, no officer of the Department, not even a Solicitor-General, can withdraw a criminal case acting under Section 191 of the Constitution. It then follows naturally that where there is no incumbent Attorney-General, the powers given to him by Section 191 will, as it were, lie dormant. The question of delegation will arise only where there is someone, constitutionally competent, to make that delegation. Where therefore, as happened in Kaduna State during the period under review, there

was no Attorney-General, the Solicitor-General, who cannot act without delegation from the Attorney-General, was acting unconstitutionally when he withdrew Charge No. KDH/28C/81 pending before Aroyewun, J. I am in complete agreement with the argument, reasoning and conclusion of my learned brother, Irikefe, J.S.C., in his lead judgment with regard to the issue whether or not the Solicitor-General of Kaduna State acted constitutionally in withdrawing the criminal case before Aroyewun, J., and I adopt same as mine. I will therefore uphold and affirm the judgment of the court of first instance (the judgment of Chigbue, J.) and the majority judgment of the Court of Appeal, Kaduna Division (which is the judgment of the Court) on the interpretation and application of Section 191 of the 1979 Constitution.

It is on the issue of locus standi that I cannot pretend that I have not had some serious headache and considerable hesitation in views on locus standi between the majority and minority judgments - between Justices of equal authority who were almost equally divided; the diversity of reasoning between the Attorneys-General who support one side or the other; the decision of this Court in Senator Adesanya v. President of Nigeria (1981) 2 NCL 358; the obiter dictum of my learned brother Eso, JSC in the State v. Ilori and 2 ors (1983) 1 SCNLR 94 at p.111:-

'That a person who has suffered from the unjust exercise of his powers by an unscrupulous Attorney-General is not without remedy; for he can invoke other proceedings against the Attorney-General' (as the Respondent did in the case now on appeal).

all these made me doubt for a time, but I am satisfied that upon the whole, the Court of Appeal in its majority judgment was right in holding that the Respondent had a locus standi.

It may therefore be necessary at this stage to probe more deeply the concept of locus standi generally but more especially as it relates to declaratory actions. Locus standi literally means a place

of standing. It is thus used to denote a right of appearance in a court of justice or before a legislative body on a given question. Earl Jowitt in his Dictionary of English Law, p.1110 observed:-

'To say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.

There is perhaps no question more fundamental in the whole process of adjudication than that of access to justice - access to the courts. He who cannot even reach the courts cannot talk of justice from those courts. It is in this context and for this fundamental reason that many legal systems are now relaxing the erstwhile severity of their rules regarding locus standi.

In Roman law, it was open to any citizen to bring an actio popularis in respect of a public delict or to sue for a prohibitory or restitutory interdict for the protection of res sacrae and res publicae but title to sue, otherwise, depended upon the infringement of a private right. Deriving from this, most legal systems require that, save in exceptional circumstances, a plaintiff must have a special personal interest in the proceedings he institutes. In the United States, the petitioner to have a locus standi must generally establish a personal interest but there has progressively been a clearly marked tendency both in Federal and State administrations to give standing or locus standi to anyone 'who is in fact adversely affected by governmental action to challenge that action if it is judicially reviewable'. (see K.C. Davis' Administrative Law Treatise, iii. 291) and this is so, notwithstanding that the adverse effect on his personal interest is no greater than no other members of the community. In Canada, the Supreme Court has recently relaxed the requirements for locus standi in litigation in which the constitutionality of legislation is impugned:- Thorson v Attorney-General of Canada (1975) 1 S.C.R. 138; See also Nova Scotia Board of Censors v. McNeil (1976) 2 S.C.R. 265. The point being made here is that the courts should not give an unduly restrictive interpretation to the expression locus standi.

Here in Nigeria, the problem of locus standi is compounded by the fact that the common law concept where the right to sue accrues only to a person who has a legal right or whose legal right has been adversely affected or who has suffered or is likely to suffer special damage in consequence of an alleged wrong has been reinforced by the constitutional provisions of section 6 of the 1979 Constitution. This compounding has further confounded the problem. But one has to recognise the fact that locus standi means the legal capacity to challenge the order or act etc. Standing confers on an applicant the right to be heard as distinct from the right to succeed in the action or proceeding for relief. Let me cite just one example. A person may have a locus standi to apply for an order of certiorari to quash the decision of an inferior tribunal although the application is bound to be refused because he will be unable to prove that the decision is in any way tainted with either illegality or invalidity. In Adesanya's case supra the Senator did approach the Court. He was heard by the Lagos High Court. But in the Court of Appeal, Lagos Division, the issue of locus standi was raised for the first time. The Supreme Court held that he had no locus standi.

What is, however, more interesting is the varying opinions of my learned brothers on the issue of locus standi in Adesanya's case supra. In the case on appeal, Nasir, P., quoted and adopted the opinion of Fatayi-Williams, C.J.N. at p.373. Two or three sentences in that dictum deserve special mention:-

(i) 'To deny any member of such a society (a developing country with multi-ethnic society and a written Federal Constitution) who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution access to a court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organised discenchantment with the judicial process.'

(ii) 'In the Nigerian context, it is better to allow a party to go to court and to be heard than to refuse him access to our Courts.'

(iii) 'Except in extreme and obvious cases of abuse of process, how then can one conceive of a judicial process where access to the courts, by persons with grievances is based solely on the Court's own value judgment in a multi-ethnic country where more than two hundred languages are spoken? I would rather err on the side of access than that of restriction.'

Bearing in mind the primary aim of the 1979 Constitution namely-

'To provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and justice etc.'

and applying the guidelines suggested by Fatayi-Williams, C.J.N. in Adesanya's case above to the facts of the case now on appeal, one soon discovers that:-

1. The Respondent is one of the persons whose welfare is guaranteed and to whom justice is also guaranteed.

2. His son has been killed.

3. He was a witness for the prosecution during the trial of those alleged to have killed his son.

4. There was an obvious infraction of Section 191(1)(c) of the Constitution when the Solicitor-General without the necessary constitutional authority withdrew the charges and let the alleged 'murderers' of his son go scot free (in the Nigerian context the accused persons now set free will naturally brag that they were nearer the seat of power or should I call it 'long leg').

In view of the above, what will the Respondent think of our justice if his simple application for a declaration that the Solicitor-General was wrong in acting the way he did (and the Respondent is right) was thrown out on what Fatayi-Williams, C.J.N. in Adesanya's case called the 'flimsy excuse of lack of sufficient interest'? If we are to keep our peoples together we must observe the commandment - 'thou shall not ration justice'.

But hasn't the Respondent sufficient interest to qualify as a plaintiff? Coker, J.C.A., (as he then was) in his dissenting judgment at page 83 conceded that the Respondent 'might however, in an appropriate case, have a legal right against the killers in tort, for example, loss of service or under the Fatal Accident Act.'

Karibi-Whyte, J.C.A. (as he then was) observed in his own dissenting judgment at p.106:-

It is now fairly well settled that where a plaintiff seeks to establish a private as opposed to a public right, there will be locus standi only if he has a special legal right or if he has sufficient interest in the performance of the duty sought to be enforced' or where his interest is adversely affected. See S.6(6)(b) Constitution 1979; Senator Adesanya v. President of Federal Republic & Anor; Gouriet v. Union of Post Office Workers (1977) 3 All. E. R. 70'

One has to note here that the Respondent was a witness for the prosecution. He therefore definitely had some interest in the prosecution and its eventual outcome. In the lead judgment of the Court of Appeal, Nasir, P., dealing with the issue of locus standi referred also to Adesanya's case supra particularly to the observation of Fatayi Williams, C.J.N. referred to earlier on in this judgment and concluded:

'From the above observations and conclusions by His Lordship, which I consider relevant here I am convinced that in the present appeal the learned trial judge was right to open the gates of the court for the Respondent to air his grievances and make the application he made in this case. The Respondent's son was killed in circumstances which made it necessary to start a culpable homicide trial. The relationship of father and son ought to be sufficient to give the father interest to see that justice is done in the trial. The interest is greater if there is suspicion that the case was unlawfully terminated.' It is here that the dictum of Kayode Eso, J.S.C. in Ilori's case becomes relevant.

The legal concept of Standing or locus standi is predicated on the assumption that no court is obliged to provide a remedy for a claim in which the applicant has a remote, hypothetical or no interest. A right may exist not as a primary right say in contract; tort; or property and marital rights. Primary rights are those which can be created without reference to rights already existing. Preventive or protective rights exist in order to protect the infringement or loss of primary rights. These are secondary rights. Secondary rights are judicial when they require the assistance of the law for their enforcement.

The commandment: 'Thou shall not kill' was taken very seriously. The death penalty was insisted on for murder (Genesis 9:5). The reason being the theological principle involved:

'For your life blood I will surely require a reckoning ... I will require it and of men; of every man's brother, I will require the life of man. Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image.'

This was the principle applied in the Pentateuch. But it was common in other legal systems to allow compensation in the case of homicide. Instead of being executed, the offender or his family could pay appropriate compensation to the family of the one he

killed. In the primordial Igbo Society, this compensation may take the form of grant in perpetuity of land or fish pond to the family of the deceased. It may take the form of giving female members of the accused person's family into forced marriages to members of the deceased's family. The whole idea was to restore the balance, the social equilibrium caused by the homicide. Who can argue that in such a situation the father of the deceased will have no legal claim to the compensation paid for the death of his son? He will surely have a secondary right to the compensation. Section 78 of the Penal Code has, in principle, kept alive the practice of composition for homicide.

By section 78 of the Penal Code:-

'Any person who is convicted of an offence under this Penal Code may be adjudged to make Compensation to any person injured by his offence and such compensation may be either in addition to or in substitution for other punishment.'

Now the Respondent as the heir and personal representative of his deceased son, has thus a legal right, though secondary not primary, to the successful conclusion of the criminal action. The unlawful termination of that prosecution was thus a justiciable wrong which will give him a locus standi in the case now on appeal: see Section 367 of the Criminal Procedure Code of Northern Nigeria stipulating the mode of payment of such compensation:

'It will be enforced as if it were a fine.' See Babalola John v. Zaria N.A. (1959) N.R.N.L.R. 43 at p 45: See also Banana v. Bornu N.A. (1961) N.R.N.L.R.79.

Also sections 3 and 4 of the Fatal Accidents Law Cap 43 of the Laws of Northern Nigeria will give the Respondent a right of action if at the end of the prosecution it was proved that the death of his son was 'fatally and accidentally' caused by the accused persons.

Coker, J.C.A. (as he then was) in his dissenting judgment quoted earlier on admitted this.

Lazar Sarna in his book - 'Law of Declaratory Judgments' dealt with Locus Standi and at page 15, he wrote:-

"The court has sufficient leeway, perhaps tantamount to outright discretion, to decide whether or not an applicant for relief has legal interest to sue; at the same time the court in its absolute discretion may decide whether or not declaratory relief is suitable and should be granted... It has been assumed that the locus standi of an applicant must be determined in the light of the special relief sought and that accordingly declaratory discretion and discretion on standing must unavoidably suffer a degree of fusion'. or the above proposition, the learned author cited the Canadian case of Thorson v Attorney-General of Canada (No.2) (1975)1 S.C.R. 138. There test of justiciability was proffered by Laskin, J. at p.145:-

'I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder....The courts are quite able to control declaratory actions both through discretion by directing a stay and by imposing costs'.The substantive issue raised by the plaintiffs action is a justiciable one, and, prima fade, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of judicial process could be made the subject of adjudication'.

In the case on appeal, can anyone doubt that the substantive issue "the extent of the power conferred by S.191; whether or not the constitutional right to discontinue criminal prosecutions under Section 191(1)(c) can be exercised by a Solicitor-General without delegation of such power to him by an incumbent Attorney-General - is a justiciable issue? It is because that issue is not only justiciable but also of serious concern and importance, that the

court invited all the Attorneys-General of the States and of the Federation to appear and address it as amici curiae. Will the court be justified in refusing to adjudicate on this important issue of considerable public interest on the 'flimsy excuse of lack of sufficient interest' or locus standi of the applicant? I imagine not. In fact, that was why during the argument, the, learned Chief Justice of Nigeria who presided paid more attention to the constitutional issue involving the powers of the Attorney-General of a State under Section 191 of the Constitution. The issue of locus standi was to him of secondary importance and with respect, he is right.

Another test of Standing is whether there exists a dispute between the parties. Proof of a dispute is in effect proof that the judicial intervention is not only helpful but also necessary indeed, for the resolution of the issue. In the Brief filed on behalf of the Appellant, several issues were set out under Questions for Determination, one of those issues being:- 'Can the Solicitor-General or officers of his Department exercise the powers under Section 191(2) of the 1979 Constitution of the Federal Republic of Nigeria?' In the Respondent's Brief, the central issue for determination was put down as:- Can the powers conferred on the Attorney-General by Section 191 of the 1979 Constitution be exercised in the absence of an incumbent Attorney-General by officers of the Attorney-General's department if such powers have not been specifically delegated to them by an incumbent Attorney-General?" On this central issue of great public importance, the Appellant says yes, while the Respondent says No. There should be someone to decide this dispute one way or the other. The courts below were therefore justified in hearing the plaintiffs claim even if the dispute went beyond the strict legal relationship of the parties, so long as it concerns a real question of substance.

It is here that I will refer again to the observations of my learned brother, Eso, J.S.C. in two cases:

In Attorney-General of Bendel State v Attorney-General of the Federation & 22 ors (1981) 10 S.C. 1 at pages 190 & 191 the

learned Justice after reproducing the comments of Fatayi Williams, C.J.N. in Adesanya's case supra observed:-

'On constitutional issues, if this is what it imports, let there be a floodgate. The constitution can only be tested in the courts and it is access to the courts for such test that will give satisfaction to the people for whom the Constitution is made.'

The Respondent is, no doubt, one of those 'people for whom the Constitution is made.'This all boils down to this - that there should be a very broad and liberal interpretation of Section 6(6) to make it accord with the preamble to the Constitution and a relaxation of extreme legalism and the undue rigidity involved in the concept of locus standi at least where constitutional issues are called in question - here Section 191 of the Constitution. The second dictum of Eso, J.S.C., I will quote (even at the risk of repetition) the learned Justice's observation in The State v. S.O. Ilori & 2 ors (1983) 1 SCNLR. 94 at p.111:

'The appellant has strenuously harped on the possibility of abuse of his powers by an Attorney-General who is left with his absolute discretion. I have already pointed out earlier, that the sanction lies in the reaction of his appointor and also in public opinion. But more importantly is the fact that a person who has suffered from the unjust exercise of his powers by an unscrupulous Attorney-General is not without remedy; for he can invoke other proceedings against the Attorney-General". (italics mine).

In the case on appeal, the exercise of his powers was not even by the Attorney-General. It was a wrongful, unlawful and unconstitutional exercise of the Attorney-General's power by the Solicitor-General. The Respondent was the one who suffered from this infraction of the Constitution, this usurpation of the powers of the Attorney-General by the Solicitor-General which rendered the whole exercise- the termination of the prosecution pending before Aroyewun, J. void. In law, it is a nullity and as Denning, L.J. (as he

then was) observed in Wiseman v Wiseman (1953-56) Probate Div. 79 at p.91:-

"The distinction between a transaction which is void and one that is only voidable, as I understand it is this if a transaction is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order to set it aside. It is automatically null and void without more ado although it is sometimes convenient to have the court declare it to be so"

All that the Respondent has done in this case is to alert the court to declare void that which was void ab initio and has ever since remained void. In the contemplation of the law, the charges wrongfully and unconstitutionally withdrawn by the learned Solicitor-General of Kaduna State are deemed to be still pending before Aroweyun, J.

In the final result, it is for all the reasons given above and for the fuller and more comprehensive reasons in the lead judgment of my learned brother, Irikefe, J.S.C., that I too will dismiss this appeal and I hereby dismiss same with N300.00 to the Respondent.

Appeal dismissed

Decisions of the Court of Appeal and High Court affirmed