

SUPERME COURT OF NIGERIA

23RD JULY, 1993. SC.213/1991

**CORAM:- A. G. KARIBI-WHYTE, S. M. A. BELGORE,
A. B. WALI, O. OLATAWURA, I. L. KUTIGI, JJSC**

RAPHAEL OKECHUKWU ARICHE APPELLANT
V.
THE STATE RESPONDENT

*APPEALS - Trial court's finding of fact- conditions that will lead to
appellate court's interference*

*EVIDENCE - Murder- contradictions in the defence evidence - whether
trial court was right in disregarding the entire defence*

*EVIDENCE - Where accused admitted death of deceased - but with
holds account of the death - when the onus is on
accused to give such account - whether accused shall be
presumed to have killed the deceased*

*MURDER - Where there is no direct evidence-circumstances
pointing to the accused as responsible-whether court can
rightly convict*

*MURDER - Absence of evidence of cause of death - accused with
holding true circumstances of deceased's death - whether
court can presume that accused killed the deceased.*

*MURDER - Unequivocal evidence pointing to accused as the only
one with deceased up to her death - whether evidence is
sufficient to ground conviction*

FACTS

The Appellant picked the deceased, a girl, in his car heading for Lagos via Onitsha - Asaba - Benin road. The point of departure was Owerri in Imo State. On getting to Ovia River bridge along the Benin- Lagos expressway the appellant alleged another vehicle hit his own vehicle from behind while he was attempting to overtake a stationary accidented vehicle at the entrance to the bridge. The vehicle, with him and the deceased inside, were thrown into the river. The appellant's story of the incident varied as the number of times he made statements to the police. It was his

story that a fisherman finally rescued him from the river after he had swam for some minutes and put him on a vehicle to the University of Benin Teaching Hospital where he was treated for bruises on the face and neck. No evidence of the treatment was produced by the Appellant. The Appellant admitted the deceased had died but insisted that her corpse would be inside the vehicle under the waters of Ovia River. Divers who searched the bottom of the river however did not see the appellant's vehicle neither did they see the corpse of the deceased although they picked up scraps of other vehicles from the river.

The defence witnesses gave widely differing and contradictory accounts of the accident and in the end, the trial Judge after a review of all the evidence before him could not believe the appellant's story nor that of his witnesses. The appellant was found guilty of murder on the strong circumstantial evidence and was accordingly convicted and sentenced to death. He appealed to the Court of Appeal where the appeal was dismissed. He then appealed to the Supreme Court against the decision of the two lower courts.

HELD (unanimously dismissing the appeal)

1. Unless a finding of fact is perverse, not supported by evidence or is based on evidence not legally admissible, the appellate court will not disturb that finding. (p.55 L26)
2. The story of the Appellant is a complete contradiction of those of his witnesses and the learned trial Judge who was not convinced that the deceased was trapped in any car that plunged into the river, was right in disregarding the entire defence of the Appellant. (p.55 L30)
3. Where the evidence is not direct but on the entire circumstance of the case it could be established that the accused is the only one that could be responsible for the death of the victim, the court can rightly convict (p.55 L36)
4. There was no evidence of what killed the deceased as that prof erred by the Appellant was totally rejected. The contradictions in the Appellant's statement to the Police, his evidence in court and that of his witnesses are enough to disbelieve him and hold that he must be withholding the true circumstance of the deceased's death from the court, (p. 56 L21)

5. The onus is on the Appellant to give account of where the deceased ended, which fact he is withholding. Appellant having admitted that she had died, the presumption is that he killed her. (p.56 L30)
6. The circumstantial evidence in this case points to the conclusion that the Appellant killed the deceased somewhere and concocted the story of the accident to cover his trail, (p.57 LI 1)
7. The unequivocal points at the Appellant as the only one who was with the deceased up to her death and the evidence relied upon is sufficient to ground the conviction which the Court of Appeal up held. No other person could be held responsible for killing the deceased except the Appellant. (p.58 L6)

REPRESENTATION

J.T.O. Okpoko, SAN (with him, J.O. Umukhoru (Mrs) and C.E. Mogboh), for the Appellant

Tinuke A. Akomolafe Wilson (Mrs); Director of Public Prosecutions Ministry of Justice, Edo State (with her, B.O. kalu (Mrs) Chief Legal Officer, Ministry of Justice, Edo State), for the Respondent

CASES REFERRED TO

1. Stephen v. The State (1986) 5 NWLR (pt. 46) 978
2. R. v. Colder (1960) 1 WLR 1169
3. Mbenu v. The State (1988) 4 NWLR (pt. 84) 615
4. Nwabueze v. The State (1988) 4 NWLR (pt. 86) 16
5. Efe v. The State (1976) 11 SC 75
6. Fashanu v. Adekoye (1974) 6 SC 83
7. Yassin vs. Barclays Bank D.C.O. Ltd (1960) 1 All NLR 1711
8. Edim v. The State (1972) 4 SC 160
9. Ogundipe v. The State (1991) 2 NWLR 458
10. Ogala v. The State (1991) 2 NWLR (pt. 175) 509
11. Alake v. The State (1922) 9 NWLR 260
12. Ojegele v. The State (1988) 1 NWLR (pt. 71) 414
13. Adio v. The State (1986) 2 NWLR (pt. 24) 581
14. Shazali v. The State (1988) 4 NWLR (pt. 93) 164
15. Iyaro v. The State (1988) 1 NWLR (pt. 69) 256

16. Gabriel v. State (1989) 5 NWLR (pt. 122) 457
17. Atano v. A.G. Bendel (1988) 2 NWLR (pt. 75) 201
18. Alaka v. State (1992) 9 NWLR (pt. 265) 260
19. Abieke v. The State (1975) 9-11 SC 97
20. Anekwe v. The State (1976) 10 SC 255
21. Ukorah v. State (1977) 4 SC 167
22. Ache v. State (1980) 1-2 SC 166
23. Lori v. State (1980) 8-11 SC 81
24. Omogodo v. State (1981) 5 SC 5
25. Gbadamosi v. State (1992) 9 NWLR (pt. 266)
26. Udedibia ors v. The State (1965) NMLR 129
27. Edet Obasi v. The State (1965) NMLR 129
28. R. v. Taper (1952) A.C. 480
29. R.v. Taylor Weaver & Donovan 21 C.A.R. 20
30. R.v. Onufrezyk (1955) 1 All ER 247
31. Nwosu v. The State (1986) pt. 35 348
32. Oyeyemi v. Irewole Local Government (1993) 1 NWLR (pt. 270) 462/477.
33. Stephen Ukopoh v. The State (1977) 4 SC. 167
34. Onah v. The State (1985) 3 NWLR (pt. 12) 236

STATUTES REFERRED TO

1. Criminal Code Section 319. Cap.48 vol. II Laws of Bendel State of Nigeria 1976.
2. Evidence Act. Section 38
3. Evidence Act. Section 91 (1)
4. Evidence Act. Section 138

LEAD JUDGMENT BY BELGORE JSC

On the 3rd day of August 1985, the appellant picked Apolonia Onyeanywu in his car of Peugeot 504 Saloon make, registration number LA 5730 MG and they were heading for Lagos via Onitsha - Asaba - Umunede - Benin road. The starting point was Onweku village Ogbaku Owerri in Imo State, and they certainly left for Lagos after 9a.m. according to the evidence of the appellant in the witness box at trial court. The lady (i.e. Miss Apolonia Onyeanywu - hereinafter referred to as "the deceased"), requested after 9 a.m. to be taken back home to pick something she forgot. They then called at the Fuel Filling Facility to take petrol. They passed through

Onitsha to Asaba where they stopped for the deceased to eat. They proceeded to Umunede where the deceased bought some yams her mother gave her money to purchase. Already in the car from the starting point were a bag of gari, some pears, sum of N3,000.00 in the glove compartment, cobs of corn and a jerry can half full of palm wine. The appellant never
5 gave details of the various times they arrived in each place up to Benin City where they topped up the fuel in the car. Proceeding on the Benin - Lagos road on the expressway at about 18 miles west of Benin City at Ovia River bridge, the appellant alleged that in an attempt to overtake a stationary accident vehicle at the entrance to the bridge, a vehicle hit him from the
10 back, and his vehicle, with him and the deceased inside, were thrown into the river. The appellant's story of this accident is as varied as the number of statements he made. The consistent strain in his statement is that a fisherman finally rescued him from the river and that he arranged to take him to the road and put him in a vehicle to the University of Benin Teaching
15 Hospital where he was treated, but whose record of the treatment was not in evidence in court. He however ended up in a private hospital where he was treated for bruises on the face and neck. His first statement to the Police was on 5th August, 1985 and it was a brief one as follows:

"I was coming from Owerri going to Lagos with Miss Apolonia Onyeonu. Two of us were only occupants of my car 504 GR A/C LA 5730 MG.

*At the edge of OVIA RIVER Bridge I saw a broken down vehicle and I slowed down in order to avoid the said vehicle at that juncture another vehicle hit my car from behind and forced my car (LA 5730 MG) into the
25 River.*

I manage to escape with the help of a fisherman after swimming for about twenty minutes, the other occupant could not escape and she is still inside the car under the RIVER.

*The fisher man with the help of a UTC lorry driver took me to UBTH
30 where I was first treated before my Company Branch Manager at Benin brought me to this Hospital 'Bennoni Hospital' for further treatment with the help of my brother in-laws Dr. & MRS. F.G.A. OGBE.*

I cannot recollect the car that hit me all I know was that a car hit me from behind and we went into the river." (Sgd) R.O. ARICHE

35 However, on 13th August 1985, about a week after the first statement, he made another voluntary statement as follows:

"I have made statement earlier on this accident to the Police on my hospital bed at Bennoni Hospital Benin City.

However, I would like to say as follows in addition to my former

statement:-

On the 4th Sunday 1985 I was travelling from Ogbaku in Owerri to Lagos in the company of Miss Apolonia Onyeonu we were both travelling in my car LA 5730 MG while I am the driver of the same car.

The parents of the said Miss Apolonia Onyeonu and my own parents are family friends and in fact her parents are my parents sponsor for my parents Church Marriage. In the other hand myself and the uncle of Apolonia Onyeonu i.e. Mr. Malachy Nwaiwu are friends and members of the same social club and at the same time Miss Apolonia Onyeonu is friendly to me. A week to the accident I collected an application for employment from her which I submitted for her.

Two of us travelled happily all the way from Ogbaku up to Benin without trouble from Benin we continued toward Lagos on the express Road. After Ekiadolor at the edged of Ovia River there was a 504 station wagon which was accidented and blocked one of the lanes (Right lane). I viewed side mirror and I trafficated to the left before I entered the left lane I slowed down so as to pass safely as I passed the car on the Ovia River bridge the luxury Bus behind us hit my car from behind thereby forcing and/or pushing our car into the river.

I managed to escape when the car got under the river by swimming to the River surface. The River tide was very swift and it carried me to a very far distance until I get to the middle of the River where a tree fell across the River, I held on to the tree until I saw a fisherman and the son who are fishing in a canoe I shouted at them and they came to my help, they carried me in there boat to Land they also arrange the vehicle that took me to the Hospital (UBTH) Benin where I was first treated. My brother-in-law was contacted and he came to collect me to their house and the next day took me to Benoni Hospital with the consent of my company branch manager. At Benoni Hospital I was admitted on the 5th August, 1985 and discharged on the 13th August, 1985. And in fact I was the person who instructed my brother-in-law Uche Asibelua to inform the Police about the accident on the 5th August, 1985.

In the other hand, it was a pity that Miss Apolonia Onyeonu was not able to escape from the car and the river and uptill now effort to locate the body and the car have not yielded any result.

Immediately I was discharged from the Hospital I went straight to the Police Station to get the Police informed and at the Police Station I saw the girl's parents we exchanged greetings it was when I met the Police that the Police informed me of my detention. And that they could release me only if I can get somebody to bail me."

(Sgd)???
13/8/85

Statement recorded in my present by the accused.

5

(Sgd) ? ? ? Sgt.
13/8/85

By the time the appellant was giving evidence in the witness box he
10 gave graphic description of the times and firmly stated that the alleged
accident occurred at 1p.m., that was during cross-examination. In his evi-
dence the appellant alleged that on his being thrown into the river the car
settled under the river's water and he immediately unbuckled his seat belt.
The deceased was still in the car. He opened his driver's side door and
15 swam to the surface. The car landed in the river on the eastern side, still in
the river. In his first statement, Exhibit A, he swam for ten minutes before
the fisherman rescued him. But the evidence of the appellant left many
improbable for the trial Judge and an example is this portion:

20 *"I attempted to get up my seatbelt held me back and I instinctively
pressed the button which instantly released my seat belt; and I got out of
the car into the river through the driver's side and swam to the surface and
by the time my head came out, I was on the left side of the river. This is
also because when the accident the car fell into the river on the right hand
25 side facing Lagos, the river was following from right to left but when I came
out I found myself on the opposite side i.e. the left hand side following the
current when I surfaced from the river I was about One hundred and fifty
yards from the Ovia bridge and I came out facing the bridge and I at-
tempted to swim to the bank of the river; but as I firstly observed some
30 people on the bridge and I attempted to swim to the back of the river; but
as I made effort the fast current of the flowing river was rocking me up and
down and attempting to carry me away; at a point in time I got tired and
could no longer swim effectively and I began to take in some water as I
managed to keep afloat; as I was doing this I saw an object floating in my
35 front and I used the last energy in me to grab the object and I held on
tightly to the object which I later discovered to be a jerry can half filled with
palm wine which was previously in the booth of my car, and at this stage I
now used only my legs to swim, the water was carrying me away and I felt
I had injuries on my hand, my legs and my eyes - the current however was*

still carrying me away and latter the current of the river carried me to one of the dead woods in the river, and there I used one hand to hold on to the branch of the dead wood and the other to the jerry can. At this period I began to view again and as my hands were getting weak holding on to the branch of the dead tree and the jerry can, there I saw a canoe, coming toward my direction and it got to me. I observed that inside the canoe was an elderly man and a small boy of about ten years, the elderly man assisted me from the water into his canoe, unconsciously I was still holding on the jerry can in the canoe and the elderly man asked me what was inside the jerry can, this elderly man later took the jerry can and emptied the contents inside the river, and paddled the canoe to the bank of the river. The elderly man wanted to bring me out of the canoe but I was feeling cold and my hand, legs and eyes were bleeding and I could not come out from the canoe. The elderly man went into the bush cut a stick, gave me the stick to hold by my left hand side and as I held the stick the elderly man lifted me from the other side and took me to their camp which is very close to the Ovia river; from the bank of the river to the camp is about 150 yards through a bush path. On arrival at the camp, the people in the camp brought out some Ogogoro gin put some on my wounds and gave me a portion to drink, and they also put some garri soaked with water into my mouth. Thereafter these people carried me from their camp to the main road, where I was lying on the road side, this people began to stop cars which refused to stop, eventually a lorry stopped after about more than thirty minutes was description of U.T.C. was written on the lorry.

The people and the elderly man whom I later knew his name to be Mr. Oyo asked the lorry driver to take me to the hospital, this was at about 3p.m. on 4/8/85. The accident happened about some minutes to one O'clock in the afternoon. The lorry took me to the University of Benin Teaching Hospital, Benin City on arrival at the Hospital I was not attended promptly but hospital attendant carried me into the casualty ward and put me on the bed there the Doctors came and examined me and at about 9 p.m. My wounds were stitched thereafter while in the hospital somebody in the hospital informed me that if I have any relation in Benin City; I should give him the address and he will arrange for ambulance to go and inform them; thereafter I gave the person mentioned since Chaki Monis, and I gave the latter the name of Mrs. Rose Ogbe and requested him to contact her, this person returned and came with one Uche Asebelawe, who brought a Range Rover vehicle took me away from the Hospital to 28 Airport Road, Benin City, Mrs. Ogbe's residence. This was at about 11p.m."

Thus it was that the appellant gave evidence of what he did uncon-

sciously, a total impossibility for humans. Even though the appellant said he swam for ten minutes before Michael Oyor (D.W.3) the alleged fisherman helped him out of the river and thus rescued him from drowning he was not up to two hundred yards from the bridge where he was allegedly thrown into the river. D.W.3 gave evidence that neither did he see the alleged accident 504 Peugeot station wagon nor the persons helping to push it off at the bridge. Whereas the appellant gave 1 p.m. or some five minutes before as the time of the accident, D.W.3 who allegedly rescued him said the time he rescued the appellant was about 10am.

There were three sets of divers that went to search for the appellant's car and the body of the deceased that was supposed to be inside. Even though each set of drivers searched in vain for the vehicle, it was certainly not there. The appellant was certain Apolonia Onyeonwu had died but his varied account of the accident that allegedly claimed her life has left a serious circumstance of unreliability in the story. The D.W.1, Nnodem, who claimed to be a soldier that was in the luxury bus that allegedly hit the appellant's car asserted that he saw the accident. He claimed he saw a stationary station wagon of 504 Peugeot make near the bridge. His account is widely different from that of the appellant. The appellant said he saw accident vehicle that some persons were attempting to put on its wheels; this witness never saw a crowd or group of persons helping. His story was another exercise in contradiction. He claimed to have come out of the luxury bus after it crossed the bridge and with other passengers saw a survivor from the car that was thrown into the river "*struggling*". Nobody offered help and instead of helping he joined another car to travel miles back to Benin to report to Police. He claimed to have returned to the scene with some Police Officers and there again saw a fresh accident involving another luxury bus, a station wagon vehicle and a trailer lorry. There was no report of this witness reporting any accident to the Police much less following him to the scene on that day. The first report to the Police was on 5th August, 1985 when the appellant was in the house of his in-laws, the Ogbes, and before he went to the private hospital. This witness claimed he left Benin at about 1p.m. and got to the accident scene a little later, it is remarkable that he in the same breath under cross-examination said "*The weather condition on the date of the accident was foggy. The accident occurred in the morning.*" He was anxious, he seemed to portray, to go back to Benin to report the accident without for a moment considering how to rescue the appellant. He also never thought of doing anything to the alleged driver of the luxury bus. There were searches by the drivers on various days between 17th August, 1985 and 23rd August, 1985 and they saw no evidence of the

alleged car that fell into the River Ovia; they however found scraps of other vehicles at the bottom of the river. Another set of divers were at the scene almost a year later, i.e. around 18th June, 1986. The car was not found even though fragments of the previous accidents were found. The witness for defence who was also a diver never saw the vehicle the appellant said was in the river with the corpse of the deceased. 5

Trial Judge, on a very careful review of all evidence before him could not believe the story of the appellant that the car fell or was thrown into River Ovia and he firmly believed that there was no accident. The contradictions in the evidence of the appellant and his witnesses were such that he could not believe them. What remained for him was that the appellant 10 picked the deceased alive from Ogbaku in his car on 4th August, 1985, a Sunday, and both the car and the deceased have not been seen again. The explanation given by the appellant was not believed as the story of an accident could not be supported by strong evidence of the divers who believed the car was not in the river as claimed by the appellant. The D.W.1., 15 a soldier, claimed to have seen the accident and that he went to report to the Police in Benin City, The Police never had any report of the accident on that day and never saw D.W.1. The appellant told the story of a car hitting his vehicle in Exhibit A, his statement to the Police at first opportunity but in Exhibit B it was a luxury bus hitting his car. The evidence of D.W.3, the 20 alleged fisherman who rescued the appellant was not highly regarded by the trial Judge. Trial Judge therefore held that due to inconsistencies in the evidence of defence, they should not be relied upon and he relied on Stephen v. State (1986) 5 NWLR (Pt. 46) 978,1000, 1001;

R. v. Golder (1960) 1 WLR 1169, 1172; Mbenu v. State (1988) 3 NWLR (Pt. 84) 615, and Nwahueze v. State (1988) 4 NWLR (Pt. 86) 16. The Judge found the defence of the appellant mere after thought and held the appellant had killed the deceased and hid the body and the car. He found that by the circumstances of the case only the appellant could have killed 30 the deceased and that though he maintained the deceased had died he had not revealed the truth that he killed her. It is noteworthy that the Judge in conclusion of his findings found of the defence evidence.

"I am satisfied that this testimony of the P.W.6 has remained unassailable 35 despite the feeble and belated attempt of the accused person and his fellow conspirators to dislodge it by planting the plate number of the accused person's vehicle at the scene. Since the testimony of the P.W.6 is more in consonance with the truth of this episode, it is also safe to conclude from

the evidence adduced in support of the prosecution's case and the testimony of the accused person and in particular the impossible feats accused person said he performed after his vehicle plunged into the river that accused has never been inside the river nor does the accused person appear to me to be a person who has the ability to swim to safety when faced with
5 *such a sudden emergency when a vehicle in motion plunged into the bed of the river.*

..... the case for the prosecution is based on circumstantial evidence since the body of the deceased was never found."

10

The appellant was found guilty of murder and was accordingly convicted and condemned to death. He appealed to the Court of Appeal where the appeal was dismissed.

The appellant raised the following issues for determination in this
15 appeal based on his grounds of appeal:

ISSUES FOR DETERMINATION:

"The issues raised for determination in this appeal are as follows:

1. Having held that the eye witness' evidence for the Defence
20 was one sided, have the learned Justices of the Court of Appeal any legally justifiable basis for affirming the Judgment of the trial Judge that Appellant was not involved in a road accident?

2. Have the learned justices of the Court of Appeal basis for
25 their view that absence of visible sign of accident on the Ovia River bridge in this case proved that Appellant was not involved in such accident?

3. Were the learned justices of the Court of Appeal right to
regard the admitted contradictory evidence of P.W.3, P.W.4 and P.W.7
30 as of no consequence in this case?

4. Were the learned justices of the Court of Appeal right in
dismissing the Appeal in the manner they did?"

The respondent's issue for determination are also in the lines above.

35

The evidence of the defence were not believed by the trial court. The contention that none of the prosecution witnesses travelled with the appellant and the deceased is also true of the defence witnesses. The case for the prosecution is based entirely on circumstantial evidence. The evidence of

the appellant that he was involved in an accident was not believed by the trial Judge; he also disbelieved the evidence of defence witnesses. D.W1., Regimen Nnodium, whose evidence seems to indicate that he was in the luxury bus that allegedly pushed the appellant's car into the river, was not believed by trial Judge. He (trial Judge) had the opportunity of physically seeing and hearing the evidence of this witness. The record is very clear; this witness purported to have been in the luxury bus allegedly hit the appellant's car whereby it was thrown over the bridge; that the bus none the less crossed the bridge and pulled up whereby he came out and saw someone coming out of the car and struggling to swim out of danger.

At this stage, according to this witness, he never sought any help or personally attempted to rescue the appellant; rather he travelled eighteen miles to Benin City to report the accident. There is nowhere his presence at the Police station was recorded against that day i.e. 4th August, 1985. All he did was merely to go to Benin and found his way back to join the luxury bus which had left the scene. The evidence of D.W.3, Michael Oyor the fisherman is also incredible. He never saw the Peugeot 504 station wagon allegedly involved in an accident prior to the arrival of the appellant's car at the scene. Whereas the appellant said the river current carried him about 150 yards down the stream for about ten minutes after the car plunged into the river, D.W.1 seemed to describe a matter completely unrelated to the accident the appellant claimed to be involved in. All the three sets of divers that thoroughly searched the bed of river for the appellant's car, found nothing of the sort except scraps of previous accidents. The sum total was that the appellant's car was not in that river. Unless a finding of fact is not supported by evidence or is perverse or based on evidence not legally admissible the finding will not be disturbed by the appellate court. *Efe v. State* (1976) 11 S.C. 75, 79; *Fashanu v. Adekoya* (1974) 6 S.C. 83, SCNLR 91; *Yassin v. Barclays Bank D.C.O. Ltd* (1960) 1 All NLR 171, (1968) NMLR 380. Learned trial Judge was convinced there was no accident in which the appellant's car was involved nor was the deceased trapped in any car that plunged into River Ovia. The story of the appellant is a complete contradiction of those of his witnesses and learned trial Judge was right in disregarding the entire defence of the appellant. There was no tell tale of an accident at the spot the appellant claimed an accident occurred.

The position is that the evidence, if not direct but on the entire circumstance of the case, it could be established that the accused is the only one that could be responsible for the death of the victim the court can rightly convict. The appellant, by telephoning the deceased's uncle was assured that the deceased had travelled to Imo State; he went to the de-

ceased village and offered to give a lift to the deceased to Lagos, assuring her that his own sister and a nephew would be in the car to Lagos. He travelled alone with her on 4th August, 1985. He claimed to be involved in an accident on River Ovia bridge around 1 p.m. and by about 1.15p.m. he was already rescued from the river. This evidence was not believed by trial
5 court. In all the previous cases, the courts have been confronted with circumstances where the conviction for murder had to be returned where the corpse of the victim was not found. There were cases where there were positive evidence that the deceased had died but the body was not discovered and on the confession of the accused alone conviction was upheld
10 [Edim v. State (1972) 4 S.C. 160, 162]. Similarly, in the case where the child victim was abducted and was never seen again, the circumstance pointed at the kidnapper as the murderer Efe v. State (1976) 11 S.C. 75, 79] In Ogundipe v. Queen 14 WACA 458, the body of the deceased was not found and thus there was no medical evidence of the cause of death
15 but this did not vitiate the conviction of the appellants for murder as there was clear evidence of the attack on the victim and the nature of injuries he received to support the circumstantial evidence that the death was due to the cumulative acts of the accused persons. In the instant case, there was the evidence from the appellant himself that he gave lift to the deceased
20 and was all the time with her. He conceded she died. He however maintained that she died in a car submerged in River Ovia when the car plunged into it, a story the trial court disbelieved. There was no evidence of what killed the deceased and the evidence proffered by the appellant was totally rejected. The contradictions in the evidence of the appellant as contained
25 in Exhibit A and Exhibit B, his statement to the Police which he admitted he made, and his evidence in court, as well as the evidence of his witnesses are enough to disbelieve him and hold that he must be withholding the true circumstance of the deceased's death from the court. There is no evidence of the cause of death of the deceased as the corpse had not been seen;
30 where the appellant claimed the car in which he conveyed her rested, the car was not there. The onus therefore is on him to give account of where the poor girl ended. He is withholding this fact. So far he admitted that she had died, the presumption is that he killed her. The D.W.3, the alleged fisherman who claimed to have rescued the appellant testified the rescue
35 was about 10 a.m. The D. W.1, the soldier who falsely claimed to have reported the accident at Benin, was not believed as nobody at that Police station saw him. The whole defence looks more like a cock and bull story and the lower courts rightly rejected it. [Isaac Stephen v. State (1986) 5 NWLR (Pt. 46) 978,100; Ogata v. State (1991) 2 NWLR (Pt. 175) 509].

The conclusion of the trial court boils down to one important fact: that the appellant's car never plunged into the River Ovia with the body of Apalonia Onyeawwu inside and therefore never died in any accident.

The conduct of the appellant after the accident is in a line of circumstances that the trial court relied upon. He alleged the accident occurred and that he knew everything that happened despite claim of unconsciousness at a point. Still, he never reported the alleged accident not until late on 5th August, 1985, second day of the alleged accident. His injuries were not such as to render him incapable of reporting immediately to the Police an accident involving the life of a person. The circumstances in this case indicate the appellant hides the truth of how the deceased died and he concocted his story on an accident. He admitted the deceased died and left the rest to conjecture by his diversionary account of an accident which never occurred. The circumstantial evidence in this case point to the conclusion that the appellant killed the deceased somewhere and concocted the story of the accident to cover his trail. The body of the deceased is not seen up till now. The circumstance of the appellant giving lift to the deceased in his car, alone with her, and inventing an accident as the cause of her death leads to one conclusion that he knows where the deceased had died. Because she did not die at River Ovia as claimed by the appellant, the knowledge of the whereabouts of her corpse can only be known to the appellant who now decides to keep the secret. The circumstantial evidence against the appellant after rejecting his explanation is strongly against him, for he chooses to hide the body and the presumption is that he killed her. *Alake v. State* (1992) 9 NWLR (Pt. 265) 260. Nobody else could be accused of killing her, only the appellant, and he has not pointed an accusing finger at any other person as the murderer. Appellant was convicted at the trial court entirely on circumstantial evidence and as it is admitted even by the appellant that Miss Onyeawwu had died, the burden was on him to explain to satisfaction of the court how she met her death; this the appellant failed to do convincingly. Pointing irresistibly at the appellant are the facts that he was alone with the deceased and the deceased is not seen again in which case he is to explain her where about, only he can explain. His explanation was held to be untrue, and rightly so. The conclusion is that he killed her and hid away her corpse. *Ojegele v. State* (1988) 1 NWLR (Pt. 71) 414; *Adio v. State* (1986) 2 NWLR (Pt. 24) 581; *Shazali v. State* (1988) 5 NWLR (Pt. 93) 164. The evidence that the appellant was alone with the deceased and the deceased was not found again, with the appellant admitting conclusively that she had died, has placed the appellant in a position of explaining her whereabouts. His explanation was not believed

thus his burden remains undischarged and the presumption he has to rebut is that he and only he was responsible for her death and disposal of her corpse. The evidence is cogent and sufficient enough to lead to the presumption yet un rebutted that he killed her. [Iyaro v. State (1988) 1 NWLR (Pt. 69) 256]. The evidence in the circumstances of this case is cogent and
 5 compelling that the appellant killed the deceased and stealthily did away with the corpse. [Gabriel v. State (1989) 5 NWLR (Pt. 122) 457; Atano v. A.G. Bendel (1988) 2 NWLR (Pt. 75) 201; Alake v. State (1992) 9 NWLR (Pt. 265) 260]. No other person could be held responsible for killing the deceased on the available evidence except the appellant. The evidence, as
 10 it is, unequivocally points at the appellant as the only one who was with the deceased up to her death. The evidence relied upon is sufficient to ground the conviction which the Court of Appeal upheld. [Abieke v. State (1975) 9-11 S.C. 97; Anekwe v. State (1976) 10 S.C. 255; Ukorah v. State (1977) 4 S.C. 167; Adie v. State (1980) 1-2 S.C. 116; Lori v. State (1980) 8-11
 15 S.C. 81; Omogodo v State (1981) 5 S.C. 5; Gbadamosi v. State (1992) 9 NWLR (Pt. 266) 465. I find no merit in this appeal. [Udedibia & Ors. v State (1976) NSCC 669, 670].

I dismiss this appeal and affirm the decision of the Court of Appeal which upheld the conviction and death sentence passed by the trial court.
 20

KARIBI-WHYTE JSC

I have read the judgment of my learned brother, Belgore, J.S.C. in this appeal. I agree with his conclusion that the appeal lacks merit and
 25 should be dismissed. I too hereby dismiss the appeal, and affirm the judgment of the Court of Appeal.

WALI JSC

30 I am privileged to have read in advance a copy of the lead judgment of my learned brother, Belgore, J.S.C. and with which I entirely agree.

The appellant was not denying that he collected the deceased from her home to travel back with her to Lagos in his car. Since then, she was never seen. It was the appellant who stated that she died by drowning in
 35 River Ovia when the car he was travelling with the deceased was pushed into the river by another vehicle.

The learned trial Judge, after a painstaking consideration and a review of the evidence made the following findings:-

"Upon a dispassionate review and consideration of the evidence adduced in support of the charge and that of the accused person and his witness given in rebuttal, I make the following findings of facts:-

- (1) *That the deceased left 8 PW. residence at Lagos for Ogbaku Imo State on 29/7/85.*
- (2) *That the deceased arrived Ogbaku in Imo State where she stayed with her parents PWs 1 and 10 until Sunday the 4th day of August, 1985.*
- (3) *That on the said Sunday 4th day of August, 1985 accused travelled with the deceased (Miss Apolonia Onyeonwu) in accused person's vehicle with Registration No. LA 5730 MG from Ogbaku in Owerri to Lagos and that accused person was the driver of the said vehicle (Exhibit B).*
- (4) *that on the said 4th day of August, 1985 the deceased was alive before travelling with the accused person in the presence of the 1st and 10 PWs thus on the evidence adduced the deceased was last seen alive in the vehicle driven by the accused person.*
- (5) *That the deceased has not been seen alive since she travelled with the accused person in the latter's vehicle on 4/8/85."*

"Thus I am satisfied on the evidence adduced considered as whole that accused person never drove his vehicle with the deceased inside it anywhere near Ovia River bridge and that there was never an accident on the said bridge involving the accused person's vehicle and a stationary vehicle and a luxurious bus on 4/8/85."

"The defence of the accused person and his witnesses to put it mildly is an after-thought. In this regard, the accused person in conducting his defence failed to appreciate the reaction of a Police Officer attached to the Motor Traffic Division such as 6 PW in the normal course of his duties when a case in which vehicles are involved in an accident is reported at the station. The 6th PW had testified that immediately he received a report of the accident, he visited the scene at Ovia river bridge with a view to taking a rough sketch of the scene of accident. However 6th PW further stated that on arrival he was unable to obtain a rough sketch of the sketch of the scene as there were no skid marks made by any vehicle at the scene. I am satisfied that this testimony of the 6th PW has remained unassailable despite the feeble and belated attempt of the accused person and his fellow conspirators to dislodge it by planting the plate number of the accused person's vehicle at the scene. Since the testimony of the 6th PW is more in consonance with the truth of this episode, it is also safe to conclude from

5 *motion plunges into the bed of the river.*

10 *Onyeawwu and that the killing of the deceased by the accused was intentional, deliberate and premeditated and I so hold".*

15 matter has been found, even if the person suspected has made no confession of any participation in committing the crime. But before the accused is convicted on such evidence, it must be such that makes the commission of the crime certain and leaves no reasonable doubt that it was the accused that committed it.

20 See *Edet Obosi v. State* (1965) NMLR 119; *R. v. Teper* (1952) AC
480; *R. v. Taylor Weaver & Donovan* 21 Crim. App. Rept. 20;
R. v. Onufreiczuk (1955) 1 All ER 247.

25 of my learned brother, Belgore, J.S.C., that I too hereby dismiss this ap-
 appeal. The judgment of the trial court as affirmed by the court of Appeal is
 further confirmed.

30

The Appellant was charged with the murder of one Miss Apolonia Onyeanywu contrary to section 319 of the Criminal Code Cap. 48 Vol. II Laws of Bendel State of Nigeria 1976.

35 The summary of the facts has already been stated in the lead judgment of my learned brother, Belgore, J.S.C. I need not go over them, but since there was no direct eye witness to the murder, it is inevitable that I may have to refer to the substance of the evidence of some of the witnesses for the prosecution and the witnesses called by the Appellant.

The Appellant did not deny travelling with the deceased from Ogbaku, Imo State in the Appellant's private car. They started off with a view to getting to Lagos. The crux of the charge was that after they had left Benin in the same Peugeot 504 saloon car LA 5730 MG the appellant claimed that there was an accident over the bridge on Ovia River as a result of which his car driven by him was involved in an accident. The car was as a result of the accident, pushed into the river and that up till the time of his appearance in court and in fact till date the deceased had not been seen or found alive. So also the car has never been found. The witnesses called by the appellant were witnesses who claimed to have seen the accident and in fact D.W.3 was the fisherman who allegedly rescued the appellant after he had managed to get out of the car into the river at a time he was struggling for his own life.

At the end of the case for the prosecution and the defence, the learned trial Judge, Agun, J. found the appellant guilty of murder convicted and sentenced him accordingly. The appeal to the Court of Appeal, Benin Division was dismissed.

The issues in respect of which the judgment of the lower court is being challenged in this court are:

- "1. Having held that the eye witness' evidence for the Defence was one sided, have the learned Justices of the Court of Appeal any legally justifiable basis for affirming the judgment of the trial Judge that Appellant was not involved in a road accident?"*
- 2. Have the learned Justices of the Court of Appeal any legal basis for their view that absence of visible sign of accident on the Ovia River bridge in this case proved that Appellant was not involved in such accident?"*
- 3. Were the learned Justices of the Court of Appeal right to regard the admitted contradictory evidence of P.W.3, P.W.A, and P.W.7 as of no consequence in this case?"*
- 4. Were the learned Justices of the Court of Appeal right in dismissing the Appeal in the manner they did?"*

In my view these issues can safely be reduced into two:

1. Whether the prosecution has proved the case beyond reasonable doubt.
2. Whether the duty cast on the appellant to explain the whereabouts of the deceased last seen with him alive has been discharged.

In his judgment, Agun, J. made the following findings of fact:

"(1) That the deceased left 8 P.W. residence at Lagos for Ogbaku Imo State on 29/7/85.

(2) That the deceased arrived Ogbaku in Imo State where she stayed with her parents P.W. 1 and 10 until Sunday the 4th day of August, 1985.

5 (3) That on the said Sunday 4th day of August 1985 Accused travelled with the deceased (Miss Apolonia Onyeonwu) in accused person's vehicle with Registration No. LA 5730 MG from Ogbaku in Owerri to Lagos and that accused person was the driver of the said vehicle (Exhibit B).

10 (4) That on the said 4th day of August, 1985 the deceased was alive before travelling with the accused person in the presence of the 1st and 10 P.W. thus on the evidence adduced the deceased was last seen alive in the vehicle driven by the accused person.

15 (5) That the deceased has been seen alive since she travelled with the accused person in the latter's vehicle on 4/8/85."

These findings have not been attacked. In fact the entire case right from the High Court to this court is on issue 5. In fact this much the Appellant admitted in Exhibit B where he stated inter alia:

20 "...In the other hand, it was a pity that Miss Apolonia Onyeonwu was not able to escape from the car and the river and up till now efforts to locate the body and the car have not yielded any result."

This inevitable raises the issue of whether the appellant was involved in an accident on the bridge over Ovia River. The prosecution has maintained there was no accident and that the defence of accident was merely a ruse.

25 In the overall consideration of the issue of whether there was ever an accident involving the appellant's car and the deceased, the learned trial Judge said:

30 "Thus I am satisfied on the evidence adduced considered as a whole that accused person never drove his vehicle with the deceased inside it anywhere near Ovia bridge and that there was never an accident on the said bridge involving the accused person's vehicle and a stationary vehicle and a luxury bus on 4/8/85."

35 Briefs were filed by the Appellant and the Respondent. In amplification of the Appellant's brief, the learned counsel for the Appellant, Mr. Okpoko, S.A.N. made brief submissions in respect of two issues: Why the court below did not believe the oral explanation of what took place on their way back from Owerri to Lagos as narrated by the Appellant that the

Appellant mentioned that a "car" collided with his own car in his statement to the Police and in another statement, he mentioned it was a luxurious bus, the learned Senior Advocate submitted that this was not enough to disbelieve the defence set up by the appellant. Learned counsel then pointed out that the learned trial Judge did not base his reason for rejecting the appellant's defence on that difference between a "car" and a "luxurious bus". 5
 Learned Senior Advocate pointed out that before Exh. B was made, P.W.6. the Investigating Police officer related the story told by the appellant, he then emphasised that the essential thing was that the appellant's car was hit from behind. He further contended that the fact that the accident happened could not be ruled out and that the reasons given by the lower court are not sound. Learned counsel then pointed out that the Court of Appeal 10
 was silent over their complaint the way the evidence of D.W.3 - the fisherman who allegedly rescued the appellant was treated.

With regard to the fact that there were no visible signs of the accident claimed to have occurred by the appellant, learned counsel pointed 15
 out that the Court of Appeal was wrong in its approach and the approach vitiated their judgment. The lower court came to their own findings and did not rely on the finding made by the trial court. He pointed out that S.91 (1) of the Evidence Act which deals with weight to be attached to any admissible statement which stipulates that regard shall be heard to all the circumstances from which any reference about the accuracy or otherwise of the 20
 statement can be drawn. Learned counsel again submitted that if the lower court relied on S.91 (1) of the Evidence Act, the judgment will not be sound and cited the case of Nwosli v. State (1988) 4 NWLR (Pt. 35) 348 at 359.

In her own reply Mrs. Akomolafe-Wilson, the learned Director-General and Director of Public Prosecutions submitted that the two lower courts came to a just conclusion in rejecting the evidence of the appellant and his witnesses in respect of the account of the accident. The reasons given by the two lower courts were based on examination and evaluation of the evidence on the entire case. She submitted that the evidence from the eye- 30
 witnesses was completely porous. Learned Director of Public Prosecutions referred to Exhibit B and section 138 of the Evidence Act which deals with burden of proof as to any particular fact which burden lies on the person who wishes the court to believe on its existence. In this case, the particular fact put forward by the appellant was that there was an accident as a result 35
 of which his car plunged into a river and the deceased who was never seen alive died as a result of that accident. Learned Director of Public Prosecutions then referred specifically to the evidence of D.W.1., D.W.3 and D.W.5 and the material discrepancies in their evidence. D.W.3 said he was drain-

ing blood from the canoe, D.W.5, the doctor the appellant saw at the Teaching Hospital Benin talked of minor injuries and D.W.1 said nothing about the blood. Learned Director of Public Prosecutions said that the Court of Appeal was right to have rejected the evidence of the witnesses called by the Appellant. As regards the issue of accident, learned D.P.P. 5 asked us to examine the evidence of P.W.6, the Investigating Police Officer who went to the alleged scene of accident and submitted that since there were no physical signs, the issue of accident was a ruse. Finally the learned Director of Public Prosecutions submitted that in view of section 38 of the Evidence Act, the burden is on the appellant to explain circumstances of 10 death of the deceased, and that the appellant has failed to do so in view of the discrepancies in the evidence of the appellant and his witnesses. She finally asked that the appeal be dismissed.

In reply Mr. Okpoko, S.A.N. cited the case of *Oyeyemi v. Irewole Local Government* (1993) 1 NWLR (Pt. 270) 462 at 477.

15 It is trite that the onus is on the prosecution to prove its case beyond reasonable doubt. One thing is certain and that is Miss Apolonia Onyeonu died. I say certain because that evidence of death was supplied by the appellant himself during his evidence-in-chief when he said:

20 *"I know one Apolonia (sic) Onyeonu.*
She was my girl friend but SHE IS DEAD.
I feel sorry and sad about her death,
because she was a good friend to me".
(Capital supplied for emphasis).

25 The only issue then left is: How did she die and where was her corpse? Following the trend of evidence led by the appellant and his witnesses, it appears to me that section 138 of the Evidence Act applies more so when the deceased was last seen alive with the appellant who claimed that Miss Onyeonu was dead. This section provides:

30 *"138. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in course of a case be shifted from one side to the other; in*
35 *considering the amount of evidence necessary to shift the burden of proof regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."*

This burden has not been discharged.

The appellant both in his extra-judicial statements and evidence in court gave the impression that he is a man of extra-ordinary strength, good intellect and courage, but it became obvious that at the end of the case both for the prosecution and the defence set up, that he is a callous; mischievous and unreliable person. His account may be of interest to those who are interested in fictions.

One cannot disregard the evidence of 6 P.W. and the fisherman (3rd P.W.) before coming to the conclusion that there was no accident. Even if there was one, he did not travel up to the point of where he claimed there was accident with the deceased.

That the body of the deceased was not found is not a good defence to the charge of murder. The circumstantial evidence as to the fact of death was cogent and compelling that the court of trial and the lower court came to the inevitable conclusion that the appellant murdered her: See Stephen Ukorah v. State (1977) 4 S.C. 167/176; Ogundipe & Ors v. Queen 14 W.A.C.A 458 and R.v. Onufrejczk (1955) 39 CAR. 1.

In the final analysis I will, for the above reasons and the detailed reasons in the lead judgment of my learned brother Belgore, J.S.C., dismiss the appeal.

KUTIGI JSC

I read in advance the judgment of my learned brother, Belgore, J.S.C. just delivered. I agree with him that the appeal lacks merit and ought to be dismissed. There is no doubt that the prosecution in this case rested its case wholly on circumstantial evidence. The body of the deceased was never discovered and there was no direct evidence that the deceased was killed by the appellant. On pages 89 - 90 of the record the learned trial Judge made these findings of facts -

1. That the deceased left 8 P.W.'s residence at Lagos for Ogbaku Imo State on 29/7/85.
2. That the deceased arrived Ogbaku in Imo State where she stayed with her parents P.W.'s 1 and 10 until Sunday the 4th day of August 1985.
3. That on the said Sunday 4th day of August 1985 accused travelled with the deceased (Miss Apolonia Onyeonwu) in accused person's vehicle with Registration No. LA 5730 MG from Ogbaku

in Owerri to Lagos and that accused person was the driver of the said vehicle.

4. *That on the said 4th day of August, 1985, the deceased was alive before travelling with the accused person in the presence of the 1st and 10 PWs. Thus on the evidence adduced the deceased was*
- 5 *last seen alive in the vehicle driven by the accused person.*
5. *That the deceased has not been seen alive since she travelled with the accused person in the latter's vehicle on 4/8/85."*

There has been no appeal against the above findings which were
 10 amply supported by the evidence of PWs 1, 8 and 10. It is settled that in a charge of murder the fact of death is provable by circumstantial evidence notwithstanding that neither the body nor any trace of it has been found and that the accused has made no confession of any participation in the commission of the crime so long as the circumstantial evidence is positive,
 15 cogent and compelling and leaves no ground for reasonable doubt (See for example *Lori & Anors v. State* (1980) 11 S.C. 81; *Efe & Ors v. State* (1976) 11 S.C. 75; *Ukorah v. State* (1977) 4 S.C 167; *Ogundipe & Ors v. Queen* 14 WACA 458; *R. v. Onufrejczk* (1955) 1 All E.R. 247; 39 CAR 1, *Onah v. State* (1985) 3 NWLR (Pt. 12) 236).

20 The learned trial Judge also considered the defence of Motor accident raised by the appellant in his evidence court and in his extra-judicial statements (Exhibits A & B) and concluded on page 101 of the record thus-

"I am satisfied on the evidence adduced considered as a whole that the
 25 *accused person never drove his vehicle with the deceased inside it anywhere near Ovia River bridge and that there was never any accident on the said bridge involving the accused person's vehicle and a stationery vehicle and a luxurious bus on 4/8/85.....*

The defence of the accused person and his witnesses to put it mildly is an
 30 *after-thought."*

The Court of Appeal agreed with the trial court and dismissed appellant's appeal. I think they were right.

For the fuller reasons stated in the lead judgment I will also dismiss the appeal and confirm the sentence and orders of the lower courts.