

**SUPREME COURT OF NIGERIA**  
18TH JUNE 1993. SC. 246/1991  
**CORAM:- M. L. UWAIS, S. M. A. BELGORE, A. B. WALI,**  
**O. OLATAWURA, I. L. KUTIGI, JJSC**

PHILIP EKPENYONG ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

*CRIMINAL LAW* - *Provocation - what act is provocative - the test the court must apply - factors that should be considered - when the defence of provocation does not avail.*

*CRIMINAL LAW* - *Self defence - no indication of an attack on the accused - whether the issue of self defence can arise.*

*EVIDENCE* - *Of premeditated intention to kill - or inflict hurt - whether consistent with the defence of provocation.*

*PROVOCATION* - *Justified or unjustified desire for vengeance - can provocation be grounded thereon.*

**FACTS**

The appellant found his brother and the deceased in a physical combat and his mother seeming unconscious on the ground. Without finding out what was wrong, Appellant took over the fight on his assumed conclusion that the deceased might be the guilty person. They were separated and each person went to his house. The Appellant later went to the deceased and attacked him, thereby starting another combat. Appellant stabbed the deceased with the kitchen knife he (Appellant) brought to the scene and he died in the hospital 3 days after the incident. The Appellant was found guilty of murder by the Umuahia High Court and sentenced to death. The medical report (autopsy) tallied with the evidence of those who saw the stabbing. Appellant's appeal to the Court of Appeal was dismissed. On further appeal the Supreme Court had to determine whether the defence of provocation or self-defence can be raised in favour of the Appellant.

**HELD** (unanimously dismissing the appeal)

1. The fact in each case dictates what act is provocative and the court must apply an objective test. The background of the accused, his station in life and his susceptibilities are relevant in considering the defence of provocation. (P. 72 L 24)
2. Evidence of premeditated intention to kill or inflict hurt is not consistent with the defence of provocation. (P. 72 L 27)
3. From the facts of this case, there was no provocation in fact and in law. Rather, it was the blatant aggression of the Appellant that culminated in the deceased being stabbed fatally. (P. 72 L 37)
4. In an ordinary disagreement leading to physical combat, drawing a knife to stab the opponent is unreasonable if the opponent having said nothing, held no weapon, and a plea of provocation cannot be established thereby. Nor can provocation be grounded on a justified or unjustified desire for vengeance. (P. 73 L 7)
5. From the records and available evidence, the defence of provocation does not avail the Appellant and the Court of Appeal was right in upholding the trial Court's decision to that effect. (P. 73 L 20)
6. The issue of self-defence sought to be raised by Appellant's counsel does not arise as counsel has not succeeded in indicating on the whole evidence that Appellant was attacked and had to defend himself. (P. 74 L 1).

PER BELGORE JSC *"It is more in line with good practice for a witness, especially in criminal trial, to give his evidence viva voce and not to adopt a previous extra-judicial statement for his defence."* (P. 73 L 27)

### **REPRESENTATION**

Beatrice Fisher (Mrs.), Moruf Akinyo, Anthony Onuegbe, for the Appellant  
Respondent not represented, for the Respondent

**CASES REFERRED TO**

1. Udofia v. D.P.P. vol. 10 Digest of SC 343
2. Green v. The Queen XV WACA 73
3. Sanusi v. The State Digest of SC vol. 10 343
4. Okonji v. The State (1987) NWLR (Pt. 52) 659
5. R. V. Alli & Anor. (1949) XII WACA 434
6. Akang v. The State (171) 1 ALL NLR 47
7. Chukwu v. The State (1968) NMLR 274
8. Nwede v. The State (1985) 3 NWLR (Pt. 13) 444
9. R. v. Duffy 14 WACA 379
10. Akalezi v. The State (1993) 10 LRCN 264
11. Adio & Anor. v. The State (1986) NWLR (pt. 24) 581

**STATUTES**

1. Laws of Eastern Nigeria Cap 30 1963 S. 284
2. Laws of Eastern Nigeria 1963 Cap 49(Evidence Law) ss. 198, 209.

**LEAD JUDGMENT BY BELGORE JSC**

The appellant was on 4th day of December 1991 at Umuahia, in the High Court of the then Imo State found guilty of murder and was convicted and sentenced to death. His appeal to the Court of Appeal, Port Harcourt Division was dismissed. He has now appealed to this Court. For fuller apprehension of the case, it is pertinent to give a summary of its facts.

On 1st of January 1980 about 1700 hours, James Adaise (hereinafter referred to as "the deceased") went to Daniel Ekpenyong to ask for his pomade to rub on his body. He returned it later but in giving it to Daniel Ekpenyong's brother's wife it dropped and hit her on the toe. He never tendered any apology for this. There ensued some altercations between these two men and a fight followed. As they were struggling, James

Ekpenyong's mother came out and tried to separate them. Whilst on this, according to some people she collided with a bench, and according to others it was James that knocked her down. She was on the ground when Philip Ekpenyong (now the Appellant arrived at the scene). He saw his brother Daniel in struggle with the deceased and his own mother on the  
 5 ground. Philip literally took over the fight from Daniel and he and the deceased were then fighting. According to the appellant, his mother had fainted and he obviously believed the deceased was responsible. Neighbours separated them and each combatant was led to his house. It seemed that was the end of the uproar. However, Philip Ekpenyong (the appellant) broke  
 10 loose from his room and went straight for the deceased in his house where he was with his mother. The struggle started again and the appellant took a kitchen knife he came with to the house and stabbed the deceased whereby it severed one of his kidneys and his viscera protruded. He was rushed to the hospital where he received treatment on admission. He died there on  
 15 the 3rd of January 1980; the third day of the injury. The autopsy revealed a very deep wound that caused substantial loss of blood into the abdominal cavity and this was due to the destruction of one of the kidneys by a sharp object. This opinion tallies with the evidence of those who saw the stabbing. The death, according to the medical officer, was caused by severe loss of blood (haemorrhage) due to severed left kidney.

The Brief of Argument on behalf of the appellant in this Court raised the following issues:-

"ISSUES FOR DETERMINATION:

*The following issues are for determination in this appeal, namely:-*

25     2.01     *Whether the defense of provocation as prescribed in Section 284 Cap 30 Laws of Eastern Nigeria, 1963 is wide enough to accommodate the defense as raised by the appellant in the Lower Court, and/or in the alternative, the defense of self-defense could have availed the appellant on the same set of facts and sufficient enough to reduce the charge of murder to manslaughter bearing in mind his station in life.*

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2.02     *Whether the Forensic report on Exhibits 'A' and 'B' was relevant in proof of the killing of Deceased in circumstances where the report was inconclusive and Exhibits 'A' and 'B' were not obtained from proper custody. The learned Justices of the Court of Appeal recapped at pages 110 and 111 of the record thus:-*

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*'The learned trial Judge summarized the facts as follows:*

- (1) *It was the accused who stabbed the Deceased to death.*
- (2) *The injury was inflicted on January, 1st 1980 and it resulted in the death of the Deceased on January, 3rd 1980.*
- (3) *Exhibit "A" [the knife] belonged to the accused and it was Exhibit "A" that the accused used to inflict the savage and deadly wound which killed the Deceased.* 5
- (4) *The nature of the injury and the instruments used manifested clear intention to kill or to do grievous bodily harm on the part of the accused'.*

2.03 *Whether the Learned Justices of the Court of Appeal came to an erroneous decision when they held at page 120 lines 4-12 of the record that the Learned Trial Judge was perfectly justified to hold that the much canvassed provocation is a ruse in circumstances where the said Learned Justices of the Court of Appeal had admitted that Exhibit 'H' was wrongly admitted in evidence and expunged Exhibit 'H' from the record and Daniel Ekpenyong with whom the Deceased fought and Ikwuo Sunday who was present at the beginning of the struggle between Daniel Ekpenyong and the Deceased made statements to the Police [pages 9-11 of the record and pages 6-8 of the record] respectively, and which said statements contained facts which contradicted the evidence of P.W. 1 [pages 22-23 of the record] and P.W.2 [pages 23-24 of the record] and which evidence was material to the defense of the appellant.* 15 20

2.04 *Whether the learned Justices of the Court of Appeal should have expunged Exhibit 'F' in similar circumstance in which they expunged Exhibit 'F', and that their refusal to expunge exhibit 'F' pursuant to Sections 198 and 209 of Cap 48 of the Evidence Law of 1963 Laws of Eastern Nigeria has occasioned a miscarriage of justice; as a necessary corollary whether the Learned Justices of the Court of Appeal were in error when they held that the evidence of P.W.2 corroborated Exhibit 'F'.* 25 30

2.05 *Whether on the findings in the Court of Appeal at pages 117 and 120-122 of the record as to the conduct of the counsel to the appellant at the trial Court and the receipt of Exhibits 'H' and 'F' in evidence it was not mandatory for the learned Justices of the Court of Appeal to send the matter back to a High Court in the same jurisdiction for a trial de novo."* 35

At the Court of Appeal effort was directed towards possibility of defense of provocation which the appellant contended availed him. This plea never succeeded. Thus it is being resurrected in a big way before this Court. The evidence in this case as summarized earlier in this judgment showed the appellant finding his brother and the deceased in physical combat and his own mother seeming unconscious on the ground. Without finding out what was the cause of the fighting and what was wrong with his mother, he jumped to the conclusion that the deceased might be the guilty person and took up the combat with him. They were separated and each led to his house. The appellant after everybody thought an end to the quarrel had been achieved bolted out of his house to the house of the deceased and attacked him in the presence of his mother and thus starting another physical combat. He took the kitchen knife he brought to the scene, and fatally stabbed him with it. In law, to establish defense of provocation, there must be three constituent elements, to wit

1. the act that obviously was provocative, and
2. the provocative act must be such as to let the accused person actually and reasonably lose self control to do what led to the act now complained of in Court and
3. the retaliatory act to the provocation must be instantaneous and proportionate to the act reacted against.

The defense is that of the accused and he must set it up clearly; thus the act must be prima facie provocative and so that there was no time for passion to cool down. The fact in a particular case dictates what act is provocative; it is an objective test that the Court must apply. The background of the accused person, his station in life and his susceptibilities are relevant. But surely evidence of premeditated intention to kill or inflict hurt is not consistent with the defense of provocation. In this case the appellant assumed that because the deceased and his brother were fighting and seeing his mother lying on the ground helplessly, the deceased must be guilty and took over the fray. They were finally separated and he left for his house with the deceased also taken to his house. The appellant right from there, whatever outrage he might have felt, had cooled down enough. But that was not to be; he bolted from his mother's house to the deceased's house and in the presence of the deceased's mother, attacked him and started another physical combat. He picked up the kitchen knife on his way to attack the deceased and fatally stabbed him. There was no provocation in fact, and in law, in this case. Rather it was the blatant aggression of the appellant on the deceased that culminated in the deceased being stabbed

fatally. The acts complained of as provocative were not even explained to Court; Court will not presume facts not placed before it. [See *Udofia v. D.P.P.* (Vol 10, Digest of S.C. 343); *Sunday Igbani Green v. The Queen* XV WACA 73; *Sanusi v. The State* (Digest of Supreme Court Vol. 10, at 348).

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Thus in an ordinary disagreement leading to physical combat, the drawing of a knife to stab the opponent is not only unreasonable if the opponent held no weapon and said nothing and plea of provocation cannot thereby be established. The appellant seemed to have a desire to revenge an imaginary assault on his mother without even first establishing if in fact his mother was assaulted. A desire for vengeance justified or unjustified as in this case cannot ground provocation, [*Udofia v. D.P.P.* (supra) much less to consider whether the retaliatory act of stabbing was proportionate. In his evidence on oath, all the appellant did was to adopt Exhibit F, his voluntary statement to the police and to state that he was annoyed thinking his mother was dead and could not control himself. He never investigated what befell his mother but merely jumped to the unreasonable conclusion that the deceased must be the one responsible. He picked up the knife from his abode to the scene and stabbed the deceased, the act that was fatal. The defense of provocation. On the available evidence on the record did not avail the appellant and Court of Appeal was right to reject it in affirming the decision of the trial court. [*Okonji v. The State* (1987) 1 NWLR (Pt.52) 659, 670.

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I find nothing on record indicating that the appellant was not given a fair trial. He gave evidence; so did his mother. If the counsel to the appellant could not do more than he did it could be due to his instruction. It is more in line with good practice for a witness, especially in criminal trial, to give his evidence viva voce and not to adopt a previous extra-judicial statement for his defense. However, in the instant case the appellant not only adopted his voluntary statement earlier tendered by the prosecution but was cross-examined on it.

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Defense of provocation cannot by any means be built on that scanty foundation. The case of *R v. Rufai Alli & Anor* (1949) XII WACA 344 has no relevance to this case.

The Court of Appeal expunged the statement of PW.2 (deceased's mother) because of the irregularity in the language spoken by the maker and that in which it was made. It has no bearing on Exhibit F which the prosecution tendered without any objection and which the appellant adopted on oath as his voluntary statement.

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Learned counsel for the appellant, Mrs. Fisher, would like this Court to consider the defense of self-defence. She has however not succeeded in indicating on the whole evidence that the appellant was attacked and had to defend himself; the truth of the matter is the other way round. The appellant, and his mother, D.W.1, gave evidence and were not denied any  
5 right to testify. The prosecution merely put her in the witness box for cross-examination and the appellant hardly made use of her evidence. There was therefore no evidence of provocation and none to justify a plea of self-defence.

I find no merit whatsoever in this appeal and I accordingly dismiss  
10 it. I affirm the decision of Court of Appeal which upheld the conviction and sentence of death passed by the trial High Court.

### **UWAIS JSC**

15 I have had the advantage of reading in draft the judgment read by my learned brother Belgore, J .S.C. I agree that the appeal be dismissed and I have nothing to add.

### **WALI JSC**

I have read before now the lead judgment of my learned brother, Belgore, J.S.C. and I agree with his reasoning and conclusion that the appeal is without any merit.

25 The facts of this case have been ably set out in the lead judgment and need no further repetition.

The main defence raised in this case is that of provocation, and for it to succeed, the following must be proved by the appellant:-

- 30 1. Sudden fight between the appellant and the deceased which was continuous with no time for passion to cool down;
2. That in the course of that the appellant was deprived of his self-control;
3. That the provocative acts came from the deceased; and
- 35 4. That the force used by the appellant in repelling the provocation was not disproportionate in the given circumstance.



From the evidence adduced in this case which was painstakingly considered by the trial court and the Court of Appeal, the ingredients enumerated above, were not proved. The defence of provocation could not therefore be available to the appellant. See *Nwede v. The State* (1985) 3 NWLR (Pt. 13) 444; *R v. Duffy* 14 WACA 379 and *Basil Akalezi v. The State* (1993) 10 LRCN 264; (1993) 2 NWLR (Pt.273) 1. 5

The defence had failed to adduce credible and positive evidence to support the alleged provocation. The concurrent findings of fact of the two lower Courts were supported by cogent, positive and credible evidence and no good reason was proffered by the appellant to warrant this Court interfering with them. See *Amos Opoola Adio & Anor v. The State* (1986) 10 2 NWLR (Pt.24) 581.

It is for this and the more elaborate reasons contained in the lead judgment and which I hereby adopt as mine that I too find no merit in this appeal, and accordingly dismiss it.

The conviction and sentence passed on the appellant are hereby 15 affirmed.

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### OLATAWURA JSC

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I had advantage of reading in advance the judgment of my learned brother Belgore. J.S.C. I agree with his reasoning and conclusion that this appeal should be dismissed.

In her oral submission in amplification of her brief, Mrs. Fisher, the learned counsel for the appellant has urged us to reduce the offence of 25 murder to manslaughter without stating reasons why this should be done.

With respect to the learned counsel, the only issue worthy of consideration in view of the evidence, the findings of the learned trial Judge and the meticulous consideration of the points raised before the Court of Appeal is the defence of provocation lumped together with the defence of 30 self-defence in issue No.1 raised in this appeal. I will for ease of reference set down this issue as formulated by the learned counsel. It reads:

*"2.0 1. Whether the defence of provocation as prescribed in Section 284 Cap 30 Laws of Eastern Nigeria, 1963 is 35 wide enough to accommodate the defence as raised by the appellant in the lower court, and/or in the alternative, the defence of self-defence could have availed the appellant on the same set of facts and sufficient enough*

*to reduce the charge of murder to manslaughter bearing in mind his station in life."*

In either of these defences, it must be borne in mind and at the same time counsel must appreciate that neither can hang in the air without supporting evidence. In other words there must be evidence of provocation and facts on which the defence of self-defence can be based. The facts have been stated in the lead judgment and I need not repeat them. The learned trial Judge in his evaluation of the evidence and findings of fact made the following pertinent findings:

1. *The evidence by the appellant that the deceased carried her (sic) mother and threw her on the ground is an after-thought concocted in order to establish the defence of provocation'.*
2. *The deceased did not offer any provocation to the accused, and 'the much canvassed, provocation to my mind is a ruse'.*
3. *That even if there was any provocation, the force used by the accused was disproportionate to the provocation, if any. The accused intended to cause death or grievous bodily hard."*

These findings were carefully and meticulously considered by Kolawole, J.C.A. in the lead judgment of the Court of Appeal. The learned Justice said:

"It is quite clear from Exhibit F that the accused did not see any one carry his mother up and throw her on the ground. He was in fact not at the scene when his mother fell down.

If the appellant was not present when his mother fell down, it could not be said that he was provoked by the act of the deceased. The learned trial Judge was therefore perfectly justified when he said that -

*'It is my view that the deceased did not offer any provocation to the accused and the much canvassed provocation to my mind is a ruse ..... The deceased never attacked the accused or the mother. He even retaliated or reacted to all the advances made to him by the accused'.*

These are concurrent findings of fact which on the evidence are not perverse and will not be disturbed in this Court.

As pointed out earlier, the learned counsel has urged to reduce the offence of murder to that of manslaughter because of the defence of provo-

cation. Though this has failed, I will only comment on it by reference to the case of Akang v. The State (1971) 1 All NLR 47 which the lower court considered. Coker, J.S.C. on page 49 of that report said:

*"Provocation which reduces what would otherwise amount to murder to manslaughter is a legal concept made up of a number of elements which must co-exist. It is of paramount importance in the consideration of this concept that the act held out as a natural and justifiable action of the provoked person be done not in self revenge but in ventilation of a natural, sudden and contemporaneous feeling of anger caused by circumstances of the occasion. (See Vincent Chukwu v. The State (1968) NMLR 274)."*

True it is, the law requires a Judge to consider any defence raised however stupid, counsel must appreciate that it is no use raising an issue of any defence only during the final address at the end of the case without any supporting evidence even however flimsy or tenuous.

I cannot, on the evidence before the trial court and the consideration given to the points raised during the hearing of the Appeal, find any justification in law to reduce the offence to manslaughter.

On the whole the appeal fails. The judgment of the trial Court and that of the Court of Appeal are hereby affirmed.

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### **KUTIGI JSC**

I have had the advantage of reading in advance the judgment just delivered by my learned brother Belgore, J.S.C. I agree with his reasoning and conclusion that the appeal lacks merit and I hereby dismiss it. Appeal dismissed.