

SUPREME COURT OF NIGERIA
18TH JUNE, 1993. SC..146/1991
CORAM:- M. L. UWAIS, S. M. A. BELGORE, A. B. WALI,
O. OLATAWURA, I. L. KUTIGI, JJSC

NICHOLAS WANKEY APPELLANT
V.
THE STATE RESPONDENT

COURTS - Offer of explanation by trial court for contradictions in evidence - not based on any evidence before it - whether proper.

CRIMINAL LAW - Murder - issues of self defence - provocation - insanity - standard of proof - when held to have been properly dealt with - by the two lower courts.

EVIDENCE - Murder - contradictions in evidence of two of the prosecution witnesses - whether fatal - will an accused person be acquitted in all cases because of contradictions in the evidence.

EVIDENCE - Admission of inadmissible evidence - remaining admissible evidence enough to sustain conviction -whether accused will be acquitted.

FACTS

The Appellant had a long standing unsettled dispute with the deceased over a piece of land. The deceased employed 8 (eight) labourers to clear the land which was in his possession, preparatory to farming it. Whilst the clearing was going on, the Appellant came to the land, armed with a gun and ordered the deceased together with the labourers to surrender. He fired the first shot in the air, followed by another shot aimed at the deceased's feet, which he missed. Appellant fired a third shot which hit the deceased on the abdomen. He died on the spot and his labourers disappeared in fear.

The Appellant was tried at the High Court, Aba for the offence of murder. He made a confessional statement to the police admitting the charge. The prosecution called a total of 11 (eleven) witnesses. Appellant was convicted and sentenced to death. His appeal to the

Court of Appeal was dismissed. On further appeal to the Supreme Court, Appellant's counsel contended that the discrepancies in the evidence of two of the prosecution witnesses and their statement to the police are enough to discredit their evidence. That since the witnesses did not offer any explanation to the contradictions, it was not proper for either the trial Court or Court of Appeal to offer one on their behalf.

HELD (unanimously dismissing the appeal)

1. The contradictions highlighted between the evidence of two of the prosecution witnesses and their respective statements to the police are not fatal to the prosecution's case. (p. 58 L 32)
2. Even if it is accepted that the deceased was advancing towards the Appellant, no aggressive motive towards him who was then armed with a gun can be inferred, when there was no evidence that the unarmed deceased threatened or attacked the Appellant. (p. 59 L 5)
3. The trial Court was wrong in its endeavour to offer explanation to the contradictions between the evidence of two of the prosecution witnesses and their respective statements. It was not its function to take such speculative and irrelevant step where no evidence was offered to that effect. (p. 59 LI 1)
4. The trial Court and Court of Appeal dealt with the issues of self defence provocation, insanity, and the standard of proof under section 137 of the Evidence Act and came to the right conclusion that none was available to the Appellant. (p. 61 L 32)
5. For an accused person to be entitled to an acquittal as a result of discrepancies or contradictions in prosecution's case, it must be founded on material points or point which creates some doubts that the accused is entitled to benefit from. (p. 62 L 12)
6. An accused person cannot be acquitted because an inadmissible evidence was admitted when even without such evidence, the re-

maining admissible accepted and reliable evidence is enough to sustain the conviction. (p. 62 L 18)

REPRESENTATION

Chief M. I. Ahamba, SAN., E. Bassey, for the Appellant
Respondent not represented, for the Respondent

CASES REFERRED TO

1. The State v. Aigbanbee (1988) 3 NWLR (pt. 84) 548
2. Queen v. Isa (1961) 1 ALL NLR (pt. 4) 668
3. Onubogu v. The State (1974) 4 ECSLR 403
4. Joshua v. R. (1964) 1 ALL NLR
5. Seismograph Ltd. v. Ogbani (1976) 4 SC 85
6. Akpynenya v. The State (1976) 11 SC 269
7. Duru v. The State (1989) 4 NWLR (pt. 113) 24
8. Ike v. The State (1985) 4 SC 30
9. Okoro v. The State (1964) 1 ALL NLR 423
10. Mancini v. D.P.P. (1942) AC 1
11. Adi v. The Queen 15 WACA 4
12. R.V. Skyes (1913) 8 CAR 232
13. Okonji v. The State (1987) 1 NWLR (pt. 52) 659
14. Lawal v. The State (1966) 1 FSC 90
15. Odu v. The State (1965) 1 ALL NLR 25
16. Akadile v. The State (1971) 1 ALL NLR 18
17. R. v. Akani (1960) 5 FSC 120
18. Jizurumba v. The State (1976) 3 SC 89
19. Osayeme v. The State (1966) NMLR 388
20. Lawal v. Dawodu (1972) 8-9 SC 144
21. Sanyaolu v. The State (1976) 6 SC 37
22. Archia & Anor v. The State (1982) 13 NSCC 85
23. Nwede v. The State (1985) 12 SC 32

STATUTES & RULES

1. Criminal Code Cap. 30 vol. II Laws of Eastern Nigeria 1963 s. 319 (I)
2. Supreme Court Rules 1985 O. 6 r. 2

LEAD JUDGMENT BY WALI JSC

The appellant Nicholas N. Wankey was arraigned before the Aba High Court of Imo State of Nigeria charged with the following offence:

"That you Nicholas N. Wankey on 2nd of February, 1985 at Osusu Umuikpeyi in Obioma Ngwa Magisterial District unlawfully killed one Adaelu Omalozu Onwueyi (m) with a gun and thereby committed an offence punishable under section 319(1) of the Criminal Code Cap. 30 Vol. 11 Laws of Eastern Nigeria, 1963."

The accused pleaded not guilty to the charge.

The prosecution opened its case and called 11 (eleven) witnesses and tendered a number of exhibits. The accused gave evidence in his own defence but called no other witness. At the end of the trial the learned trial Judge, Johnson J. reviewed the evidence before him and found the accused guilty as charged and convicted him.

He sentenced him to death by hanging.

The accused appealed to the Court of Appeal, Port Harcourt Division against the conviction and sentence on several grounds. His appeal was also dismissed by the Court of Appeal. He has now appealed to this Court.

A resume of the facts in this case is as follows:

The accused and the deceased hail from the same village - Osusu in Umuikpeyi, Obioma Local Government. They have a protracted and outstanding land dispute over which they appeared before a Magistrate Court as well as a village arbitration committee in an effort to settle it peacefully, but apparently without success.

On 2nd February, 1985; the deceased employed eight (8) labourers to clear the bush on the disputed land which he was in possession of, preparatory to farming the same. The deceased was conducting the clearing work when the accused, armed with a gun appeared on the land at about 1 a.m. and ordered the deceased and the labourers to surrender. He fired the first shot in the air followed by the second one, aimed at the deceased's legs which he missed. He fired the third shot and hit the deceased on the abdomen. The deceased slumped down and died on the spot. The labourers scattered in fear and disappeared. Henceforth the accused will be referred to as the appellant.

In compliance with Order 6 rule 2 of the Supreme Court Rules, 1985 the appellant filed a brief. The respondent did not file any brief nor was it represented in court on the date the appeal came up for hearing, though it filed an application for extension of time to file brief to which the proposed brief was annexed. it was struck out
5 for non-prosecution.

In the brief filed by the appellant, the following five issues were formulated for determination by this Court:

"2.01 Was it proper for the Court of Appeal to surmise as to
10 what the explanation proffered by P.W.'s 4 and 5 was in order to sustain the trial Court's conclusion that there was no material contradictions between the testimonies of the two witnesses and their respective extra-judicial statements?

2.02 Did the Court of Appeal direct itself properly as to the
15 effect of the wrongly admitted and applied Exhibit 'L'

2.03 Do the contradictions in the testimonies of other prosecution witnesses not raise the possibility of a frame up and thus doubt in the case of the prosecution?

2.04 Is a conclusion arrived at in a criminal trial after 'weighing'
20 the evidence proffered by both the prosecution and the defence sustainable?

2.05 Was there no statutory defence available to the appellant?

25 It was the contention of learned counsel for the appellant that the contradictions between the evidence of the P.W. 4 and P.W. 5 and Exhibits "B" and "C", their extra-judicial statements to the police respectively are material to discredit their evidence. He submitted that since the witnesses did not offer any explanation to the contradictions it was not proper for either the trial court or the Court of Appeal
30 to offer one on their behalf. He cited and relied on *The State v. Aibangbee* (1988) 3 NWLR (Pt. 84) 548, *Queen v. Abdullahi Isa* (1961) 2 SCNLR 347 (1961) 1 All NLR (Pt. 4) 668 and *Gilubogu v. The State* (1974) 9 S.C. 1 (1974); 4 ECSLR 403 in support of the
35 submissions.'

The relevant portions of the evidence of P.WA and P.W.5 that came under attack and criticism by the appellant are related to the answers, they gave to a question put to them under cross-examination. It reads thus for P.W.4:

"Q. Did you at all on that day see the deceased advancing towards the accused who was then retreating?"

Ans: This is false. The deceased was merely standing."

In Exhibit B, the witness's statement to the police, he said thus:

"Then Adaelu called the suspect brother, do you come to kill me, as he was saying this and he was advancing to the suspect and while the suspect was retiring back and the suspect released the second shot on the leg of the deceased but missed it. Furthermore the deceased was advancing this time to the suspect while the suspect was retreating back, at a spot the suspect fired at the deceased directly and the deceased shouted that he is dead then he fell to the ground"

P.W. 5 likewise said under cross-examination:

" Q. Did you make any statement to the police in respect of this case?"

Ans: Yes.

Q: In your statement to the Police you said you saw the deceased (Adaelu) advancing towards the accused while the accused was retreating still pointing the muzzle of his gun to the deceased?"

Ans: This is not the way I said it to the Police."

While in Exhibit C, P.W. 5's statement to the police, he stated:

"As we are enjoying palm wine I saw one Nicholas Nwanbu Wankey "m" emerged from the bush and surrounded us with automatic single barrel. The suspect released a warning shot above our heads and then released the second shot on the front of the deceased, by then the deceased asked the suspect that it seems you want to shoot me and as he was putting this question before the suspect I saw the deceased advancing to the suspect while the suspect was retreating back still pointing the muzzle of the gun on the deceased. After a short while the suspect fired directly on the deceased. Also I saw the deceased fall on the ground"

The relevant portion of the judgment in which the learned trial Judge considered the contradictions referred to above between the testimonies of P.W. 4 and P.W. 5 and their extra-judicial statements - Exhibits B and C respectively, are as follows:

"Secondly, the question of contradictions raised by defence at

the trial. These contradictions bordered on the statements Exhs. B and by P.W.s 4 and 5 Sylvanus Ikpeoha and Chinwuba Nnanya respectively in which the word "advancing" to the suspect by the deceased was used which was denied by the witnesses in their explanation that they, being illiterates were not responsible for the words
5 used by the policeman who recorded their statements. On the authority of Christopher N. Onubogu & Anor v. The State (1974) 9 S.C. 1; (1974) 4 ECSLR 403, I accept this explanation as being satisfactory for the purpose of clearing the inconsistencies."

10 The learned Justice of the Court of Appeal, (Onu, and J.C.A. as he then was) did accept in his lead judgment that both P.W.4 and P.W.5 contradicted themselves in their evidence vis-a-vis their statements - Exhs. B and C respectively. Each of them said in his statement that he saw the deceased advancing towards the appellant and
15 then proceeded to resolve the contradiction thus:

"It is clear from the evidence whether the deceased advanced towards the appellant, it was the appellant who emerged at the scene armed with a gun, fired a short in the air, secondly fired at the deceased and missed his legs, then fired the third shot at the abdomen
20 which killed the deceased instantly It is immaterial whether the deceased was advancing or not.

In my judgment it is immaterial whether the deceased advanced towards the appellant. Did the advance stop him from firing the shots?
25 The answer is no. Inconsistency in the sworn testimonies and the previous statements must be inconsistency of substance on a fact in issue as for example in Joshua v. R (1964) 1 All NLR 1 Minor differences are not important. What is important is the shooting down of an unarmed man."

30 In my view, and as stated by the Court of Appeal in its judgment, the contradictions highlighted between the evidence of P.W.4 and P.W.5 and their respective statements to the police Exhibits "B" and "C", are not fatal to the prosecution's case. While it is a fact that
35 both P.W's 4 and 5 said in their respective statements to the police - Exhibits B and C that the deceased was advancing towards the appellant at the time of the incident, and denied saying so in their evidence, it is equally important that the fact that P.W.4 and P.W.5 stated in their evidence that the deceased was unarmed, should not be over-

looked.

Even if it is accepted that the deceased was advancing towards the appellant, that in itself is not enough to infer any aggressive motive towards the appellant who was then armed with gun. 5

The evidence did not show that he attacked or even threatened to attack the appellant. The remaining eye-witnesses to the incident also testified that the deceased was unarmed. 10

I am in no doubt that the trial court was wrong in its endeavour to offer explanation to the contradictions between the evidence of PWA and P.W.5 and their respective statements - Exhibits B and C based on no evidence before it. It was not its function to do so where no such evidence was offered; and what it did in this case is speculative and therefore irrelevant. See *Seismograph (Nig) Ltd v. Ogbeni* (1976) 4 S.C. 85. But this is not to say that the prosecution's case is affected. Even with our this explanation, I do not regard the contradictions as material to be fatal to the case presented by the prosecution. See *Inyere Akpunenya v. The State* (1976) 11 S.C. 269. And even without the evidence of P.W.s 4 and 5 the prosecution's case still remains strong and unaffected. 15 20

Issues No.2, 3, 4 and 5: 25

On these issues learned counsel for the appellant submitted that, if his submissions on issue I are accepted, then it accords with reason to treat the testimonies of P.W.s 3, 6 and 7 equally unreliable since, as he put it they are materially similar to the testimonies of P.W.s 4 and 5. He also contended that whereas the 4 eye witnesses to the incident gave evidence that three shots were fired, P.W.8, Sgt. Pius Egbulonu the investigating police officer said in his evidence that he only saw and recovered at the scene one empty cat ridge. He also referred to the contradictions relating to the taking of the photograph of the deceased, the post-mortem examination and the where about of the gun used in committing the offence. On these, learned counsel urged this court to treat the evidence of P.W.1. P.W.2. P.W.8 and P.W.9 as also unreliable. On Exhibit "L" learned counsel submitted that the Court of Appeal misdirected itself as to what the com- 30 35

plaint of the appellant was. He said the complaint is that "the trial judge was likely to have been influenced by the content of the police report in his consideration of the rest of the evidence, thus resulting in miscarriage of justice. Learned Counsel also attacked the word "weighed" used by the learned trial Judge in coming to the conclusion that the appellant was guilty of the offence as charged. He submitted that a wrong standard of proof was applied and therefore the verdict cannot stand. He said the Court of Appeal was wrong in sustaining the judgment of the trial court with this glaring misdirection and cited the case of *Duru v. Nwosu* (1989) 4 NWLR (Pt. 113) 24 at 42 in support.

Apart from PW.4 and PW.5, both PW's 3, 6 and 7 were also eye witnesses to the tragic and unprovoked incident, resulting in the death of the deceased. Both witnesses testified that at the time the appellant accosted and shot the deceased to death, the latter was unarmed. The testimony of PW.3 was that: *"On the day of the incident - 2/2/85, the deceased hired me to clear a farmland for him. As we had finished clearing the first portion of the farmland, we stopped and decided to rest and sharpen our knives for the second phase. The time was about between 10 and 11 a.m. We were eight in number hired by the deceased to do the work. As I was sharpening my knife, some others were drinking palm wine. The deceased was snuffing tobacco and also holding one egg in the hand. Myself and one Christopher were the first to finish our own portion of the work. The deceased started to discuss with us how to face the second portion of the work. At that juncture the accused emerged with a gun at a very close range in the farm. Suddenly, the accused fired one shot up in the area within the air. Later, the accused fired a second shot on the ground near the deceased's leg. Then the accused fired the third shot which caught the deceased on the abdomen and the deceased shouted "he has killed me" and slumped to the ground. It was the accused who fired the shot on the deceased."*

In answer to questions put to the PW.3 under cross-examination, he stated thus: *"It was the accused who/came to the land on that day with a gun. What the deceased had in his possession were the snuff and the egg including a water-proof. The deceased never fired a shot on that day."*

He also denied that there was any scuffle between the appellant and the deceased before the former shot the latter at close range.

As I said earlier, the evidence of both P.W.'s 6 and 7 is substantially the same as that of P.W.3 quoted (supra). Even that of P.W.'s 4 and 5 vigorously attacked by the defence is substantially the same as that of P.W.'s 3, 6 and 7. The crucial issue in the case is the killing of the deceased and the circumstances in which he met his death.

The learned trial Judge after a painstaking examination and consideration of the evidence on these issues made findings and came to the following conclusion: *"I have not found any material or fundamental contradictions in the evidence of the witnesses for the prosecution, which go to the root of this matter."*

The Court of Appeal, in affirming the finding (supra) said:

"All the eye-witnesses testified as to the killing - P.W.s. 3, 4, 5, 6, and 7. There were no contradictions in their testimonies. The appellant admitted killing the deceased. The effect of Exhibits "B" and "C" and sworn testimonies of P.W.s. 4 and 5 have been dealt with earlier in the judgment. A high degree of proof is necessary to secure a conviction of murder Albert Ikem v. The State (1985) 1 NWLR (Pt. 2) 378; (1985) 4 S.C. 30. The judgment of Okoko v. The State (1964) 1 All NLR 423 quoted from Mancini v. D.P.P. (1942) A.C. 1 that 'the duty of the jury to give the benefit is a duty which they should discharge having regard to the material before them, for it is on the evidence and the evidence alone that the prisoner is being tried...' The learned Judge dispassionately and meticulously considered the case of the appellant and found him guilty. On the totality of the evidence before him, he could not have reached any decision other than the guilty of the appellant. I am of the view that the case of the prosecution was proved beyond reasonable doubt. The much vaunted discrepancies do not detract from the fact that the appellant shot the deceased with a gun. The deceased died as a result. The appellant both in his testimony and statements Exhibits "B" and "K" admitted that he killed the deceased with a gun and P.W.1, the doctor found that the deceased died of a gun shot injury."

Both the trial court and the Court of Appeal dealt with the issues of self defense, provocation, insanity and the standard of proof under Section 137 of the Evidence Act and came to the conclusion, rightly in my view, that none was available to the appellant. There is no doubt that to frame a ground of appeal in a criminal case that "the decision is against the weight of evidence" is improper, as the pre-

ponderance of evidence on one side which outweighs the evidence on the other side is not the issue. But this notwithstanding, and with the admissible evidence accepted and relied upon by the court below and the lower court, I do not consider that misdirection as serious to warrant interference by this court with the verdict of the trial court. See *Adi v. The Queen* 15 WACA 4 at 8. On the appellant's extra-judicial statements, Exhibits "P" and "K", both the trial court and the Court of Appeal gave them a thorough check and scrutiny and concluded that they found them to have been freely and voluntarily made by the appellant. The learned trial Judge rightly directed himself on the principles enunciated in *R. v. Skyes* (1913) 8 CAR. 232 in his finding that both Exhibits "P" and "K" were confessional and that they were amply corroborated by other circumstantial and direct evidence in the case. It is not in all cases where there are discrepancies or contradictions in the Prosecution's case that an accused person will be entitled to an acquittal. It is only when the discrepancies or contradictions are on material points or point in the Prosecution's cases which create some doubts that the accused is entitled to benefit there from See *Okonji v. The State* (1987) 1 NWLR (Pt. 52) 659 and *The State v. Aibangbee* (1988) 3 NWLR (Pt. 84) 548; *Onubogu & Anor v. The State* (1974) 9 S.C. 1; (1974) NLR 561. Nor will an accused person be acquitted because inadmissible evidence was admitted when even without the inadmissible evidence, the remaining admissible, accepted and reliable evidence is enough to sustain the conviction. See *Lawal v. The State* (1966) 1 F.S.C. 90; *Odu v. The State* (1965) 1 All NLR 25 and *Akadile v. The State* (1971) 1 All NLR 18.

This issue was adequately dealt with by the Court of Appeal when it said:

"A statement of a witness who is available to testify is not admissible in evidence except with the aim of discrediting him under Section 198 of the Evidence Act R v. Akanni (1960) SCNLR 239; (1960) 5 FSC 120, 123. Exhibit "L", the investigative document should never have been received in evidence. The only proper use of it could have been the cross-examination on it to P.W. 9. If he had said anything in his evidence which was contrary to what he said in the report. In my judgment, both the reception of the report and the

use made of it are improper. On the other hand, the rest of the evidence disclosed a substantial case against the appellant:"

Even without Exhibit L, there is still enough evidence to sustain the appellant's conviction.

I have carefully examined the evidence adduced by the prosecution and I cannot find any material discrepancies or contradictions that are fatal to its case. See *Inyere Akpuenya v. The State* (1976) S.C. 269 and *Jizurumba v. The State* (1976) 3 S.C. 89. Save for the speculative explanation given by the trial court between the evidence of P.W.s 4 and 5 and their respective statements to the police Exhibits B and C, and which did not in any Way affect the prosecution's case.

I am of the view that the case against the appellant had been abundantly proved. There was nothing impeachable in the judgment of the trial court in that it was the appellant that caused the demise of the deceased by deliberately shooting him with a gun for no justifiable cause or reason. The concurrent findings of the trial court and the Court of Appeal on this issue and which were borne by the credible evidence are unimpeachable and are hereby affirmed. See *Osayeme v. The State* (1966) NMLR 388, *Lawal v. Dawodu* (1972) 8-9 S.C. 83, *Sanyaolu v. The State* (1976) 5 S.C. 37. This appeal fails and it is dismissed.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Wali, J.S.C. I entirely agree that the appeal be dismissed. I, accordingly, hereby dismiss the appeal.

BELGORE JSC

I read in advance the judgment of my learned brother Wali, J.S.C, and I agree that this appeal totally lacks merit. This has been a blatant murder and I see no mitigating circumstances whereby I will disturb the decision of Court of Appeal upholding the conviction and sentence of the trial court. I also dismiss the appeal and adopt the reasoning and conclusion of Wali, J.S.C. as mine.

OLATAWURA JSC

I had a preview of the judgment of my learned brother, Wali, J.S.C. I agree that the appeal lacks merit and should be dismissed. The facts have been stated in the lead judgment. Chief Ahamba, S.A.N., the learned counsel has submitted that there were discrepancies in the evidence of P. W. 4, P.W.5 and their statements, Exhibits B and C made to the police and consequently their evidence should not have been believed by the trial court. The, crux of this matter is who fired the gun that killed the deceased? The prosecution witnesses said that it was the appellant who fired three shots: one was a warning shot, the other one was fired towards the legs of the deceased and the third one which dealt the fatal blow was fired at a close range and hit the deceased in the abdomen. There was the argument that since P.W.4 and P.W.5 said in Exhibits B and C respectively that the deceased was advancing towards the appellant, the appellant thought his life was in danger.

This conclusion over-looked the fact that all the witnesses gave evidence to the effect that the deceased was unarmed. Even if he "was advancing" towards the appellant, what could he have done to the appellant who held a lethal weapon - a gun? The learned trial Judge appreciated the issues involved to be:

- (1) Who, as between the accused and the deceased, brought the gun to the farm; and
- (2) Whether or not the accused shot and killed the deceased in self-defence.

In his evaluation of the evidence before him, the learned trial Judge said:

"From my own findings of fact, I have no difficulty in believing that it was the accused who brought the gun - the lethal weapon - to the farm, the scene of crime on the 2nd of February, 1985. It was not by accident. Being motivated by malice arising from the protracted land dispute between him and deceased, and having got a wind of the presence of the deceased on the day of the incident at the farm, the accused picked his gun, determined to settle the dispute permanently by eliminating the deceased....."

From the facts, which I strongly believe, there was no struggle

of any kind between the deceased and the accused nor any assault by the deceased on the accused before the shooting."

I agree with these findings and conclusions reached by the learned trial Judge.

On the material contradictions in the evidence of P.W. 4 and P.W. 5, the learned trial Judge said:

"These contradictions bordered on the statements Exhs. B and C by P.W's. 4 and 5, Sylvanus Ikpeoha and Chinwouba Nnanya respectively in which the word "advancing" to the suspect by the deceased was used which was denied by the witnesses in their explanation that they, being illiterates were not responsible for the words used by the policeman who recorded their statements. On the authority of Christopher N. Onubogu & Anor v. The State (1974) 9 S.C 1; (1974) 4 E.C.S.L.R. 403, I accept this explanation as being satisfactory for the purpose of clearing the inconsistencies. Indeed, I have not found any material or fundamental contradictions in the evidence of the witnesses for the prosecution which go to the root of this matter."

Minor contradictions in the evidence of the prosecution witnesses cannot be fatal to the case of the prosecution convictions in respect of material contradictions in the evidence of prosecution witnesses are unsafe and will be set aside: Akpuenya v. The State (1976) 11 S.C. 269; (1976) 19 N.S.C.C. 594; Arehia & Anor v. The State (1982) 4 S.C. 78; (1982) 13 N.S.C.C. 85. Chief Ahamba, S.A.N., has also submitted that once the evidence of P.W.4 and P.W.5 are unreliable, the court should not believe the evidence of P.W.3 and P.W.7.

This, I would have ignored but from the nature of the case, it is worth commenting upon notwithstanding its startling proposition. About 8 labourers including P.W.4 and P.W.5 were working on the farm. At the stage the appellant emerged and started to release the shots, it would have been strange if there were no minor differences in their evidence. If two out of six prosecution witnesses lied it will be a strange proposition of law that the remaining witnesses must equally be treated as unreliable witnesses.

The learned Senior Advocate was unable to cite any authority in support. For the 6 of them to have 'recited' the same event like

memory verses ought to have cast doubt on their veracity.

The defence of the appellant showed a premeditated plan to settle old scores. He successfully carried it out. The evidence of P.W.4 and P.W.5 belied his defence. From the evidence of the medical doctor the appellant made sure he got rid of the deceased once and for all.

I will for the above reasons and for the fuller reasons in the judgment of my learned brother Wali, J.S.C., dismiss the appeal.

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KUTIGI JSC

I have had the opportunity of reading before now the judgment read by my learned brother Wali, J.S.C. I agree that the appeal has no merit. P.W.s 3, 4, 5, 6 and 7 were all eye witnesses when the appellant shot the deceased in the stomach with a gun. His intestines were out and he died instantly. Evidence galore that the deceased at the material time was unarmed and that there was no fight or struggle when the appellant fired the deadly shot.

Where the evidence from the prosecution negates the offer of acts of provocation, the defence must adduce credible evidence to establish provocation or self-defence. There is a total absence of evidence amounting to provocation for the murder of the deceased in this case. The appellant was unable to show that his life was endangered by any act of the deceased that the only means of survival was to have killed him (See *Nwede v. The State* (1985) 3 NWLR (Pt. 13) 444; (1985) 12 S.C. 32. It was not enough merely for the deceased "to be advancing" towards the appellant. The deceased was unarmed. And it was the appellant who went with his gun to the farm of the deceased to meet him there and then shot him.

The appeal is accordingly dismissed and the decisions of the lower courts are confirmed.

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