

**SUPREME COURT OF NIGERIA**

15TH JULY, 1993. SC.131/1992

**CORAM:- M. L. UWAI, A. B. WALI, O. OLATAWURA,  
U. OMO, M. E. OGUNDARE, JJSC**

OKOAGWU AZU ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

*EVIDENCE - Expert witness - how to qualify as one - who determines whether a witness is an expert*

*EVIDENCE - Circumstantial evidence - whether strong enough to establish cause of death - No material contradictions in evidence - whether conviction will be vitiated*

*CRIMINAL - Defences open to an accused person considered by the two lower courts*

*CRIMINAL - Murder - Cause of death - whether proved by strong circumstantial evidence*

*CRIMINAL- What prosecutor must prove - before holding out a witness as an expert - prima facie factors that will qualify a witness as an expert - whether applicable*

*CRIMINAL - Murder - Proof of cause of death - Whether medical evidence is a sine qua non*

**FACTS**

The Appellant went to eat at the house of a man whose wife ran a restaurant. He complained about the meat in his food as not only being small but also bony. The woman instructed one of her daughters to add another piece of meat. But the Appellant without any permission took a Piece of meat from the pot, sought to put it in his mouth before the woman knocked it down. The Appellant slapped the woman and hit her daughter with a kitchen stool. The deceased who inquired as to what was happening was hit with the same stool by the Appellant. He died on the way to the hospital.

The Appellant was charged with murder before the Imo State High Court, Afikpo. The prosecution called eight witnesses whilst the Appellant who denied the charge testified and called one witness in his defence. The trial Judge convicted the Appellant. His appeal to the Court of Appeal was dismissed. On further appeal, the Supreme Court had to determine inter alia, whether the prosecution has proved its case beyond all reasonable doubt.

**HELD** (Unanimously dismissing the appeal)

1. A witness must be specially skilled in the field of his evidence in order to qualify as an expert under the Evidence Act, and whether or not a witness can be regarded as an expert is to be determined by the Judge based on legal evidence before him. (p.50 L 11)
2. What prosecutors must establish before holding a witness as an expert does not appear to have been done in this case. The witness (apart from stating that he was a Medical doctor) ought to have been asked about his qualification and experience before commencing his evidence on the autopsy he carried out. (p.51 L 12)
3. In the light of the decision in *Aouad V. IGP* (14 WACA 449) to the effect that where an expert witness was not cross-examined as to his personal qualifications and ability, the nature and duties of the witness's public office coupled with the conduct of the scientific tests by him constitute a prima facie evidence in justification of his evidence as that of an expert; the learned trial Judge was right to have treated the doctor that performed the autopsy as an expert. (p.52 L 16)
4. It is settled law that as much as medical evidence is desirable towards providing the cause of death in homicide cases, it is not a sine qua non (p.52 L 20)
5. With regard to the available evidence in this case, there can be no doubt that there is strong circumstantial evidence establishing the fact that the deceased died as a result of the injury sustained by him when he was hit with a wooden stool. (p.53 L 8)

6. There are no material inconsistencies or contradictions in the evidence of the prosecution that could vitiate the Appellant's conviction for the offence of murder. (p.58 L 2)
7. The two lower courts adequately dealt with and came to the right conclusions on the issues of provocation, self-defence and the caution to be exercised in the evaluation of evidence of prosecution witnesses said to be relations of the deceased. (p.58 L 7)

### **REPRESENTATION**

Chief E. Ume Ezeoke, P.A. Ezeoke, for the Appellant

N.U.Chianakwalarn(Miss) Ag. D.P.P. (Abia State), for the Respondent

### **CASES REFERRED TO**

1. Ajani V. The Comptroller of customs 14 WACA 34
2. Aouad &Anor. V. Inspector-General of Police 14 WACA 449
3. Akpuenya V. The State (1976) 11 SC 269
4. Lori V. The State (1980) 8-11 SC 81
5. Adamu Kumo V. The State (1968) NMLR 227
6. Tonara Bakuri V. The State (1965) N.M.L.R. 163
7. Adamu V. Kano Native Authority (1956) 1 FSC 25
8. Ayinde V. The State (1972) 3 SC 153
9. Edim V. The State (1972) 4 SC 160
10. The State V. Edobor (1975) 9-11 SC 69
11. Essien V. The State (1984) 3 SC.14
12. Adekunle V. The State (1989) 5 NWLR 505
13. Okafor V. The State (1990) 1 NWLR (pt.128) 614
14. Queen V. Ukpong (1961) All NLR 25
15. Queen V. Joshua (1964) 1 SCNLR 54
16. Muka V. The State (1976) 9 - 10 SC 305
17. Ogbor V. The State (1990) 3 NWLR 484
18. Ugwunneyi V. The State (1989) 4 NWLR (pt. 114) 131
19. Egwuenu V. The State (1957) SCMLR 302
20. Kalu V. The State (1988) 4 NWLR (pt.90) 503.
21. Omenihu V. The State (1966) NMLR 356
22. Nwuzoke V. The State (1988) 1 NWLR (pt.72) 529
23. Onofowokan V. The State (1986) 2 NWLR (pt.23)
24. Nosamu V. The State (1979) 6-9 SC 133

25. Lamba Kumbia V. Bauchi N.A. (1963)>NNLR
26. Obaji V. The State (J965) NMLR 417
27. Nwede V. The State
28. Ukaobasi Ajunwa V. The State (1988) 4 NWLR (pt. 89) 380

5 **STATUTES**

1. Evidence Law Cap. 49 Laws of Eastern Nigeria 1963 S.56(2)
2. Evidence Act Cap. 112, Laws of Nigeria 1990. S.57
3. Minerals Ordinance Cap. 134
- 10 4. Criminal Code Cap.30 Laws of Eastern Nigeria, 1963 ss. 286, 287 and 318.

***LEAD JUDGMENT BY OGUNDARE JSC***

The appellant stood trial before the High Court of Imo State  
 15 in the Afikpo Judicial Division for the murder of one Ude Agwu. He  
 pleaded not guilty to the charge. At the trial the prosecution called  
 eight witnesses and closed its case. The appellant testified in his own  
 defence and called a witness. At the close of the defence and after  
 addresses by learned counsel for both the defence and the prosecu-  
 20 tion, the learned trial Judge in a reserved judgment found the charge  
 proved and convicted the appellant of the murder of Ude Agwu. He  
 was sentenced to death by hanging.

Dissatisfied with this judgment the appellant appealed to the  
 25 Court of Appeal (Port Harcourt Division). That Court dismissed the  
 appeal. He has now further appealed to this court upon four grounds  
 of appeal which, without their particulars, read as follows:-

- 30 "(A) The Court of Appeal erred in law when it affirmed the  
 decision of the trial court which convicted and sentenced the  
 appellant to death despite the fact that the cause of death  
 could not be proved beyond all reasonable doubt.
- (B) The Court of Appeal erred in law when it held that P.W.8  
 was an expert witness, when there was not evidence that he  
 enjoyed that status within the meaning of Section 56(2) of  
 35 the Evidence Law Cap. 49. Vol. III Laws of Eastern Nigeria  
 1963.
- (C) The Court of Appeal erred in law when it held that there  
 was no fighting between members of the family of the de  
 ceased and the appellant, consequently the defence of provo

cation, accident and self defence could not avail the appellant.

- (D) The decision of the Court of Appeal is unwarranted, unreasonable and cannot be supported having regard to the evidence. "

Pursuant to the Rules of this court, learned counsel for both appellant and the respondent filed and exchanged their respective briefs of argument. The issues formulated in the appellant's brief which coincide with the grounds of appeal are:-

- I. Whether the prosecution has proved its case beyond all reasonable doubt in the light of obvious and material contradictions and inconsistencies in the evidence and statements of the prosecution witnesses. 10
- II. Whether medical evidence was necessary in this case to prove cause of death. If the answer is 'yes', whether P.W.8 was an expert within the meaning of Section 56 of the Evidence Law Cap. 49 Vol. III, Laws of the Eastern Nigeria 1963, and competent to give expert opinion. 15
- III. Whether there was a free for all fight between the appellant and members of the deceased's family. If the answer is in the affirmative, whether the defence of accident, self-defence and provocation could avail the appellant. 20
- IV. Whether the court below properly evaluated the evidence of the P.W.5 to P.W.6 in the light of the fact that the said witnesses were members of the deceased's family. 25

Before I consider the issues as raised in the appellant's brief and which I would adopt for the purpose of this judgment, I need to state the facts howbeit briefly. The appellant on 23rd November, 1987 went to the house of one Emmanuel Agwu, P.W.5 at Amachi Afikpo where the latter's wife, Beatrice Ewa (P.W.1) ran a food restaurant. The appellant made an order for food and was served by P.W.4 Patience Ewa, daughter to P.W.1. Appellant however complained that the meat in the food was not only small but bony. Upon this complaint, P.W.1 instructed P.W.4 to add another piece of meat for the appellant which P.W.4 promptly did. Appellant however, got up from where he was sitting, went into the kitchen without the permission of either P.W.1 or P.W.4, opened the meat pot and unilaterally helped himself to a piece of meat. As he was about to put the meat in

his mouth, P.W.1 knocked the meat from his hand and it fell down. The appellant thereupon slapped P.W.1 who started crying. Egwu Ewa P.W.1's son on hearing the cry of his mother went to the scene and asked the appellant why he slapped his mother. The appellant picked a kitchen stool and hit P.W.1 on the head; P.W.1 slumped to  
5 the ground and shouted. Ude Agu (the deceased) was attracted to the scene by P.W.1's shout. The deceased also enquired what was happening. The appellant hit him with the same kitchen stool that he had used on P.W.1 and he too slumped exclaiming that the appellant  
10 had killed him. He was rushed to the hospital but died on the way.

In his defence, appellant admitted throwing a kitchen stool at P.W.1. He also admitted that P.W.1, P.W.4 and P.W.6 were present at the time. He gave his own account of what happened on the fateful night and claimed that one Nnachi was present at the time.  
15 He denied that it was the kitchen stool tendered in evidence he used on the night of the incident. He denied knowing the deceased and claimed that it was about 2 to 3 hours after the incident he learnt that someone died. His witness, Ndubu Eze Egwu gave an account of what happened on the fateful night. He testified that the appellant  
20 complained that the meat served him was bony. The meat was shown to the witness who found that the meat was bony. In his evidence about what happened on the fateful night, he testified that at a stage the appellant ran away and that it was after the appellant had gone  
25 away that P.W.1 hit the deceased on the head with the stool and that he helped to put the deceased in a vehicle that took him to the hospital. In short the evidence of this witness was to the effect that it was P.W.1, and not the appellant, that hit the deceased on the head with a stool resulting in the death of the latter.

I now proceed to consider the issues raised in this appeal.  
30 ISSUE 2: I am starting on this issue because as issue 1 deals with question of fact, I consider it more appropriate to take it after. Learned counsel for the appellant, in his brief, submitted that in the light of contradictions in the evidence for the prosecution the only evidence  
35 that would have enabled the court to reach the conclusion as to the cause of death was the evidence of P.W.8 the Medical Practitioner. He submitted however, that the evidence of this witness was not to be countenanced because proper evidence was not led to show that the witness was an expert under Section 56 of the Evidence Law

Cap. 49 Laws of the Eastern Nigeria. Learned counsel observed that there was nothing on record to show that P.W.8 was a Medical Practitioner at the time he claimed to perform the post mortem examination on the deceased and there was no records of his experience and competence in the science of Medicine. He then submitted that in the circumstance, this court should hold that P.W.8 was not specially skilled under the Evidence Law to conduct a post mortem examination and that his evidence was irrelevant. 5

In reply, learned Acting Director of Public Prosecutions, (Abia State), in her brief, submitted that P.W.8 being a Medical Practitioner was a medical expert trained to practise medicine and as his evidence was unchallenged and uncontradicted the court ought to act on it and accept it. Learned Acting Director further argued that if the medical evidence was excluded the court was entitled to examined further evidence before it to draw the necessary inference as to the cause of death. Learned counsel observed that from the evidence of P.W.1 to P.W.6, it was clear that the appellant hit the deceased with Exhibit D - the wooden stool; the latter slumped there and then and never got up. She then submitted that where a person "dies instantly or soon thereafter, after injury, the court may infer the cause of death and convict from the circumstances, even in the absence of medical evidence. The learned Acting Director referred to a number of legal authorities in support. She went on to submit also that it was not an immutable requirement that the cause of death should be proved by medical evidence. She argued that "where a man is struck with a lethal weapon and he falls down there and dies, it does not require medical evidence to say that the cause of death is the wound inflicted with the lethal weapon, an eye witness who sees the attack could give such evidence and from such evidence the court could infer the cause of death." On this point the learned Acting Director finally submitted that medical evidence was not always essential to prove the cause of death where the victim of a murder died in circumstances in which there was abundant evidence of the manner of death. 10 15 20 25 30 35

To begin with, the learned counsel for the appellant could have referred to the Evidence Act and not the Evidence Law of Eastern Nigeria since the subject "Evidence" under the 1979 Constitution is a Federal subject. Section 57 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990 provides for the acceptance of the

opinions of experts and is in identical terms with Section 56 of the Evidence Law of the former Eastern Nigeria. Section 57 reads:

"57(1) When the court has to form an opinion upon a point of foreign law, native law or custom, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, native law or custom, or science or art, or in question as to identity of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts."

To qualify as an expert under the Act the witness must be specially skilled in the field in which he is giving evidence and whether or not a witness can be regarded as an expert is a question for the Judge to decide; the decision must be based on legal evidence before him. As Sir Verity, CJ (Nigeria) put it in *Ajani v. The Controller of Customs* 14 WACA 34 at 36:

*"It is clear, I think, that the test must always be the knowledge and experience of the particular witness and whether the evidence justifies the conclusion that he is 'specially skilled' within the meaning of the Evidence Ordinance, which means no more than that he has special knowledge, training or experience in the matter in question."*

Giving evidence at the trial, P.W.8 said:-

*"My name is Dr. Gabriel A. Idam. I live at Amashiri in Afikpo Local Government Area. I am a medical practitioner."*

He was not cross examined on his claim to be a medical practitioner. The learned trial Judge appeared to have accepted him as such. Indeed the issue was not raised at the trial court and when it was raised at the Court of Appeal, that court per Onu, J.C.A. (as he then was) said:-

"I will commence the consideration of the argument proffered in Issue A by firstly dealing with the expert evidence of P.W.8. For evidence of a person to be regarded as that of an expert it must conform with the provisions of Section 56(1) which provides:-

56(1) When the court has to form an opinion upon a point of foreign law or custom, or science or art, or as to identity of handwriting or finger impressions, the opinions

upon that point of persons especially skilled in such foreign law, local law or custom, or science or art, or in question as to the identity of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.'

I agree with learned counsel for the appellant's submission that apart from the designation, doctor, given to P.W.8, there is no evidence that he is specially skilled in the science of medicine strictly in conformity with Section 56(2) of the Evidence Act. This is particularly true as there is no evidence as usually would be in proceedings of this nature wherein the qualifications, the name and address of the hospital where he was employed and his status in such hospital should be stated."

I agree with the above views expressed by the learned Justice of the Court of Appeal. I hope prosecutors and other counsel would take note of what they must establish before holding out a particular witness as an expert. That does not appear to have been done in this case. P.W.8 ought to have been asked of his qualifications and experience before proceeding to give his evidence on the autopsy he carried out on the corpse of the deceased.

The West African Court of Appeal held in *Aouad & Anor v. Inspector General of Police* 14 WACA 449 that the nature and duties of a witness's public office and the technical or scientific tests he made, which were not challenged, constituted prima facie evidence of his qualification to be admitted as an expert witness. In that case, a witness who described himself as an Inspector of Mines under the Minerals Ordinance was called by the prosecution as an expert and gave evidence of the office he held and the tests he had made to ascertain the nature of the ore, but was not cross-examined on those tests or on his qualifications. In the court's short judgment delivered by Sir Verity CJ (Nigeria), the learned Chief Justice observed at pages 449-450 of the Report:-

*"The offence related to certain mineral ores and evidence as to their nature was received by the Magistrate from a witness who gave expert opinion in regard thereto. It is submitted on behalf of the appellants that there was no prima facie evidence that the witness was 'specially skilled' in this subject so as to warrant his being treated as an 'expert' within the meaning of section 56 of the Evidence Ordinance (Cap.63). The witness gave evidence that he was an Inspector of Mines under the Minerals Ordinance (Cap.134) and that he made certain tests in order to ascertain the nature of the ores in question. He was not cross-examined as to his personal qualifications, as to his ability to make these tests or as to the*

*accuracy of the conclusions he drew therefrom. It is clear that he was put forward by the prosecution as an expert, his qualifications were not questioned by the defence and he was accepted as such by the Magistrate. The question was raised for the first time at the appeal to the Supreme Court and the learned Judge in a carefully considered judgment held that there*  
 5 *was sufficient evidence of special skill to justify the admission in evidence of the witness's opinion. We think that he was right. The nature and duties of the witness's public office and the conduct by him of technical or scientific tests the nature and efficiency of which have not even now been challenged constitute in our opinion prima facie evidence of his qualifications*  
 10 *sufficient to justify the admission of his evidence as that of an expert."*

In the light of the above authority, the facts of which are not too dissimilar to the facts of the case on hand, I am of the view, and I so hold, that the  
 15 learned trial Judge was right to have treated P.W.8 Dr. Idam as an expert. This disposes of Issue 2.

Be that as it may, however, it is now well settled that as much as medical evidence is desirable to prove the cause of death in homicide cases, it is not a sine qua non. It has been laid down in a long line of cases that  
 20 cause of death can be established by sufficient evidence. other than medical evidence, showing beyond reasonable doubt that death resulted from the particular act of the accused. See Akpuenya v. The State (1976) 11 S.C. 269, 278. In Lori v. The State (1980) 8-11 S.C. 81 at 97, Nnamani, J.S.C. observed as follows:-

25 *"It is conceded that medical evidence is not always essential. Where the victim dies in circumstances in which there is abundant evidence of the manner of death medical evidence can be dispensed with. See Adamu Kumo v. The State (1968) NMLR 227: and Tonara Bakuri v. The State (1965) NMLR 163."*

30 In Adamu v. Kano Native Authority (1956) 1 F.S.C. 25 (1956) SCNLR 65 the Federal Supreme Court held that the court could infer cause of death from the circumstances surrounding the death where there is lack of medical evidence. See also Ayinde v. The State (1972) 3 S.C. 153; Edim v. The State (1972) 4 S.C. 160; and The State v. Edohor (1975) 9-11 S.C. 69 in  
 35 all these three cases, the body was not even found but this court held in each one that the fact of death was provable by circumstantial evidence. See also Essien v. The State (1984) 3 S.C. 14. 18 where Bellow, J.S.C. (as he then was) observed:-

*"It is trite law that although medical evidence as to the cause of death is desirable, it is not essential in all cases of homicide. Where medical evidence is not available as to the cause of death, the court may infer the cause of death upon circumstantial evidence adduced before it."*

5

See also Adekunle v. The State (1989) 5 NWLR (Pt.123) 505,516. Having regard to the evidence available in the case on hand, there can be no doubt that there is strong circumstantial evidence establishing the fact that the deceased died as a result of the injury sustained by him when he was hit with a wooden stool. Even if therefore the medical evidence of P.W.8 is disregarded, as it is being urged upon us by learned counsel for the appellant, on the evidence of the other prosecution witnesses and D.W.2 (appellant's own witness) who claimed he was present at the time of the incident, the death of the deceased was clearly due to the injury he sustained when he was hit with a wooden stool.

15

ISSUES 1, 3 & 4: I shall consider the remaining issues together as they all put in issue the findings of fact made by the learned trial Judge. On Issue 1, learned counsel for the appellant submitted that the prosecution failed to discharge the onus on it to prove that the appellant killed the deceased. He submitted further that the contradictions and inconsistencies in the prosecution's case as revealed in the evidence of its witnesses had considerably weakened the prosecution's case and exposed it to serious doubts which no reasonable tribunal could overlook. He highlighted in his brief these contradictions and inconsistencies in the evidence of P.W.1, P.W.2, P.W.3, P.W.4, P.W.6 and P.W.7 and submitted that it was not proved beyond doubt that it was the act of the appellant that caused the death of the deceased. Learned counsel submitted that evidence of P.W.1 and P.W.4 not only contradicted those of other witnesses but "were inconsistent with their statements to the police": he urged that their evidence did not constitute evidence upon which the courts below should have acted. He cited in support of his submissions Okafor v. The State (1990) 1 NWLR (Pt.128) 614; Queen v. Ukpogong (1961) All NLR 25; (1961) SCNLR 53; Queen v. Joshua (1964) All NLR 1 and Muka v. The State (1976) 9-10 S.C. 305.

35

On Issue 3, learned counsel urged us to hold that on a proper evaluation of the evidence adduced at the trial, there was a free for all fight between members of the deceased's family on the one part and the appellant on the other. Learned counsel then submitted "if

the appellant used Exhibit "D" in killing the deceased, he did so in self-defence in the effort to extricate himself from the fight and save his life from imminent danger." The appellant was therefore entitled, so submitted learned counsel, to the protection of Section 286 of the Criminal Code, Cap. 30 Laws of Eastern Nigeria, 1963. Learned  
5 counsel also urged us to hold that, on the evidence of P.W.2 and the statement of P.W.1 to the police, Exhibit "4", the appellant was provoked by the acts of P.W.1, P.W.4 and P.W.6. He relied on *Oghor v. The State* (1990) 3 NWLR (Pt.139) 484. In this oral argument before us, learned counsel cited also: *Ugwunnenyi v. The State* (1989)  
10 4 NWLR (Pt.114) 131; and *Egwuenu v. State* (1957) SCNLR 302.

On Issue 4, learned counsel submitted that the courts below failed to evaluate the evidence of P.W.1, P.W.4, P.W.5 and P.W.6 who were, from their evidence, blood relations of the deceased. He re-  
15 marked that the courts below ought to have received the evidence of these witnesses with circumspection and not having done so, counsel argued, this court should disturb the findings of fact made by the courts below. He finally urged us to allow the appeal, set aside the judgment of the courts below and discharge and acquit appellant.

20 For the respondent, the learned Ag. Director of Public Prosecutions submitted that the evidence of P.W.1, P.W.4 and P.W.6 proved that the death of the deceased was as a result of the voluntary act of the appellant. She submitted further that there was no material inconsistency in the evidence of P.W.1, P.W.4 and P.W.6 as to create any  
25 doubt in the case for the prosecution. She recognized that there were minor differences in style of making statements but contended that these did not in any way affect the positive testimonies that the appellant did the act for which he was charged and convicted. Learned  
30 Acting Director submitted that to affect the credibility of a witness the contradiction in his evidence must be on a material point; she cited *Kalu v. The State* (1988) 4 NWLR (Pt.90) 503, 504, in support. She observed that the learned trial Judge found there were no contradictions nor inconsistencies in the evidence of witnesses for the prosecution inter se and with their statements to the police, Exhibits A and B.  
35 Learned Acting Director of Public Prosecutions observed that the learned trial Judge found there was no fight between P.W.1 - P.W.6 on the one part and the appellant on the other and submitted:-

*"the knocking off of the meat from the hand of the appellant*

by the P.W.1 was a mere rebuke for unruly behaviour of the appellant in going into her kitchen and taking out meat from her pot. The appellant's retaliation with a slap on the P.W.1 was, if anything a normal reaction to a surprise attack, that is, the knocking off the meat from his hand."

Continuing with her submission the learned Ag. DPP submitted:- 5

"The deceased did not offer any provocation to the appellant. If for anything there was provocation in the whole case, such provocation first of all came from the accused/appellant who rather then (sic) show remorse (for unruly behaviour) resorted to attacking the helpless old woman with a slap. See 10  
Oghor v. State (1990) 3 NWLR (Pt.139) 484. Even other witnesses who came to know the trouble between the accused and the P.W.1 were not spared an attack from the appellant. Even if the appellant was provoked by P.W.1, P.W.4 15  
and P.W.6 the provocation offered by them does not warrant the killing of the deceased or any other person who did not participate. See Omenihu v. The State (1966) NMLR 356."

On the defence of self defence, learned Ag. DPP submitted as follows:" 20

"The defence by the appellant of self-defence does not avail him. The defence of self-defence is available to an accused person only when he proved that he was at the time of the killing in reasonable apprehension of death or grievous harm and that it was necessary at the time to use force which re 25  
sulted in the death of the deceased in order to preserve him self from danger. See Nwuzoke v. State (1988) 1 NWLR (Pt. 72) 529 at 530. Moreover, there is no iota of evidence to show that the appellant was in fact assaulted by the deceased. 30  
The deceased was still inquiring about what the trouble was when the accused/appellant hit him with the hard object. There was therefore no basis for the appellant to use any force at all against the deceased and certainly not the degree of force he 35  
used that caused the death of the deceased."

On the question of the prosecution witnesses being blood relations of the deceased, learned Ag. DPP submitted that that fact alone was not sufficient to make the court disregard their evidence; the trial court only needed to be circumspect of their evidence and to treat it

with caution. She cited *Onafowokan v. The State* (1986) 2 NWLR (Pt.23) 496. She finally urged us to dismiss the appeal and affirm the judgment of the court below.

I have given careful consideration to the contradictions and inconsistencies highlighted in appellant's brief. The law is clear. It is not every contradiction in the evidence of witnesses called by a party that is fatal to the party's case but only those contradictions on material points - *Nasama v. State* (1979) 6-9 SC 153; *R. v. Ekanem* 5 F.S.C. 14, (1960) SCNLR 42; *Kalu v. State* (1988) 4 NWLR (Pt.90) 503.

I have examined the evidence of P.W.1 and her statement to the police. Exhibit A and can find no such contradiction in the two that can be said to vitiate the evidence of the witness. Nor can I find any contradiction in the evidence of P.W.2 and his statement to the police. True enough, he did not mention the names of P.W.4 and P.W.6 in his statement to the police. Neither did he do so in his evidence. He testified, under cross-examination, thus:-

*"I cannot say whether Patience Ewa and Egwu Ewa were at the scene on that day. That place was confused that time."*  
I cannot see anything in his statement, Exhibit B that is inconsistent with his evidence at the trial.

I have also examined the evidence of P.W.3 which learned counsel for the appellant complained about. I find no substance in the complaint; the sentence that gave rise to the complaint was taken in isolation. The witness, under cross-examination, testified:-

*"I did not see the P.W.2 as I reached the scene. It was after the commotion had calmed down that I looked round and saw P.W.2."* (Italics is mine)

The witness's evidence clearly confirmed that P.W.2 was at the scene.

It is correct to say that there is contradiction in the evidence of P.W.4 vis-a-vis her statement to the police, Exhibit C as to who slapped the other as between Egwu Ewa and the appellant. But this contradiction is rather minor and did not affect the material issue before the trial court which was: who inflicted the injury on the deceased that led to his death?

P.W.7. Cpl. Bassey John was the investigating Police Officer. He was not at the scene when the incident took place and came to the picture after a report had been made to the police and he was

assigned to investigate. His evidence that-

*"I found that the people were engaged in a free for all fight. Nobody told me that it was a free for all fight. I found that out from my investigation"* is clearly worthless, he not being present when the event took place nor did he disclose from which investigation he came to his conclusion more so that the evidence and statements of prosecution witnesses that were present went the other way. Similarly his testimony, that:-

*"No one could tell me how the deceased sustained the injury from which he died."*

does not accord with written statements taken by the witness from eye witnesses of the event. His evidence to the effect that:-

*"I was present when the doctor was performing autopsy on the deceased. I did not observe any injury on the deceased."*

betrays the reluctance of the witness to be candid with the trial court. The doctor, P.W.8 in his evidence deposed:-

*"I examined the corpse fresh. I found that the deceased had bleeding from the nose, ear and mouth."*

It is not surprising that the learned trial Judge made the following note in his record book:-

**"COURT**

*This court remarks that this witness gives this court the impression that he is not prepared to speak the truth. The witness has been warned that he is not discharged from this case and that he must continue to attend this court until he is discharged."*

The learned trial Judge had this to say in his judgment:-

*"Mr. Okor had submitted that there were material contradictions in the evidence of the P.W.1 and P.W.2 and their statements to the police exhibits A and B respectively. Exhibit A shows that the P.W.1 told the police that when she was slapped by the accused and she cried the P.W.6 came into the kitchen and held and slapped the accused. This she denied under cross-examination. The issue in this case is who hit the deceased and was the deceased involved in a fight where the accused was defending himself? I hold that the denial in court of part of the content of exhibit A does not affect the credibility of the P.W.1 in this case. I hold the same view in respect of the testimony of the P.W.2 and Exhibit B."*

I am in complete agreement with the views expressed in the passage above.

I can find no such contradictions or inconsistencies on material points in the evidence for the prosecution that could vitiate the conviction of the appellant for the offence of murder for which he was charged.

On the issues of the defences of provocation and self-defence and the caution to be exercised in the evaluation of the evidence of prosecution witnesses who are said to be relations of the deceased, it is sufficient for me to say that these issues were adequately dealt with in the judgments of the two courts below and that they came, in my respectful view, to correct conclusions on them. The learned trial Judge said:-

10      *"Is the defence of self defence available to the accused person in this case? I find that there was no fight between the P.W.1, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6 on the one hand and the accused on the other: The accused was not attacked by any of them. The P.W.2 - P.W.6 came to the scene because of the shout or cry of the P.W.1 who was first slapped by the accused.*  
 15      *They were then present when the accused used Exhibit D in hitting the deceased as soon as he came to the scene to enquire as to cause of the disturbance. There was nothing offered against the accused to warrant the use of Exhibit D on the deceased.*

20      *The defence of provocation is equally not available to the accused. The defences of self defence and provocation postulate that the accused did the act complained of and that he was forced by the circumstances then prevailing against him to do the act complained of. I do not find any basis for these defences.*

25      *If a person used a hard wooden object like Exhibit D and hit a person on the head he certainly intended either to kill him or to do grievous bodily harm to him. I find that the accused hit the deceased with, Exhibit D intending to kill him or to do him grievous bodily harm. The deceased shortly after being hit died from the injuries he received. I find the accused guilty of the murder of Ude*  
 30      *Agwu and convict him accordingly."*

And the Court of Appeal, per Onu, J.C.A. (as he then was) observed:"

35      "The appellant contends in respect of issue C inter alia that the trial court had not properly considered and evaluated the evidence of prosecution witnesses, particularly the evidence of P.W.1, P.W.2, P.W.3, P.W.4, P.W.6 and P.W.7 (investigating Police Corporal Bassey John) and that if the trial court had done so, it would have come to the only just conclusion, that there was a free-for-all fight between the appellant and the family of the deceased and that the appellant acted in self defence. We are referred to various

excerpts in the trial courts Record containing the evidence and statement of P.W.2 (Exhibit A), the evidence and statement of P.W.2 (Exhibit B), the evidence and statement of P.W.4 (Exhibit C), and the evidence of P.W.6 and P.W.7 which put together will lead to no other conclusion than that a free-for-all fight took place between the appellant and the deceased's family and that the findings thereon by the trial court were erroneous. The case of Stephen Okafor v. The State (supra) at 617 under ratio 2 was called in aid. It is additionally maintained that this case therefore affords this court, as an appellate court, an appropriate opportunity to exercise its powers of reviewing the facts and drawing the only just and reasonable inference that there was a free-for-all fight and that the appellant acted in self defence. Further, that in the commotion that ensued comment on which was appropriately made by the trial Judge, the appellant's conduct was lawfully justified under Section 287 of the Criminal Code.

It is sufficient to say in answer to points raised on this issue that firstly there was no fighting, let alone a free-for-all one between the deceased and the appellant. The deceased did not offer any provocation to the appellant. Hence, all the extracts from the trial court's Record in relation to what for instance P.W.1, P.W.2, P.W.4, P.W.6 and P.W.7 said as well as to what the trial court observed in relation to a free-for-all fight, provocation and self defence, have no relevance to what took place between the deceased and the appellant. Secondly, even if the appellant was provoked by P.W.1, P.W.4 and P.W.6, such provocation offered by them did not warrant the killing of the deceased or any other person who did not participate in the misunderstanding. See Sunday Omeninu v. The State (1966) NMLR 356 where the Supreme Court dismissed the appeal of the appellant who killed his child on the pretext that his mother had earlier provoked and injured him on the neck and the child had used words which also provoked him. Nor can defence of accident avail the appellant in the instant case - See Ogwu v. State (1990) 3 NWLR (Pt.139) 484. The defence of self defence can only avail the appellant if he proved that at the time of calling the deceased he had reasonable apprehension of his impending death or grievous harm from the deceased and that it was necessary to use force to free himself which resulted in the death of the deceased. In the instant case, there was no evidence to show that the appellant was in fact assaulted by the deceased.

See *Nwuzoke v. The State* (1988) 1 NWLR (Pt.72) 529 at 534.

See also Section 287 of the Criminal Code. What the deceased did was to ask what the matter was on being attracted by the commotion that was taking place. In the cases of *Lamba Kumbin v. Bauchi N A.* (1963) NNLR 49; and *Obaji v. The State* (1965)

5 NMLR 417 it was stated that the correct direction in law is that in relation to murder provocation in Section 318 of the Criminal Code requires consideration of the nature of the weapon or force used as a mode of resentment bearing some reasonable relation to the provocation received, the disproportion being a matter for the  
10 jury to consider in determining whether the accused had completely lost control of himself or was acting for a reason other than complete loss of self control caused by sudden provocation. See *Nwede v. The State* (supra); and *Ukaobasi Ajunwa v. The State* (1988) 4 NWLR (Pt.89) 380 at 381:"

15 In the light of the findings of fact made by the learned trial Judge, which findings, are adequately supported by the credible evidence accepted by him, I have no reason to disturb any of the conclusions reached in the passages above. In the net result, I find no substance in this appeal which I accordingly dismiss: I affirm the judgment of the court below.

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### **UWAIS JSC**

I have had the advantage of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I agree that the appeal has no merit  
25 and that it should be dismissed.

Accordingly, the appeal is hereby dismissed and the decision of the Court of Appeal, confirming the decision of the trial court, is hereby affirmed.

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### **WALI JSC**

I have read in advance a copy of the lead judgment of my learned brother Ogundare, J.S.C. and for the reasons stated therein with which I

agree, I am also of the same view that the appeal lacks merit. It is therefore  
35 dismissed.

The conviction and sentence are further affirmed.

**OLATAWURA JSC**

I agree in toto with the reasoning and conclusions of my learned brother Ogundare, J.S.C. in his lead judgment just delivered. I have nothing more to add. I will also dismiss the appeal.

**OMO JSC**

I have been privileged to read in draft the judgment of my learned brother Ogundare, J.S.C., in the above appeal. All the issues raised and canvassed have been fully considered therein. I am in complete agreement with the views therein expressed and the conclusions arrived thereat which I adopt as mine.

Accordingly, I am of the view that there is no merit in this appeal which is therefore hereby dismissed. Appeal dismissed.

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