

SUPREME COURT OF NIGERIA
17TH FEBRUARY, 1995. SC. 41/94
CORAM:- M.L. UWAIS, A.B. WALI, E.G.
OGWUEGBU, U. MOHAMMED, S.U. ONU, JJSC.

FATAI ADELE APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Assessment of credibility of witnesses - Is a privilege of the trial court - Whether Court of Appeal can use the discredited evidence of a witness - In affirming appellant's conviction.

CRIMINAL PROCEDURE - Alibi - Failure to believe appellant's alibi - Whether appellant was wrongfully convicted thereby.

CRIMINAL PROCEDURE - Discredited evidence of a witness - Disbelieved unto discharging one of the accused - Whether conviction of a co-accused can be based on that evidence .

FACTS

An affray took place between members of the National Union of Road Transport Association and The Road Transport Employers Association sometime in November, 1982, at Mushin. One Sesan Idowu Moses was murdered during the skirmishes. Nine members of the NURTWAN were charged with the murder of the deceased. Before trial commenced the charges against three of the accused persons were dropped, while 1st accused escaped from custody. Out of the five persons tried, the trial court discharged one and convicted four of them.

On appeal to the Court of Appeal, three of the accused persons were acquitted. The appellant whose appeal was dismissed by the court below has now appealed to the Supreme Court to determine whether the Court of Appeal properly evaluated the evidence of PW.3 before basing appellant's conviction thereon. And whether that court properly evaluated the plea of alibi put forward by the appellant. The said PW3's evidence was disbelieved by the trial court who discharged one of the accused persons for that reason.

HELD (Unanimously allowing the appeal per lead judgment of **MOHAMMED JSC**)

Assessment of Credibility of witnesses

1. The issue of assessment of credibility of witnesses remains within the privilege of the trial court. It is the trial court that saw the witnesses, heard them, watched their demeanour in the witness box and assessed the quality of their evidence before accepting or rejecting it. An appeal court, particularly in a criminal trial, without being invited to do so must not venture on re-assessment of the credibility of witnesses. The trial court in the case in hand disbelieved the testimony of PW.3 and discharged the 7th accused. The Court of Appeal was in error to use the discredited evidence of PW.3 in affirming the conviction of the appellant. (P. 432 L. 'HI')

Discredited evidence of a witness

2. Where a trial court, in a joint criminal trial, disbelieved the evidence of a witness and, because of doubt, discharged one of the accused standing trial before it, an appeal court will be in error to use the same discredited evidence, on the same facts, in order to find conviction for a co-accused. If a testimony of a witness casts doubt on a trial judge the evidence given by that witness must be rejected entirely. (P. 433 L. 'BI')

Failure to believe appellant's alibi

3. The appellant mentioned that the 9th accused, Mufu Jimoh, who was the 4th appellant before the Court of Appeal, was with him during the naming ceremony. If the Court of Appeal believed that the 4th appellant was at the party and therefore accepted his plea of alibi and discharged him, why did it refuse to accept that the appellant, in this appeal, who organized the party for the naming ceremony was also there? It is plain therefore that on both issues which have been formulated for the determination of this appeal the appellant has been wrongly convicted. (P. 434 L. 'BI')

NOTABLE POINTS OF INTEREST

UWAIS JSC

1. Wrong use of Exhibit by Court of Appeal

I think it is necessary to point out at this stage that the use made of Exhibit M. by the Court of Appeal to discredit the evidence of P.W.I is quite wrong as it offends the provisions of sections 199 and 209 of the Evidence Act, Cap. 112 of the Laws of the Federation 1990 and is contrary to the

decisions of this Court in Ojo v. The State. Federal Supreme Court Suit No. 93/1960 (unreported) judgment delivered on 12th May, 1960; Kasa v. The State, (1994) 5 N.W.L.R. (Part 344) 269 and Hausa v. The State, (1994) 6 N.W.L.R. 281. The statement was not shown to P.W.1 nor was it used by the defence to cross-examine her in order to discredit her testimony. It follows that the inconsistency alleged between the testimony of P.W.1 and Exhibit M has not been proved. (P. 438 F)

2. Proper interference with trial court's finding

Surely the acceptance of the testimony of P.W.1 by the learned trial judge was perverse. Therefore, the Court of Appeal was, in this respect right in interfering with it since it occasioned miscarriage of justice. (P. 441 D)

3. Failure to cross appeal - Effects

The evidence of P. W.3 was rejected by the learned trial judge. Although I have shown in passing that the rejection was wrong, there is no cross-appeal by the prosecution against it. Therefore, it must be held, in the circumstances, that the evidence of P.W.3 is not available to support the prosecution's case against the 8th Accused. (P. 441 F)

OGWUEGBUJSC

4. Plea of alibi - Onus on the prosecution

On a plea of alibi, the law is that the court should not disregard the evidence unless there is stronger evidence against it and where a defendant sets up a defence of alibi, the onus of disproving it rests on the prosecution. In this case, the prosecution did not adduce evidence stronger than that of the appellant in support of his alibi. That being the case the prosecution failed to discharge the onus. (P. 445 H)

ONU JSC

5. Proof beyond reasonable doubt - Alibi

Where as in the instant case, the appellant introduced a plea of alibi which had not been fully investigated, the prosecution's case would not be said to have been proved beyond reasonable doubt - the onus on the appellant being to introduce evidence of alibi, which indeed he did. (P. 449 E)

REPRESENTATION

Namseh Enoch Esq. with O. Okereke for the Appellant.
S.O. Ishola Esq. D.P.P Lagos State for the Respondent.

CASES REFERRED TO

Obade v. The State (1991) 6 NWLR (Pt 198) 495
Boy Muka v. The State (1976) 9-10 SC 305
Bayo v. Adelumola (1988) 1 NSCC 465
Kasa v. The State (1994) 6 NWLR 281
Okoro v. The State (1973) 5 SC 231
Yanor v. The State (1965) NMLR 337
Ikono v. The State (1973) 5 SC 23
Iboi v. The State (1983) 3 SC 1
Onafowokan v. The State (1987) 3 NWLR (Pt 61) 538
Ali v. The State (1988) 1 NWLR (Pt 68) 1
Obiode v. the State (1970) 1 All NLR 35
Umani v. The State (1988) 1 NWLR (Pt 70) 274
Kalu v. The State (1988) 4 NWLR (Pt 90) 503

STATUTES REFERRED TO

Evidence Act ss. 199, 209 Criminal Code s. 319 (1)

LEAD JUDGMENT BY MUHAMMED JSC

On 21st November, 1982, there was an affray at Atewolara Garage, Mushin, during which members of the National Union of Road Transport Workers Association (NURTWAN), and the Road Transport Employers Association (RTEAN) fought each other. During the skirmishes, one Sesan Idowu Moses was murdered. Many arrests were made, and at the end of investigations, nine members of NURTWAN were charged with the murder of Sesan Idowu Moses.

Before the trial opened, the charges against 2nd, 5th and 6th accused were dropped and 1st accused escaped from custody while awaiting trial. The prosecution led evidence against the remaining five accused persons, namely, Mufu Folorunsho as 3rd accused, Bashiru Awofe, 4th, Abiodun Ogunleye, 7th, Fatai Adele, 8th and Mufu Jimoh as 9th accused person. At the conclusion of the trial, the learned trial Judge discharged the 7th accused and convicted the 3rd, 4th, 8th and 9th accused persons.

On appeal to the Court of Appeal, the learned justices (Coram: Sulu Gambari, Niki Tobi and Ubaezonu, JJ.C.A.) allowed the appeal of Mufu Folorunsho, Bashiru Awofe and Mufu Jimoh. They appeared before the Court of Appeal as 1st, 2nd and 4th appellants respectively. Thus leaving only Fatai Adele 3rd appellant whose appeal was dismissed to contest his conviction in an appeal before this Court.

Fatai Adele filed two grounds of appeal before this court and his counsel formulated two issues for the determination of the appeal from those grounds. Learned counsel for the respondent formulated similar issues, couched in a simple language, from the grounds. The two counsel are therefore ad-idem that the following issues shall be questions for the determination of this appeal:

“1. Whether the Court of Appeal properly evaluated the evidence of P.W.3 against the appellant before using it to confirm the conviction and sentence of the appellant by the High Court.

2. Whether the Court of Appeal properly evaluated the plea of Alibi put forward by the appellant.”

Learned counsel for the appellant, on issue 1, submitted that the Court of Appeal was in error to hold that there was no where to show where the learned trial Judge disbelieved the evidence of P.W.3 Counsel said that the learned trial Judge discredited and rejected the evidence of P.W.3 on at least two occasions. The first was when the learned Judge was discharging and acquitting the 7th accused notwithstanding that P.W.3 testified before the court and said that he saw both the 7th and 8th accused persons matcheting the deceased. The second occasion was when the learned trial Judge convicted and sentenced the 3rd, 4th and 9th accused persons notwithstanding the evidence of P.W.3 that he did not see any of them among the crowd, at the scene of the crime.

Although learned counsel for the respondent replied that the trial court did not disbelieve the evidence of P.W.3, it is plain from the judgment of the trial court that the learned trial Judge was in doubt over the evidence of P.W.3. It is therefore relevant in this judgment to reproduce the evidence of P.W.3 and thereafter analyse what the learned trial Judge said in his evaluation of that evidence. In his testimony before the court P.W.3 said:

“When we saw accused and crowd we were running for our lives. We saw accused with cutlasses hence we ran.

We were running to the police station. We met the accused and crowd and could not enter. They chased us and matcheted one Sunday.

There we saw the accused and crowd running after the deceased

Idowu Moses. He sells tea and eggs at the garage.

One of the crowd, now at large tripped the deceased. The 1st Accused started to matchet the deceased. The 7th and 8th accused were matcheting the deceased.

I saw wife of deceased (P.W.1) coming towards the scene. The men started throwing bottle at her. I had to hide in a chemist's shop and hid myself. Deceased fell unconscious." B

While considering the defence put forward by the 7th accused learned trial Judge referred to the above testimony, because P.W.3 had identified the 7th accused in the crowd. The learned trial Judge in his judgment expressed some doubt over the veracity of the testimony of P. W.3 in connection with the witnesses' identification of the 7th accused at the scene of the crime. The doubt is clear in the following extract from the learned trial Judge's Judgment: C

'The principal eye witness in this case was P.W.1 the wife of the deceased. She did not testify that she saw the 7th accused at the time of the assault on the deceased, Sesan Idowu Moses. D

P.W.3 appeared to me equivocal as to whether or not the 7th accused was at the scene. P.W.3 estimated the crowd he saw as about 200 and that there was a crisis situation at the scene.

Having regard to the testimony of P.W.3 and the evidence of the 7th accused and his father, there is doubt in my mind as to whether or not the 7th accused was present and took part in matcheting the deceased." E

In his evidence before the trial court P.W.3 identified the 1st, 7th and 8th accused persons attacking the deceased with a matchet. It should be noted that the 8th accused is Fatai Adele, the appellant in this appeal. If the learned trial Judge was in doubt about the testimony of P.W.3 in connection with the attack on the deceased which led him to discharge and acquit the 7th accused, the 8th accused ought to have benefited from this doubt and be discharged as well. The learned justice of the Court of Appeal, Niki Tobi, J.C.A., who wrote the leading judgment in the appeal filed by four appellants before that court, with respect, made inconsistent findings in respect of the trial Judge's evaluation of the evidence of P.W.3. The learned justice of the Court of Appeal questioned the manner in which the learned trial Judge seemed to have dismissed the evidence of P.W.3 and thereafter said: F G

"There is no where the learned trial Judge disbelieved the evidence of P.W.3. Rather, he believed the evidence of the witness, a situation which resulted in the acquittal of the 7th accused person." H

The learned justice of the Court of Appeal proceeded to explain the procedure which courts should follow where evidence of prosecu-

tion witnesses are materially contradictory. In such a situation, the learned justice opined that a trial Judge must resolve that contradictions in favour of the accused person, more so when the accused faces capital punishment on conviction - Obade v The State (1991) 6 NWLR (Pt. 198) 435. However, later in the judgment, the learned justice of the Court of Appeal made findings which clearly are inconsistent with his earlier opinion that the learned trial Judge did believe the evidence of P.W.3. The learned justice now says:

“In the instant case, the learned trial Judge was therefore wrong in proffering an explanation in respect of the evidence of P.W.3, an explanation which was not borne out from the evidence before him. He ought not to have taken that line.

Why should the learned trial Judge accept the evidence of P.W.1 and P.W.4 and reject the evidence of P.W.3? What gave rise to the picking and choosing? In the light of the material contradictions, in the evidence of P.W.1, the trial Judge was entitled to disbelieve her evidence rather than rejecting the evidence of P.W.3.”

It is abundantly clear that the learned trial Judge disbelieved the evidence of P.W.3 because if he did not he would not have discharged and acquitted the 7th accused. The Court of Appeal made a considerable finding in respect of inconsistencies and contradictions in the evidence of P.W.1 and P.W.4 and quite rightly, rejected those testimonies and allowed the appeal of Mufu Folorunsho, Bashiru Awofe and Mufu Jimoh. In dismissing the appeal of Fatai Adele, the court relied on the evidence of P.W.3 whose testimony was disbelieved by the trial court. There is a vital point here which the Court of Appeal did not observe.

The trial court did not base its conviction of Fatai Adele, (8th Accused before it) on the evidence of P.W.3. It relied on the evidence of P.W.1 and P.W.4 to convict him. The Court of Appeal however, found the evidence of P.W.1 and P.W.4 unreliable and allowed the appeal of 1st, 2nd and 4th appellants before it. It then affirmed the conviction of Fatai Adele, the appellant in this appeal, but without saying that his conviction based on the evidence of P.W.1 and P.W.4 was wrong. It is therefore quite clear that what this court had warned against in the case of Boy Muka and others v. The State (1976) 9-10 S.C 305 had been committed by both the trial court and the Court of Appeal. The two lower courts went about picking and choosing the witness they want to believe in this murder case.

The issue of assessment of credibility of witnesses remains within the privilege of the trial court. It is the trial court that saw the witnesses, heard them, watched their demeanour in the witness box and assessed the quality of their evidence before accepting or rejecting it. An appeal court, particularly in

a criminal trial, without being invited to do so, must not venture on re-assessment of the credibility of witnesses. See Bayo Adelumola v. The State (1988) 1 NSCC 465 at 471 (1988) 1 NWLR Pt.73) 683. The trial court in the case in hand disbelieved the testimony of P.W.3 and discharged the 7th accused. The Court of Appeal was in error to use the discredited evidence of P.W.3 in affirming the conviction of the appellant.

Where a trial court, in a joint criminal trial, disbelieved the evidence of a witness and, because of doubt, discharged one of the accused standing trial before it, an appeal court will be in error to use the same discredited evidence, on the same facts, in order to find conviction for a co-accused. If a testimony of a witness casts doubt on a trial Judge the evidence given by that witness must be rejected entirely.

I now turn to issue 2 where the learned counsel for the appellant argued that the defence of alibi put forward by the appellant was not considered by both the High Court and the Court of Appeal. Here again the two lower courts committed similar error, as in the first issue, of picking and choosing the witnesses they wanted to believe. For example, the Court of Appeal was satisfied with the defence of alibi put forward by Mufu Jimoh who was the 4th appellant before it. In his defence before the trial court Mufu Jimoh said:

“Not true as P.W.1 said, that I matcheted the deceased. On 21/11/82, I was in the house of 8th Accused, doing naming ceremony. On 20/11/82 in the evening I was at house of 8th Accused. I left the party at 4. p.m. On 21/11/82. I was not at scene. I knew deceased. I was arrested at Alasalatu Market by police. I attended party with my wife.”

Learned counsel for the appellant, Mr. Namseh Eno, submitted that the above testimony shows that at the material time of the crime Mufu Jimoh was with the appellant. Therefore by discharging and acquitting the 4th appellant, it must be presumed that the Court of Appeal accepted the facts of his plea of alibi. Counsel is correct that the Court of Appeal accepted the plea of alibi put forward by the 4th appellant. In his judgment Niki-Tobi, J.C.A said:

“In the light of the evidence of P.W.3, the contradictions in the evidence of P.W.1 and the alibi put forward by the 1st, 2nd and 4th appellants, I cannot see my way clear in confirming the conviction of the appellants. I allow their appeal.”

The appellant, who was the 8th accused mentioned in the evidence of Mufu Jimoh; told the trial court that he was not at the scene of the crime on the day in question. He said he was engaged in a naming ceremony of his child in his house. His testimony on the issue of alibi is reproduced as follows:

“On 21/11/82, I was in my house. There was a naming ceremony of my child overnight till the following morning. Party started on 20/11/

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82, about the morning. We went on till 4. p.m. On 21/11/82. The day was a Saturday. We named on 20/11/82. The child was named SENOBU. We celebrated till the night. Only the 9th accused was present, at the naming ceremony.

B *Party went on till 4 p.m. on 21/11/82. I never left home throughout. 9th Accused left me 4 p.m. on 21/11/82."*

C The appellant mentioned that the 9th accused, Mufu Jimoh, who was the 4th appellant before the Court of Appeal, was with him during the naming ceremony. If the Court of Appeal believed that the 4th appellant was at the party and therefore accepted his plea of alibi and discharged him, why did it refuse to accept that the appellant in this appeal, who organised the party for the naming ceremony was also there?

It is plain therefore that on both issues which have been formulated for the determination of this appeal the appellant has been wrongly convicted.

D For the above reasons, this appeal succeeds and it is allowed. The conviction and sentence passed on the appellant by trial court and affirmed by the Court of Appeal are hereby set aside. The appellant is discharged and acquitted.

UWAIS JSC

E The Appellant together with 8 others were charged with murder, in the High Court of Lagos State, holden at Ikeja. At the trial, the charge against the 2nd, 5th and 6th Accused persons was withdrawn by the prosecution, while the 1st Accused escaped from prison custody.

F The facts of the case can be gathered hereunder. For now it suffices to state that the evidence which implicated the appellant herein, who was the 8th accused person at the trial before Desalu, J, of blessed memory consisted of the testimony of the wife of the deceased, Idiatsu Moses (P.W.1) and that of Saka Yekini (P.W.3). Both were eye-witnesses to the attack with lethal weapons on the deceased by a mob. P.W. 1 testified on 3/4/85 as follows:-

G *"I live at 110 Agege Motor Road, Mushin.*

I am a trader. I know Sesan Idowu Moses,

He is brother (senior) to my husband.

My husband is Idowu Moses. I know Olusoji Moses, a senior brother to my husband.

H *I now say my husband is Sesan Idowu Moses. He is now dead. My husband was a motor driver. He was employed to drive Taxi. His boss, I do not know his name. I now say his name is Akamo. He worked*

at Mushin Garage.

I see the accused. I know some of them. They are 1st, 3rd, 4th, 8th and 9th accused. I went in again. They were armed with cutlasses, knives and axes. I do not know any of them before that date."

At this stage of the testimony, the prosecuting counsel indicated to the court that the witness was incoherent and sought leave, which was granted, to withdraw the witness so that she could be recalled later. The witness was recalled on 6/5/85 after P.W.2 had testified. Part of her further testimony reads -

".....I saw the accused gathered outside running after my husband. The accused were armed with cutlasses and axes. The accused caught up with my husband and cut him up all over the body. I ran to plead to my husband. They started throwing bottles at me. The named accused 1st, 3rd, 4th, 8th and 9th accused were among those who matcheted my husband."

In his evaluation of the evidence adduced at the trial, the learned trial Judge held as follows -

"The testimony of P.W.1 fixed the 8th accused at the scene of crime in the morning of the 21st day of November, 1982.

*.....
I am satisfied on the evidence of P.W.1 and P.W.4 that they saw the 3rd, 4th, 8th and 9th accused at the scene, recognised them and identified them without any equivocation."*

The testimony of P.W.3. as relevant reads as follows-

"I am a driver. I drive Urvan bus for some one, Ramoni Efunso. I know Atewolara Garage. It is our garage, where we had our passengers.

On 21/11/82, it was a Sunday. Early in the morning, in the queue, about 6.30 a.m. my vehicle was loading when I saw the accused and others numbering about 200, and were armed with cutlasses and axes, approaching our garage.

I knew the accused persons before. They were members of a Union at Oke Oja Mushin, garage. I know all the six accused before the incident. I saw all the accused in the crowd with others, some of whom are still outside the court today. Oke Oja Mushin garage is about 5 poles to our garage. When we saw accused and crowd we were running for our lives. We saw accused with cutlass hence we ran.

We were running to the Police Station. We met the accused and crowd and could not enter. They chased us and matcheted one Sunday.

There we saw the accused and crowd running after the deceased Idowu Moses. He sells tea and eggs, at the garage.

One of the crowd now at large tripped the deceased. The 1st accused started to matchet the deceased. The 7th and 8th accused were matcheting the deceased.

B *I saw wife of deceased. P.W.1 coming towards the scene. The men started throwing bottles at her. I had to hide in a Chemist's shop and hid myself. Deceased fell unconscious.*

I saw Idowu Moses at the station before he was taken to hospital. He was unconscious, covered in blood and matcheted all over the body.

C *Idowu Moses is dead. We went to collect his body from mortuary and took him for burial in his village at Wasimi.*

The 3rd, 4th and 9th accused were not there at all when deceased was being matcheted."

D *When the witness was cross-examined by counsel for the 7th and 8th accused persons respectively, he stated as follows:-*

"Accused were of N.P.N. Drivers Union, I do not hate 7th accused. I saw 7th accused that day. He came with his sect from Idi-Araba. I saw a large crowd causing commotion.

E *9th accused was in the crowd. 8th accused was there too. I did not know the 8th accused had a child shortly before or after a party the day before, He was present. I am not lying ..."*

In evaluating the testimony of this witness, the learned trial Judge held as follows -

F *"P.W.3 appeared to me equivocal as to whether or not the 7th accused was at the scene. P.W.3 estimated the crowd he saw at about 200 and that there was a crisis situation at the scene.*

G *Having regard to the testimony of P.W.3 and the evidence of the 7th Accused and (that of) his father, there is no doubt in my mind as to whether or not the 7th accused was present and took part in matcheting the deceased."*

In finding the 3rd, 4th, 8th and 9th accused persons guilty as charged the learned trial Judge, found as follows -

H *"All the witnesses did was to testify as to what each perceived and at the time of such perception. Each witness testified as to what and whom he saw at the particular time.*

I am satisfied on the evidence of P.W.1 and P.W.4 that they saw the 3rd, 4th, 8th and 9th accused at the scene, recognised them and identified them without any equivocation.

The P.W.3 said he did not see 3rd, 4th and 9th Accused at the

scene. That may well be so amongst the large crowd of about 200 people and during the bed lane.

I am however of firm mind and believe P.W.1 and P.W.4 that the 3rd, 4th, 8th and 9th Accused were at the scene of crime and actively took part therein.

I hold that the defence of ALIBI was not available to any of the 3rd, 4th, 8th and 9th Accused. B

It is my considered view that the evidence of the prosecution witnesses rendered the defence of ALIBI ineffective and therefore unavailable to the 3rd, 4th, 8th and 9th Accused,

..... C
I am not satisfied that any defences have been established for and of the 3rd, 4th, 8th and 9th Accused.

There is abundant and satisfactory evidence which I believe that the 3rd, 4th, 8th and 9th Accused pursued, tripped and matcheted SESAN IDOWU MOSES on his head and chest. D

.....
Therefore find the 3rd, 4th, 8th and 9th Accused guilty of the MURDER OF SEASAN IDOWU MOSES as charged.

I accordingly convict each of the 3rd, 4th, 8th and 9th Accused.

I find 7th Accused NOT GUILTY and he is accordingly DISCHARGED AND ACQUITTED.” E

The convicted persons appealed from his decision to the Court of Appeal. The 3rd, 4th, 8th and 9th Accused persons were the 1st 2nd, 3rd and 4th appellants respectively. The 3rd Accused complained in his brief of argument inter alia. That the evidence of P.W. 1 was inconsistent with her statement to Police (Exhibit M). The statement was tendered in the course of the cross-examination of P.W.7 - a police detective, by counsel for the 1st Accused. The 4th and 8th Accused persons in a joint brief of argument formulated only 2 issues for the determination of the lower court. The issues read – F G

“(i) Whether the learned trial Judge did not err on the law and on the facts of this case, when his judgment failed to reflect clearly that he carefully and properly shifted the evidence of P.W.1 and P.W.4 against the appellants (i.e. 4th and 8th Accused persons). And eliminated therefrom every possible risk of convicting the appellants on evidence of doubtful identification. H

(ii) Whether the learned trial Judge did not err in law and on the facts when his judgment did not demonstrate in full a dispassionate consideration of issues properly raised and heard and did not reflect the

From the foregoing it is clear that the 8th Accused's case was not based on the inconsistency between the testimony of P.W.4 and her statement to the Police (Exhibit M). Be that as it may, the Court of Appeal (Sulu-Gambari, Tobi and Ubaezonu JJ.C.A.) reproduced the testimony of P.W.1. as quoted above in its judgment and continued thus (as per Tobi. J.C.A.) -

"In her statement to the Police which she made on 24/11/82, just three days after the murder, the witness said inter alia:

"That day the people I saw matcheting my husband were Sikiru Adamson, Yinka Esho, Abe, Mufu Okegbo, Fatai Arab, Sauler, Baba Monsor, Muse and Others. It was Awofe and Adegbenro that led them. I know everyone of them if I see them."

From the above evidence, the following emerge: (1) P.W.1 had some initial problem as to whether the deceased was her husband or a brother to her husband (2) she gave conflicting evidence as to whether she saw or knew the accused persons before the day of the incident. In one breath she said that she did not know any of the appellants before the day of the incident and in any breath she said she knew all the appellants before the day of the incident. (3) The witness specifically mentioned ten persons amongst others who matcheted her husband. Of the ten, 2nd appellant was mentioned in her evidence in court. While there is the possibility that the 1st, 3rd and 4th appellants could come under the expression "*others*". it gives rise to some concern, particularly in the light of her inconsistent evidence in court."

I think it is necessary to point out at this stage that the use made of Exhibit M. by the Court of Appeal to discredit the evidence of P.W.1 is quite wrong as it offends the provisions of sections 199 and 209 of the Evidence Act. Cap. 112 of the Laws of the Federation 1990 and is contrary to the decisions of this Court in *Ojo v. The State*, Federal Supreme Court Suit No. 93/1960 (unreported) judgment delivered on 12th May, 1960: *Kasa v. The State*. (1994) 5 NWLR (Pt. 344) 269 and *Hausa v. The State* (1994) 6 NWLR 281. The statement was not shown to P.W.1 nor was it used by the defence to cross-examine her in order to discredit her testimony. It follows that the inconsistency alleged between the testimony of P. W. 1 and Exhibit M has not been proved. Similarly, the Court of Appeal found inconsistency in the testimony of P.W4 and concluded as follows in finding the 3rd, 4th and 9th Accused not guilty -

"In the light of the evidence of P.W.3, the contradictions in the

evidence of P.W. 1 and the alibi put forward by the 1st, 2nd and 4th appellants, I cannot see my way clear in confirming the conviction of the appellants. I allow their appeal.

With regard to the 8th Accused the Court of Appeal held as follows (per Tobi, J.C.A.)-

“That leaves me with the 3rd appellant, Fatai Adele, he was the 8th accused. P.W. 1 and P.W.3 identified him as one who killed the deceased. P.W.1 said at page 67:

“The accused caught up with my husband and cut him up all over the body. I was there.”

P.W.3 also said at page 70 of the Record:

“The 1st accused started to matchet the deceased. The 7th and 8th accused were matcheting the deceased.”

Even if the evidence of P.W. 1 cannot be believed, because of the contradictions, the 3rd appellant cannot be, discharged and acquitted because of the evidence of P.W. 3. And when I say so, I am conscious of the defence of alibi put forward by the 3rd appellant. It is good law that where there is clear evidence that an accused person was not only at the scene of crime but committed the crime, for which he is charged, the defence of alibi cannot be sustained.

After a very serious consideration of all the issues in this appeal, I have no alternative than to allow the appeal of the 1st, 2nd and 4th appellant, who are Mufu Folorunsho, Bashiru Awofe and Mufu Jimoh, They are accordingly discharged and acquitted of the charge of murder. But I cannot see my way clear in allowing the appeal of the 3rd appellant, who is Fatai Adele. I therefore dismiss his appeal.”

Hence the appeal now before us. The appellant has filed a brief of argument in which 2 issues for determination have been formulated. They read thus -

“1. Whether the Court of Appeal did not, in the circumstances of this case, err in law and on the facts, when without properly evaluating the evidence of P.W.3 against the appellant used it in confirming the conviction and sentence on the appellant by the High Court, notwithstanding that the Learned trial Judge discredited and rejected the evidence of P.W 3. which was a direct eye witness account of the complicity of the 7th accused person and the appellant in the matcheting to death of the deceased at the scene of crime.

2. Whether the Court of Appeal like the High Court did not err in law when it failed to evaluate and make a finding of fact on the plea of alibi, put forward by the appellant, which plea the prosecution did not

properly investigate, though the appellant put forward the plea at the first opportunity in his statement to police.”

Similarly 2 issues, which are virtually the same as those in the appellant’s brief but couched differently, have been raised in the B respondent’s brief, to wit -

“1. *Whether the Court of Appeal properly evaluated the evidence of the P.W.3 against the appellant before using it to confirm the conviction and sentence of the appellant by the High Court.*

2. *Whether the Court of Appeal properly evaluate the plea of C alibi put forward by the appellant.”*

Now there can be no doubt, as shown in the quotation above, that the Court of Appeal relied on the testimonies of P.W.1 and P.W.3 to uphold the conviction of the 8th Accused and to reject the alibi pleaded by him. In deciding whether the 7th Accused was guilty of the offence charged, the learned D trial Judge held that the testimony of P.W.3 was equivocal. I have earlier quoted in extenso, in this judgment, the evidence in question. The word “equivocal” has been defined in The Concise Oxford Dictionary as “of double meaning, ambiguous, of uncertain nature, (Of person, character, etc) questionable, suspicious” with respect, I have been unable to see from the testimony of P.W.3 what made his evidence equivocal. The learned trial Judge did not find that P.W.3 was a liar or his credibility had been shaken by cross-examination. The only guess to be made from the trial Judge’s acceptance of the alibi pleaded by the 7th Accused as supported by his evidence as D.W4 and that of his father (D.W.5), is that the learned trial Judge preferred the F defence evidence to that of P.W.3. It follows, therefore, that it was unsafe for the Court of Appeal to rely on the testimony of P.W.3, which had been rejected by the lower court, to convict the 8th Accused. The Court of Appeal had undoubtedly acted in error in relying on the evidence of P.W.3.

The other evidence, which the Court of Appeal relied on to uphold G the conviction of the 8th Accused, is that given by P.W.1. It is true that the learned trial Judge held that he believed her evidence. The Court of Appeal, however, rejected it on the ground that it was inconsistent with the statement (Exhibit M), which she made to the Police. I have already shown that the Court of Appeal was wrong to have rejected the evidence on that ground. Therefore, H with the acceptance of it by the learned trial Judge, his finding in that regard can only be interfered with on appeal, if it can be shown that the finding is either perverse or that it is contrary to substantive or procedural law. The trial court failed to evaluate the testimony of P.W.1 properly. The Court of Appeal re-evaluated the evidence thus (per Tobí, J.C.A) -

“(1) P.W.1 had some initial problem as to whether the deceased was her husband or a brother to her husband.

(2) She gave conflicting evidence as to whether she saw or knew the accused persons before the day of the incident.

In one breath she said that she did not know any of the appellants before the day of the incident and in any (another) breath she said that she knew all the appellants before the day of the incident.

(c) The witness specifically mentioned ten persons amongst others who matcheted her husband. Of the ten, only 2nd appellant (i.e. the 4th Accused) as was mentioned in her evidence in court,” (parenthesis mine).

With the exception of No.(3), which had been based on the wrong comparison made between the evidence of P.W. 1 and her statement (Exhibit M) to establish inconsistency, the assessment under Nos. (1) and (2) above is certainly correct. For the testimony of P.W.1 to be believed, the points in Nos. (1) and (2) aforementioned must be taken into consideration. This, the learned trial Judge failed to do. He was not at all wary of the evidence before he believed it. No where in his judgment did he even refer to or commented on the drama of the prosecution suspending for over a month her evidence, which they described as incoherent. Surely the acceptance of the testimony of P.W.1 by the learned trial Judge was perverse. Therefore, the Court of Appeal was, in this respect, right in interfering with it since it occasioned miscarriage of justice.

What remains to be considered is whether in the light of the aforesaid the Court of Appeal was right in upholding the conviction of the 8th accused. As shown earlier, the 8th Accused was implicated by the evidence of P.W.1 and P.W.3. The evidence of P.W.3 was rejected by the learned trial Judge. Although I have shown in passing that the rejection was wrong, there is no cross-appeal by the prosecution against it. Therefore, it must be held, in the circumstance, that the evidence of P.W.3 is not available to support the prosecution’s case against the 8th Accused. With regard to the testimony of P.W.1, it has been shown to be unreliable in view of its nature and the contradictions inherent in it. Consequently, the Court of Appeal was in serious error when it relied on the evidence of P.W.1 and P.W.3 to uphold the conviction of the 8th Accused by the trial court.

Furthermore, with the rejection of the evidence of P.W.1 and P.W.3 there is no evidence adduced by the prosecution which contradicted the plea of alibi raised by the 8th Accused in his statement to the Police (Exhibit E.) The alibi was that he was not at the scene of the crime

on 21/11/82 because there was a naming ceremony in his house of *his baby daughter on 20/11/82, following which he did not leave his home the next day. The evidence of P.W.8, Police Sergeant Gambo Issa, given under cross-examination, supported the alibi. For he said -*

B “8th Accused had a naming ceremony on 20/11/82. The incident happened on 21/11/82. 8th Accused said 9th Accused came to the party and left. Father of 8th Accused said so. I went to house of 8th Accused at Idimu. I did not find out when the party of 20/11/82 ended. “

C On the whole the decision of the Court of Appeal in upholding the conviction of the 8th Accused is palpably wrong and cannot be allowed to stand.

D It is for these and the reasons contained in the judgment of my learned brother, Mohammed, J.S.C., the draft of which I have had the privilege of reading in advance, that I too will allow this appeal. Therefore, the conviction and sentence passed on the appellant are hereby set aside. In their place I enter a verdict of not guilty. The appellant is hereby acquitted and discharged.

WALI JSC

E I am privileged to have read in advance the lead judgment of my learned brother, Uthman Mohammed, J.S.C. and I agree with his reasoning for allowing the appeal.

For those same reasons, I also hereby allow the appeal and substitute the order of conviction with that of discharge and acquittal.

OGWUEGBU JSC

F I had the advantage of a preview of the draft of the judgment just delivered by my learned brother, Mohammed, J.S.C. I entirely agree with the judgment. I will however make the following additional comments.

G The appeal is against the conviction for murder, contrary to section 319 (1) of the Criminal Code Cap. 31 Laws of Lagos State and the sentence of death passed on the appellant by Desalu, J. of the blessed memory on 26:6:89.

H The appellant and eight others were charged with the murder of Sesan Idowu Moses at Atewolara Bus Stop, Mushin, Lagos on 21: 11 :82. It was a violent clash between two motor transport unions - the National Union of Road Transport Workers Association of Nigeria and the Road Transport Employers Association of Nigeria. The deceased was

a member of the latter union.

The appellant and the other eight accused were members of the former union. Before trial commenced the names of the 2nd, 5th and 6th accused were withdrawn from the charge and their names were struck out. Before the close of the case for the prosecution, Sikiru Adamson (1st accused) escaped from custody. The charge against him was withdrawn and his name was similarly struck out. B

At the conclusion of the trial, the 3rd, 4th, 8th and 9th accused were convicted of the offence charged and each was sentenced to death. The 7th accused was found not guilty. Each of the four convicted persons appealed to the Court of Appeal against his conviction and sentence. In the court below, the 3rd, 4th, 8th and 9th accused were the 1st, 2nd, 3rd and 4th appellants respectively. The appeals of the 1st, 2nd and 4th appellants were allowed while that of the 3rd appellant (8th accused) was dismissed. He further appealed to this court against the decision of the court below which affirmed his conviction and sentence by the learned trial Judge. C D

Two issues were formulated by the appellant at page three of his brief of argument. The second issue touched on the plea of alibi put forward by the appellant which he alleged was not investigated by the prosecution. This appears to me a crucial issue in the appeal. E

It was the contention of the learned appellant's counsel that the appellant 'put forward the plea at the earliest opportunity in his statement to the police (Exhibit "E")'; that the appellant adduced evidence in support of his plea, describing where he was as well as naming the 9th accused as one of the persons who was with him. F

It was submitted that P.W.8, the investigating police officer failed to investigate the key elements of the alibi, namely, that the appellant held a naming ceremony for his daughter on 20: 11:82, that the party ended about 4 p.m. on 21:11:82, that he was in his house throughout 21:11 :82 and that the 9th accused (4th appellant) who attended the party was with him from 20:11 :82 till 4 p.m. on 21:11:82 when he left after the party ended. G

The learned counsel for the appellant further argued that when the sole defence put forward by the appellant is a plea of alibi, the identification of the appellant by a single witness must be conducted with great care and the summing up in the judgment must deal carefully with the facts of the identification of the appellant at the scene of crime. Counsel referred the court to the cases of Okoro . & ors. v. The State (1973) 5 S.C 231 at 255-256, and Adedeji v. The State (1971) 1 All NLR 75 at 79. H

It was further submitted that the summing up of the learned trial Judge did not deal with the identification of the appellant at the scene of crime and the court below which affirmed the finding of the trial court, did not also consider it. The court was referred to the evidence of P.W.1 and P.W.3, that the court below rejected the evidence of P.W.1 and the only evidence relied upon by it in dismissing the appeal of the appellant is that of P.W.3.

Another complaint of the appellant was that in allowing the appeal of the 4th appellant (9th accused), the court below must have accepted the facts of his plea of alibi and in dismissing the appeal of the appellant, the court below must have rejected his own plea of alibi.

It was also submitted on behalf of the appellant that the 4th appellant in the court below who was discharged and acquitted by the court as well as the appellant herein put forward the same defence of alibi. Since the alibi of the 4th appellant based on the same facts as that of the appellant was resolved in his favour by the court below, that court should also have resolved the alibi of the appellant in his favour. We were urged to allow the appeal.

It seems clear from the evidence that:

(a) the alibi put forward by the appellant was not satisfactorily investigated and the courts below failed to give adequate consideration to it in their judgments.

(b) the facts and circumstances of the defence of alibi put forward by the 4th appellant which formed the basis of his discharge and acquittal by the court below were the same as those set up by the appellant herein and the court below dismissed his own appeal.

The appellant in his statement to the police Exhibit "E" stated that on 20:11 :82, he hosted a naming ceremony for his daughter and as a result he did not go out throughout 21:11 :82 which was the date the offence was committed. In his examination -in-chief, the appellant who testified as D.W.6 told the court that he held a naming ceremony of his daughter on 20:11 :82 and that the 9th accused (4th appellant in the court below) was also present and that he left him at 4 p.m on 21:11:82.

The said 9th accused (4th appellant) in his statement to the police Exhibit "P" said:

"On the 20:11 :82 at about 8.30 p.m. I went to my friend house by name Fatai who was doing naming ceremony of his child at Egbeda near Agege. I was in the party till the following 21:11 :82, and I was there with Fatai up to 4.30 p.m. before I returned back home."

In his examination-in-chief as D.W.7. he testified as follows:

“On 21:11 :82, I was in the house of 8th accused, doing naming ceremony, On 20:11 :82 in the evening I was at the house of 8th ,accused. I left the party at 4 p.m. on 21:11:82.”

Police Sergeant Gambo Issa who testified as P.W.8 recorded the statement of the 9th accused (Exhibit “P”). He did not find out when the party ended. It is clear from the evidence that the defence of alibi set up by the appellant in Exhibit “E” was not satisfactorily investigated. That of the 9th accused received the same treatment. The learned trial Judge believed the evidence of P.W.1 and P.W.4 in convicting the 3rd, 4th, 8th and 9th accused persons and rejected the alibi pleaded by them. The court below allowed the appeal of the 1st, 2nd and 4th (9th accused) appellants. The appeal of the 3rd appellant in that court was dismissed. The court below said:

“The evidence of P.W.3 has a clear positive impact on the defence of alibi put forward by the 1st, 2nd and 4th appellants, defence which was either not investigated or investigated shabbily

In the light of the evidence of P. W.1 and the alibi put forward by the 1st, 2nd and 4th appellants, I cannot see my way clear in confirming the conviction of the appellants. I allow their appeal (Italics is for emphasis).

The court below allowed the appeal of the 4th appellant (9th accused). He was with the appellant (8th accused) from the evening of 20:11:82 till 4 p.m on 21:11:82. The offence was committed in the morning of 21:11:82. The alibi of the 9th accused and the appellant are inseperable. On the defence, both of them should sink or swim together. If the alibi put forward by the 9th accused was accepted by the court it would be unjust not to give the appellant the same benefit of doubt. The court below relied on the evidence of P.W.3 to confirm the conviction of the appellant. This witness in his evidence testified as follows:

“The 1st accused started to matchet the deceased. The 7th and 8th accused were matcheting the deceased.”

The 8th accused is the appellant in this court. The learned trial Judge had doubt about the presence of the 7th accused at the scene of crime inspite of the “positive” evidence of P.W.3 that the 7th and 8th accused were matcheting the deceased. The learned trial Judge also relied on the alibi put forward by the 7th accused in resolving the doubt in his favour.

From the above facts, I find it impossible to hold that the conviction of the appellant did not occasion a miscarriage of justice.

On a plea of alibi, the law is that the court should not disregard

the evidence unless there is stronger evidence against it and where a defendant sets up a defence of alibi, the onus of disproving it rests on the prosecution. See Yanor & ors. v. The State (1965) NMLR 337. In this case, the prosecution did not adduce evidence stronger than that of the
 B appellant in support of his alibi. That being the case the prosecution failed to discharge the onus.

For these reasons and the more detailed reasons stated in the judgment of my learned brother referred to earlier, I allow the appeal, set aside the judgment of the Court of Appeal and discharge and acquit the appellant.

C

ONU JSC

The appellant was the 8th of nine persons arraigned before Desalu, J. in the High Court of Lagos State for murder of one Sesan Idowu
 D Moses at Mushin on the 21st day of November, 1982 punishable under section 319(1) of the Criminal Code. Of the nine persons originally arraigned before the trial court, the information against the 2nd, 5th and 6th accused was withdrawn and they were accordingly discharged. After the close of the prosecution's case in which eight witnesses in all were
 E called and before the defence commenced, the 1st accused escaped from custody and the proceedings against him were struck out.'

For the defence, eight witnesses also testified but this, after 3rd, 4th, 7th, 8th and 9th accused persons had pleaded not guilty to the charge. P.W.3's evidence was held by the learned trial Judge to be an equivoca-
 F tion and at the end of the day, only the evidence of P.W.1 and P.W.4 was held by him to have fixed the appellant at the scene of the crime, thus purportedly demolishing the alibi (see Njovens v. The State (1973) 5 SC 17 at 65) defence which significantly enough, he had raised at the earliest opportunity in his statement (Exhibit E) on his arrest on 6/12/82 to P.W.8
 G (the investigating police officer). I shall come to this point shortly.

P.W.8, at the trial had said that he investigated the appellant's as-
 H sertion that he had a naming ceremony for his newly born baby girl on 20/11/82. What he admitted he did not do was to investigate when the party ended and at which 9th accused claimed to be present but which appellant asserted lasted until 4. p.m. the following day i.e 21/11/82.

On appeal to the Court below, that court (per Sulu-Gambari, Tobi and Ubaezonu, J.J.C.A.) allowed the appeals of the 3rd, 4th and 9th accused persons (1st, 2nd and 4th appellants respectively) and hence discharged and acquitted them. While dismissing the appellant's appeal,

the concluding words of the writer of the leading judgment (Tobi, J.C.A.) were as follows:

“After a very serious consideration of all the issues in this appeal, I have no alternative than to allow the appeal of the 1st, 2nd and 4th appellants, who are Mufu Folorunsho, Bashiru Awofe and Mufu Jimoh. They are accordingly discharged and acquitted of the charge of murder. But I cannot see my way clear in allowing the appeal of the 3rd appellant, who is Fatai Adele. I therefore dismiss his appeal.” (Italic is mine for emphasis). B

The italicized words above emanating as they did from the learned Justice of appeal would tend to conjure up or give the impression of a cloud of doubt surrounding appellant’s conviction. In order to appreciate this better, it is necessary first of all, to set out the two issues proffered at the instance of the appellant. They are: C

1. Whether the Court of Appeal did not in the circumstances of this case, err in law and on the facts, when without properly evaluating the evidence of P.W.3 against the appellant used it in confirming the conviction and sentence on the appellant in the High Court notwithstanding that the learned trial Judge discredited and rejected the evidence of P.W.3, which was a direct eye-witness account of the complicity of the 7th accused person and the appellant in the matcheting to death of the deceased at the scene of crime. D E

2. Whether the Court of Appeal like the High Court did not err in law when it failed to evaluate and make a finding of fact on the plea of alibi put forward by the appellant, which plea the prosecution did not properly investigate, though the appellant put forward the plea at the first opportunity in his statement to the police. F

Similarly 2 issues, which are virtually the same as those in the appellant’s brief but couched differently, have been raised in the respondent’s brief, to wit -

“1. Whether the Court of Appeal properly evaluated the evidence of the P.W.3 against the appellant before using it to confirm the conviction and sentence of the appellant by the High Court. G

2. Whether the Court of Appeal properly evaluated the plea of alibi put forward by the appellant.” H

Now there can be no doubt, as shown in the quotation above, that the Court of Appeal relied on the testimonies of P.W.1 and P.W.3 to uphold the conviction of the 8th Accused and to reject the alibi pleaded by him. In deciding whether the 7th Accused was guilty of the offence charged, the learned trial Judge held that the testimony of P.W.3 was

equivocal. I have earlier quoted in extenso, in this judgment, the evidence in question. The word “*equivocal*” has been defined in The Concise Oxford Dictionary as “*of double meaning, ambiguous, of uncertain nature, (Of person, character, etc) questionable, suspicious*” with respect, I have been unable to see from the testimony of P.W.3 what made his evidence equivocal. The learned trial Judge did not find that P.W.3 was a liar or his credibility had been shaken by cross-examination. The only guess to be made from the trial Judge’s acceptance of the alibi pleaded by the 7th Accused as supported by his evidence as D.W4 and that of his father (D.W.5), is that the learned trial Judge preferred the defence evidence to that of P.W.3. It follows, therefore, that it was unsafe for the Court of Appeal to rely on the testimony of P.W.3, which had been rejected by the lower court, to convict the 8th Accused. The Court of Appeal had undoubtedly acted in error in relying on the evidence of P.W.3.

The other evidence, which the Court of Appeal relied on to uphold the conviction of the 8th Accused, is that given by P.W.1. It is true that the learned trial Judge held that he believed her evidence. The Court of Appeal, however, rejected it on the ground that it was inconsistent with the statement (Exhibit M) which she made to the Police. I have already shown that the Court of Appeal was wrong to have rejected the evidence on that ground. Therefore, with the acceptance of it by the learned trial Judge, his finding in that regard can only be interfered with on appeal, if it can be shown that the finding is either perverse or that it is contrary to substantive or procedural law. The trial court failed to evaluate the testimony of P.W.1 properly. The Court of Appeal re-evaluated the evidence thus (per Tobi, J.C.A) -

“(1) P.W.1 had some initial problem as to whether the deceased was her husband or a brother to her husband.

(2) She gave conflicting evidence as to whether she saw or knew the accused persons before the day of the incident.

In one breath she said that she did not know any of the appellants before the day of the incident and in any (another) breath she said that she knew all the appellants before the day of the incident.

(3) The witness specifically mentioned ten persons amongst others who matched her husband. Of the ten, only 2nd appellant (i.e. the 4th Accused) as was mentioned in her evidence in court,” (parenthesis mine).

With the exception of No.(3), which had been based on the wrong comparison made between the evidence of P.W.1 and her statement (Exhibit M) to establish inconsistency, the assessment under Nos. (1) and (2) above is certainly correct. For the testimony of P.W.1 to be believed, the

points in Nos. (1) and (2) aforementioned must be taken into consideration. This, the learned trial Judge failed to do. He was not at all wary of the evidence before he believed it. No where in his judgment did he even refer to or commented on the drama of the prosecution suspending for over a month her evidence, which they described as incoherent. Surely the acceptance of the testimony of P.W.1 by the learned trial Judge was perverse. Therefore, the Court of Appeal was, in this respect, right in interfering with it since it occasioned miscarriage of justice. B

What remains to be considered is whether in the light of the aforesaid the Court of Appeal was right in upholding the conviction of the 8th accused. As shown earlier, the 8th Accused was implicated by the evidence of P.W.1 and P.W.3. The evidence of P.W.3 was rejected by the learned trial Judge. Although I have shown in passing that the rejection was wrong, there is no cross-appeal by the prosecution against it. Therefore, it must be held, in the circumstance, that the evidence of P.W.3 is not available to support the prosecution's case against the 8th Accused. With regard to the testimony of P.W.1, it has been shown to be unreliable in view of its nature and the contradictions inherent in it. Consequently, the Court of Appeal was in serious error when it relied on the evidence of P.W.1 and P.W.3 to uphold the conviction of the 8th Accused by the trial court. D E

Furthermore, with the rejection of the evidence of P.W.1 and P.W.3 there is no evidence adduced by the prosecution which contradicted the plea of alibi raised by the 8th Accused in his statement to the Police (Exhibit E.) The alibi was that he was not at the scene of the crime on 21/11/82 because there was a naming ceremony in his house of his baby daughter on 20/11/82, following which he did not leave his home the next day. The evidence of P.W.8, Police Sergeant Gambo Issa, given under cross-examination, supported the alibi. For he said - F

"8th Accused had a naming ceremony on 20/11/82. The incident happened on 21/11/82. 8th Accused said 9th Accused came to the party and left. Father of 8th Accused said so. I went to house of 8th Accused at Idimu. I did not find out when the party of 20/11/82 ended. " G

On the whole the decision of the Court of Appeal in upholding the conviction of the 8th Accused is palpably wrong and cannot be allowed to stand. H

It is for these and the reasons contained in the judgment of my learned brother, Mohammed, J.S.C., the draft of which I have had the privilege of reading in advance, that I too will allow this appeal. Therefore, the conviction and sentence passed on the appellant are hereby set

450 Adele v. State (1995) 2 KLR Onu JSC
aside. In their place I enter a verdict of not guilty. The appellant is
hereby acquitted and discharged.

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