

SUPREME COURT OF NIGERIA
7TH APRIL, 1995. SC. 210/1992
CORAM:- M.L. UWAIS, I.L. KUTIGI, M.E. OGUNDARE,
E.O. OGWUEGBU, U. MOHAMMED, JJSC

STANLEY EJIONWU APPELLANT
V.	
THE STATE RESPONDENT

COURTS - Findings of trial court - Whether unjustified or wrongly applied.

CRIMINAL PROCEDURE - Murder - Where facts of the case are largely not in dispute - Trial Court's failure to believe the appellant upheld.

MURDER - Provocation or self defence - Finding of the lower courts - That there was no evidence to that effect - Further confirmed by the Supreme Court.

FACTS

The appellant was charged with murder before the High Court of Rivers State, Port-Harcourt and he pleaded not guilty to the charge. A total of nine witnesses testified for the prosecution, four of whom were eye witnesses. Certain controversy between the appellant and PW1 led to a fight between PW1's daughter (PW2) and appellant's sister (DW2). Two people that sought to stop the fight refrained from so doing when threatened by the appellant. The deceased who came to the scene separated the fight and he received no threat from the appellant.

As the deceased was going home together with PW1 and PW2, appellant hit him with an iron rod on the back of his head. The deceased fell down and died on the spot. The trial court disbelieved the appellant's denial of the charge, found him guilty as charged and sentenced him to death. Appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court to determine whether the appellant was rightly convicted in view of the evidence before the court. And whether the defence of provocation availed the appellant.

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC**)

Findings of trial court

1. I have studied the entire record of proceedings in this case. I am also of

the same opinion with the Court of Appeal that the findings of facts by learned trial judge are clearly unimpeachable. None of the findings have been shown to be unjustified or wrongly applied to the circumstances of the case. (p. 837 A)

Murder - Facts of the case largely not in dispute

2. The facts of the case are largely not in dispute. What the appellant disputed vigorously was the application of the iron rod (Exh. 5) to the head of the deceased. The eye witnesses P. Ws 1,2,3 & 4 all said he hit the deceased on the head with Exh.5. The court believed the witnesses and disbelieved the appellant and gave its reasons. So that was that. (p. 837 B)

Provocation or self defence

3. The Court of Appeal amongst others endorsed the above findings of facts holding particularly that there was no evidence of self-defence or provocation. Once again I am also, on the facts, unable to find any evidence of provocation offered to the appellant on the fateful day either by the deceased or anybody at all. I think to my mind all that counsel said above lend weight to the finding of the lower courts that there was no issue of provocation in the instant case as attested to by all the prosecution eye-witnesses I also agree with the finding of the lower courts that the defence of provocation and or self-defence, on the facts do not avail the appellant herein, The evidence against the appellant was overwhelming. The appellant was evidently the aggressor and not a victim of any provocation. (p. 837 F)

NOTABLE POINT OF INTEREST

KUTIGI JSC

1. Hypothetical matters - Attitude of court thereto

Now, arguing the two issues together, Mrs. Ugboma in her brief for most of the time raised hypothetical matters not based on any evidence before the court nor from inferences drawn or which could have been drawn from facts established before the court. While for some of those matters provided the answers herself, others were left unanswered. Needless say that courts of law do not deal with hypothetical matters. I do not to consider them. (p. 835 A)

CASES REFERRED TO

Board of Customs & Excise v. Barau (1982) 10 SC. 48 at 116

Bater v. Bater (1951) P. 35 at 37
 John v. Zaria N.A. (1959) N.R.N.L.R. 43
 Ajunwa v. The State (1988) 4 NMLR (Pat.89) 380
 Obaji v. The State (1965) NMLR 417
 Nomad v. Bornu N.A. (1954) 21 NLR 31
 R. v. Adekanmi (1944) 17 NLR 99
 R. v. Afonja (1955) 15 WACA 26
 Akinfe v. The State (1988) 3 NWLR (Pt. 85) 729
 Onuoha v. The State (1989) 2 NWLR (Pt. 101) 23
 R. Dumenemi 15 WACA 75
 Sadilu v. The State (1972) 12 S.C 165
 Oladipupo v. The State (1993) 6 NWLR (Pt. 98) 131 at 144
 Fatoyimbo v. Williams (1956) 1 FSC 87

LEAD JUDGMENT BY KUTIGI JSC

In the High Court of Rivers State holden at Port Harcourt the appellant pleaded not guilty to the following charge:-

“Statement of Offence

Murder, contrary to Section 319 of the Criminal Code.

Particulars of Offence

Stanley Ejionwu on the 29th day of September, 1980 at Rumuolumeni Village in the Port Harcourt Judicial Division murdered Goodlife Obasi Ejionwu.”

At the trial the prosecution called a total of nine witnesses to prove the charge while the appellant and his sister Nwuiye Ejionwu (DW2), testified for the defence.

The facts of the case were as narrated by PW3 and supported by PWs 1, 2 & 4 who the learned trial Judge believed. They were all eye witnesses. Testifying on pages 24-26 of the record PW3 said inter alia

“I remember the 28th day of September 1980 on that day I was at the front of my house at about 11.30 p.m. I saw PW1 and her daughter PW2 returning from the village. They greeted me and I greeted them. They were going to their own yard As they passed me and were entering their own yard they reached the house of Stanley Ejionwu, the accused. I heard the accused calling PW1 and asking her why she stopped the sawyer to whom he sold the timber from making use of it. PW1 replied that the tree was her own and that the sawyer destroyed all her crops in the farm where he felled the tree. Accused started to abuse PW1 by calling her

"you this foolish woman." A quarrel ensued between the two of them. One Nwinye Ejionwu (DW2) joined the accused her brother in abusing PW1, PW2 asked DW2 not to abuse PW1 who is her mother and is older than both DW2 and the accused. As PW2 said this, the accused ordered Nwinye (DW2) to hold PW2 and beat her up. Nwinye obeyed the order of the
 B accused and started to beat PW2. A fight broke out between the two girls and DW2 threw PW2 down on the ground. I heard PW1 shouting ... I rushed to the spot in order to separate the girls, but the accused warned me that I would meet my doom if I dared to separate them. I had to go back to the front of my house. The girls continued to fight. I shouted for people
 C to come and separate them.

As a result of the alarm I raised, one Wome Igbarawuche came out. He also went to the scene of the fighting and wanted to separate the girls, but the accused again warned him to keep clear. As the fight continued I continued shouting for people to come and help. As I look back I saw Goodlife
 D Obasi Ejionwu, the deceased, coming from the village. He asked me what was the matter and I told him that DW2 and PW2 were fighting and that he should go and separate them. The deceased went to the scene and separate the girls and asked PW2 to go away. The accused was at the scene at the time the deceased separated the girls from fighting. The accused did
 E not prevent or threaten the deceased from separating the fight. The accused only moved a few steps away from the girls to a corner.

After the girls had been separated and as PW1 and PW2 were going home with the deceased following them from behind.....I saw the accused come out from the scene where the fighting was taking place and hit
 F the deceased with an iron rod at the back of his head. The deceased fell down on the ground at once. I raised an alarm by shouting

Many people rushed to the spot. The accused started to run away. The first person to come to the scene as a result of the alarm I raised was one Ejike Ejionwu (PW5). He asked what has happened. I drew his attention to the
 G ground where the deceased was lying. I also showed him the accused who was running away and Ejike started to pursue him. The next person who came to the scene after the deceased had been struck down was Wobo Ejionwu (PW7). Ejike pursued the accused and caught him. Both of them started to struggle and the iron rod fell down from the hand of the accused.

H I saw Ejike pick up the rod. When Wobo Ejionwu came to the scene I told him what has happened and showed him Goodlife lying on the ground. He ran to the house to report the incident to their father. I also went and reported the matter to my father. My father caused the gong to be sounded in the village. The people came out. Not long after that, the police came to

the village. The deceased was struck down at about 12 mid-night. I was able to see what I have told the court because there was bright moonlight that night."

The decision by me not to summarise the evidence of the witness is deliberate. From the evidence of PW3 above the following sequence of B events stand out clearly.

1. It was the appellant who first asked PW1 why she drove away his sawyer and when the PW1 answered that the timber tree belonged to her the appellant started to abuse her and they started to quarrel.
2. The appellant's sister (DW2) joined him in abusing PW1 while PW2 C joined her mother (PW1) also to abuse the appellant.
3. Appellant ordered his sister (DW2) to beat PW2 (daughter of PW1). A fight ensued between DW2 and PW2.
4. When PW3 tried to stop DW2 and PW2 from fighting, the appellant warned him that he would meet "*his doom if he dared to separate them.*" D
5. One Wome Igbawuche who heard the alarm raised by PW3 also came to the scene. When he tried to stop DW2 and PW2 from fighting the appellant again warned him to keep clear.
6. When the deceased finally appeared at the scene, he succeeded in stopping the fight between DW2 and PW2. The appellant did not prevent nor E threaten the deceased from stopping the fight. He moved a few steps away and simply watched the deceased separate the fighting girls.
7. PWs 1 & 2 were being escorted home when suddenly the appellant appeared and hit the deceased with an iron rod (Exhibit 5) on the head. The deceased fell down and died on the spot. F
8. The appellant was running away after hitting the deceased when he was chased by PW5 who held him and seized the iron rod (Exh. 5) from him. One has to bear all these in mind especially when we come to consider the issues for determination in the appeal soon in the judgment. I however hasten to say that on the facts the appellant was an aggressor! G

It is convenient to state here that Ejike Ejionwu (PW5) who seized the iron rod (Exhibit 5) from the appellant later handed it over to PW7 who in turn handed same over to the Police Investigator PW9 who also during police investigations recorded the extra-judicial statement - Exhibit 6 - for H the appellant. It was PW7 who identified the body of the deceased to the medical doctor (PW6) who performed post mortem examination. The doctor found a deep wound on the occiput, that is on the back side of the skull. There was also a linear fracture of the occiput and bleeding into the

brain tissue. The cause of death was cerebral haemorrhage. In his opinion a violent blow with a hard object like the iron rod (Exh. 5) could cause the injuries he described.

The appellant denied killing the deceased. He admitted engaging one John Ifende to cut down the timber tree which when felled damaged the crops of PW1. He said there was a gun-shot that night in the village and that PWs 1, 2, 5 & 7 and the deceased had come to his house and accused him of firing the gun. They then attacked him and it was in the process that the deceased fell him down and was on top of him when he heard the deceased crying "Ejike has killed me". The deceased's grip on him loosened and he got up immediately and ran away. He said he saw Exhibit 5 for the first time in the trial High Court. He denied making the statement Exh. 6 although he said the Police forced him to sign it. DW2, appellant's sister, also gave evidence confirming appellant's story.

In a considered judgment the learned trial Judge disbelieved the appellant and his witness. He found the case for the prosecution proved beyond reasonable doubt. Consequently the appellant was found guilty as charged and sentenced to death. Against that conviction and sentence the appellant appealed to the Court of Appeal, Port Harcourt Division. One issue was submitted for determination in the Court of Appeal. It reads:-

"Whether in the circumstances of this case and the evidence before the court, the learned trial Judge was right in convicting the appellant of the offence of murder."

The Court of Appeal carefully analysed the issue in relation to the evidence offered at the trial and rightly in my view, came to the conclusion that it lacked merit and dismissed it.

Dissatisfied with the judgment of the Court of Appeal the appellant had now appealed to this Court. Mrs Stella Ugboma learned counsel for the appellant filed two amended Grounds of Appeal and stated the issue arising therefrom as:-

"(i) Whether in the circumstances of this case and the evidence before the court, the learned Justices of the Court of Appeal were right in upholding the judgment of the trial court which found the appellant guilty of the offence of murder.

(ii) Whether or not the defence of provocation availed the appellant taking into consideration the totality of evidence adduced at the trial.

It is apparent that issue (i) above was the same issue before the Court of Appeal which was resolved against the appellant. It is therefore not a new issue. And when the issue of provocation amongst other de-

fences, was adequately considered by the two lower courts before arriving at their conclusions.

Now, arguing the two issues together, Mrs. Ugboma in her brief for most of the time raised hypothetical matters not based on any evidence before the court nor from inferences drawn or which could have been drawn from facts established before the court. While for some of those matters B she provided the answer herself, others were left unanswered. Needless to say that courts of law do not deal with hypothetical matters. I do not need to consider them. I will therefore confine myself to those submissions of hers that have relevance to the evidence led before the court. These may be summarised as follows:- C

“(1) The case against the appellant was not proved beyond reasonable doubt. There was no proof that the appellant intended to kill the deceased nor that his action was premeditated cited *Board of Customs & Excise v. Barau* (1982) 10 S.C. 48 at 116 and *Bater v. Bater* (1951) P; 35 at 37 in support. D

(2) The appellant suffered a sudden and temporary loss of self-control because of the overwhelming circumstances against him. His bluff had been called by the deceased and he had to redeem his self respect and that although the appellant did not testify as to loss of self-control, that was not fatal to his case. Learned counsel nevertheless conceded that the appellant used excessive force to prove the point by dealing a fatal blow on the deceased. E

(3) Provocation cannot excuse murder or render it justifiable but by virtue of section 318 of the Criminal Code, it may reduce the offence from one of murder to one of manslaughter. Cited *John v. Zaria N.A.* F (1959) NRNL 43; *Ajunwa v. The State* (1988) 4 NWLR (Pt. 89) 380; *Obaji v. The State* (1965) NMLR 417; *Nomad v. Bornu N.A.* (1954) 21 NLR 31; *R. v. Adekanmi* (1944) 17 NLR 99; *R v. Afonja* (1955) 15 WACA 26. I agree.

(4) The appellant being an uneducated man and considering his G class regarded the deceased's interference in separating the two fighting girls as a grave provocation, moreso as others before him had quietly watched the drama unfolding, after they were warned to keep away.

(5) The learned Justices of the Court of Appeal erred by not reversing the verdict of the trial Judge who failed to adequately evaluate the evidence before him. This court has the power to evaluate the evidence and reverse the verdict of the court's below. Cited *Akinfe v. The State* (1988) 3 NWLR (Pt. 85) 729; *Onuoha v. The State* (1989) 2 NWLR (Pt. 101) 23; *R. v. Dummemi* 15 WACA 75 and *R. v. Cooper* (1968) 53 CAR 82. H

In reply Mr. Opuminji, learned Chief State Counsel for the respondent, submitted as follows:-

(a) The defence of provocation is not open to the appellant who had denied using the iron rod (Exh. 5) on the deceased. He referred to the case of *Sadiku v. The State* (1972) 12 S.C. 165.

B (b) The Court is under a duty to consider all the defences open to an accused person on the facts established at the trial. The learned trial Judge on page 28 and the Court of Appeal on page 185 both considered the defence of provocation and similar defences and rightly came to the conclusion that they did not avail the appellant, the finding of facts by the C learned trial Judge being unimpeachable.

(c) The requirements or ingredients that must co-exist before the defence of provocation can succeed vide *Oladipupo v. The State* (1993) 6 NWLR (Pt. 98) 131 at 144 H have not been proved or established. The facts established at the trial show that there was no material upon which to D base the defence of provocation. He referred to the evidence of PW3 page 25 lines 26-30.

(d) This is an appeal where there has been concurrent findings of facts. The learned trial Judge adequately evaluated the evidence before him hence the Court of Appeal held that the finding of facts were unim- E peachable and confirmed the findings. The two lower courts therefore had no "lurking doubt" in their minds and accordingly the case of *R v. Cooper* (supra) is inapplicable.

(e) There was overwhelming evidence that it was the act of the appellant to wit the striking of the deceased's head with Exh. 5 that killed F him. The appellant must have intended the natural and direct consequences of his action.

As I indicated above issue (i) was the sole issue before the Court of Appeal. The Court of Appeal considered all the points canvassed in favour of the appellant and concluded on page 190 of the lead judgment thus:-

G *"The sum total of all I have been saying is that the lone issue canvassed before us is therefore answered in the affirmative by me. In the result, this appeal fails and it is accordingly dismissed. I affirm the decision of George, J. sitting at the High Court Port Harcourt, dated 30th July, 1988."*

H The Court had on page 189 held as follows:-

"Finally on the point whether the appellant intended to kill the deceased or cause him grievous bodily harm, having earlier held that the learned trial Judge's finding on the facts are unimpeachable - there being no defence of self-defence or provocation availing the appellant - the stan-

dard of proof required to convict the appellant has, in my judgment, been fully attained."

I have studied the entire record of proceedings in this case. I am also of the same opinion with the Court of Appeal that the findings of facts by the learned trial Judge are clearly unimpeachable. None of the findings have been shown to be unjustified or wrongly applied to the circumstances of the case (See *Fatoyinbo & Ors. v. Williams* (1956) SCNLR 274; (1956) 1 FSC 87; *Barau v. B.O.C.E.* (supra). The facts of the case are largely not in dispute. What the appellant disputed vigorously was the application of the iron rod (Exh. 5) to the head of the deceased. The eye witnesses PWs 1,2,3 & 4 all said he hit the deceased on the head with Exh. 5. The court believed the witnesses and disbelieved the appellant and gave its reasons. So that was that.

On the issue of provocation the High Court said on page 98 of the record that:-

"The State Counsel said out of abundance of care that the defence of provocation though not raised by the defence is not available to the accused. I agree. There was no provocation in law to the accused. Rather it was the accused that provoked the quarrel that night when he accused PW1 and called her a bad woman. He also instigated the fight between DW2 and PW2 and prevented it from being stopped until the deceased intervened. There is no evidence in this case which amounts to provocation in law. The accused was the aggressor on the deceased. I have said earlier that I do not find as a fact that PWs 1, 2, 3, 5 & 7 and the deceased attacked the accused either by words or deed."

The learned trial Judge had earlier on pages 93 - 94 of the record considered the defences of self-defence and accident which were apparent of Exh. 6, the extrajudicial statement of the appellant and found them not available to the appellant.

The Court of Appeal amongst others endorsed the above findings of facts holding particularly that there was no evidence of self-defence or provocation. Once again I am also, on the facts, unable to find any evidence of provocation offered to the appellant on the fateful day either by the deceased or anybody at all. It is significant that Mrs. Ugboma for the appellant had stated on page 3 of her brief that:-

"In arguing this appeal, we wish to concede the fact that there was overwhelming evidence before the trial court and this was confirmed by the Court of Appeal that it was the act of the appellant to wit the striking of the deceased's head with the iron rod by the appellant that killed the deceased."

She continued on Page 4 of the brief thus:-

"Unfortunately, there was no evidence before the trial court that the appellant was the most feared man in the village nor was there evidence that he was also the strongest. However the deceased came upon the scene separated the girls and on their way home the appellant came out and dealt the fatal blow. Curiously there was no evidence to show that the appellant withdrew on sighting the deceased, neither was there evidence that there was an exchange of words between the appellant and the deceased."

I think to my mind all that counsel said above lend weight to the finding of the lower courts that there was no issue of provocation in the instant case as attested to by all the prosecution eye-witnesses. I also agree with the finding of the lower courts that the defence of provocation and or self-defence, on the facts do not avail the appellant herein. The evidence against the appellant was overwhelming. The appellant was evidently the aggressor and not a victim of any provocation.

In conclusion, I must resolve the two issues for determination in the case against the appellant.

The appeal therefore fails and it is hereby dismissed. The conviction and sentence are further affirmed by me.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Kutigi, J.S.C. I agree that the appeal has no merit and that it should be dismissed. Accordingly the appeal is hereby dismissed and the decision of the Court of Appeal is affirmed.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Kutigi, J.S.C. just delivered dismissing the appeal of the appellant. I too find no merit in this appeal and I accordingly dismiss it. I affirm the judgment of the Court below.

OGWUEGBU JSC

The judgment just read by my learned brother Kutigi, J.S.C. was

made available to me in draft and I agree with his reasoning and conclusion. The appeal is without merit. The decisions of the courts below have not been faulted. I hereby dismiss the appeal and affirm the conviction and sentence of the appellant.

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MOHAMMED JSC

I agree that this appeal is without merit and ought to be dismissed. My learned brother, Kutigi, J.S.C., in the lead judgment, just read, has considered the relevant issues raised in this appeal and I have nothing more to add. The appellant's appeal is hereby dismissed.

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