

SUPREME COURT OF NIGERIA
 26TH SEPTEMBER 1995. SC. 119/1994
CORAM:- M.L. UWAI, A.B. WALL, I.L. KUTIGI,
S. U. ONU, A. I. IGUH, JJSC.

RABBO DAMINA APPELLANT
 V.
 THE STATE RESPONDENT

COURTS - Language of the court - Whether trial judge is permitted to usurp role of interpreter - By rewriting or interpreting an exhibit.

COURTS - Impartiality - Trial judge cannot play role of the prosecution and a judge - Rolled into one at the same time.

COURTS - Supply of evidence - By the trial judge suo motu - Whether violation of appellant's right to fair hearing.

CRIMINAL PROCEDURE - Rejection of exhibit - Where tantamount to absence of material on which to find confession to culpable homicide - Trial judge's interpretation of the exhibit - Whether a breach of natural justice - And right to fair hearing.

CRIMINAL PROCEDURE - Retrial - Conviction for culpable homicide - Where ordering retrial will not serve the ends of justice better - Verdict of discharge and acquittal will be entered.

CULPABLE HOMICIDE - Identification of corpse - When its omission - Is held not to link appellant with death of the deceased.

EVIDENCE - Identity of deceased - In a culpable homicide charge - Absence of evidence to indicate that two names in issue refer to deceased - Legal implications.

FACTS

The appellant was arraigned before the High Court of Minna for the offence of culpable homicide punishable with death. It was alleged that the appellant dealt stab wounds to the deceased's neck and chest causing his instantaneous death. Apart from some serious lacuna in the prosecution's case, the trial judge rejected the interpretation of the appellant's supposed

confessional statement tendered before him and suo motu offered his own interpretation within his judgment upon which he convicted the appellant as charged.

The appellant's appeal to the Court of Appeal was dismissed. Being dissatisfied, appellant has now appealed to the Supreme Court raising six issues, three of which were considered by the apex court.

ISSUES FOR DETERMINATION

1. *Whether the re-translation of the alleged Confessional Statement as contained in Exhibit 2A by the learned trial judge suo motu, in the course of his judgment is tenable in law and whether this novel procedure did not violate the appellant's right to fair hearing and render all the findings and conclusions of guilt to which the alleged Confessional Statement was put a nullity?*

2. *If issue No. 1 is answered in the appellant's favour, what is the approximate order to be made in the circumstances. Is it a trial De Novo or acquittal?* Etc, see p. 1887.

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

Language of the court

1. From the foregoing, it is glaring that the learned trial judge while rejecting Exhibit 2A, a statement tendered by P.W.5 who was sworn for the purpose, engaged himself in rewriting and/or interpreting Exhibit 2 - an act lacked the competence to do. This act also was not permissible in that the official language of Court being English, by usurping the role of an interpreter and/or a translator, the learned trial judge was acting in breach of sections 241 and 142(1) of the C. P.C. both of which provide mandatorily with regard to the taking of proceedings in a language not being the language of court. (p. 1892 A)

Court - Impartiality

2. It is settled law that the delicate role played by a judge in our adversarial system of justice demands that he must not only be impartial, but must be seen to be impartial at all times. Furthermore, the learned trial Judge could not play the role of the prosecution and a Judge all rolled into one at the same time as he indeed sought to do in limine and suo motu outside the reaction of the parties thereto. The duty of impartiality includes the duty to hold even the balance between the parties. (p. 1893 C)

Supply of evidence - By the trial judge

3. Indeed, it is not the function of a trial Judge, by his own exercise and

ingenuity to supply the evidence or carry out the mathematics of arriving at the answer which only evidence tested under cross-examination could supply. In the light of the foregoing, the conduct of the learned trial Judge in the instant case in examining Exhibit 2 outside court, after which he came to a conclusion that that document was poorly interpreted and did not convey the real meaning, coupled with his own exercise of interpreting it without involving the prosecution whose document it was as well as the defence, to argue the propriety or otherwise of admitting it in evidence, in my respectful view, amounted to a grave error culminating in the violation of the Appellant's right to fair hearing as enshrined in section 33(4) of the 1979 Constitution, (p. 1895 B)

Rejection of Exhibit

4. The learned trial Judge having rejected Exhibit 2A, there no longer remained any material upon which he could lawfully find that the appellant confessed to the crime of culpable homicide punishable with death, Exhibit 2 (the Hausa statement) having been written in a language different from that in which proceedings were being conducted i.e. English. In other words, Exhibit 2 becomes valueless since the court is presumed not to understand its content without its interpretation. The learned trial judge's effort at interpreting Exhibit 2 at judgment stage which afforded neither party the opportunity to raise objection to such a procedure and in the absence of the statutory oath required to be taken by interpreters under Section 242 (2) C.P.C. before testifying or interpreting to the best of their ability, amounts to a breach of the fundamental principles of natural justice and the appellant's right to fair hearing. (p. 1896 F)

Retrial - Conviction for culpable homicide

5. The ends of justice will be better served if the appellant's conviction is quashed and the Appellant discharged and acquitted than to order a retrial. My reasons are that even if the error is excluded, the issues argued herein and to which I shall shortly advert, it will be difficult if not impossible, to sustain the conviction as other grave errors such as the absence of the identity of corpse of the deceased, regarding which mention will be made shortly, and lack of evidence to establish guilt on the record. Moreover, the fact that the trial of the Appellant commenced in the trial court some twelve years ago and that as early as 1986, three years later, witnesses (notably the two witnesses whose depositions at the Preliminary Inquiry were tendered at the trial when their whereabouts could not be traced) had begun to disappear. Thus, greater

injustice will be occasioned if an order of retrial is made in the instant case. I will for the reasons given above quash the conviction of the Appellant and enter a verdict of discharge and acquittal. (p. 1898 B)

Identification of Corpse

6. There was no iota of evidence to indicate that the two names, Audu and Bargo, were used by the deceased interchangeably to make the conclusion arrived thereat by the court below meaningful and conclusive. The only reasonable conclusion that can be drawn from the evidence on record is that the Appellant denied knowledge of Bargo. There being no link established between Bargo and Audu as none of the prosecution witnesses including P.W.2 said Bargo was known by any other name such as Audu, the opinions formed by both the trial court and the court below from Exhibit 1, are no more than mere conjectures and speculations. (p. 1899 G)

Evidence - Identity of the deceased

7. It was therefore not established beyond reasonable doubt that the corpse examined by P.W. 1 was that of Bargo and that both the evidence of P. W. 1 and Exhibit 1 were worthless. Indeed, the court below acknowledged this fact when it found as a fact that the categorical assertion of P.W. 1 that no identification of the corpse was made to her by anybody, was correct. In the light of this lacuna, it cannot, in my view, be said on this score that the death of the deceased could be linked, albeit remotely, to the Appellant's acts. (p. 1900 A)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Failure of justice

In this wise, rejecting an already admitted document i.e. Exhibit 2A the confessional statement in respect of which both the prosecution and defence had addressed the court and in respect of which he did not, at any stage of the proceedings, draw their attention to the alleged poor interpretation, and the impossibility of making any sense out of same, is the clearest example of failure of justice. (p. 1896 B)

UWAIS JSC

2. Denial of fair hearing - Trial Nullified thereby

It is very clear to me that but for the translation made by the learned trial Judge, which brought out the purported confession by the Appellant and on which the trial Judge heavily relied, the trial Judge could not have convicted

the Appellant of the offence charged. I will on this account alone allow the appeal. But there is also the failure of the court to observe the provisions of Section 33 subsection (4) of the 1979 Constitution since the Appellant did not have a fair hearing in the trial court. This automatically renders the proceedings null and void. Therefore, the trial in the High Court was, for that reason, null and void and of no effect whatsoever. Consequently, the conviction and sentence passed on the Appellant cannot stand. (p. 1906 A)

WALIJC

3. *Court not to translate vernacular suo motu*

It was not the function of the learned trial judge to proceed to translate suo motu the statement of the appellant into English where he found the one already admitted to be very poor. What he should have done at the stage he found Exhibit 2A “very poor” was to bring that to the notice of the parties involved so that an interpreter/translator who satisfied the provision of s.242 of the Criminal Procedure Code could be assigned to produce the correct and more satisfactory translation. Both sides would then have the liberty and opportunity of examining the translator on its contents to ascertain its accuracy or otherwise. (p. 1907 G)

IGUHC

4. *Judge not to adjudicate on his own testimony*

Although, Judges, by way of judicial notice, may in arriving at decisions, use their knowledge of the common affairs of life which men of ordinary intelligence possess, they may not act on their own private knowledge or belief regarding the facts of the particular case before them. If they have material facts to impart in connection with a cause or matter before them, it seems to me settled that the more proper role for them would be to be sworn in as witnesses and must not, either when sitting alone or with others adjudicate on his own testimony or private knowledge or take any further judicial part in the proceedings. (p. 1911 A)

CASES REFERRED TO

The State v. Gwonto (1983) 1 NCR. 19 at 30
Ajayi v. Zaria Native Authority (1964) NNLR. 65
Fawehinmi v. Akilu (1987) 4 NWLR (Part 67) 797 at 833
Udo v. The State (1988) 3 NWLR (Part 82) 316 at 333
Okoduwa v. The State (1988) 2 NWLR (Part 76) 333 at 346
Akinfe v. The State (1988) 3 NWLR (Part 72) 9

Opayemi v. The State (1985) 2 NWLR (Part 5) 101 at page 109)

Ankwa v. The State (1969) All NLR. 129 at 133

R. v. Laoye (1940) 6 WACA 6 at 7

State v. Usoagu (1990) 4 NWLR (Part 145) 469 at 482

Edwin v. State (1972) 4 S.C. 160

Ndu v. State (1990) 7 N.W.L.R. (Part 164) 550 at 571

State v. Gwonto (1983) 1 SCNLR 142 at pages 151-152B (1983) 3 S.C. 62 at pages 97-98 B

Arab v. Bauchi N.A. (1965) N.N.L.R. 48 at page 50

Abiola v. Federal Republic of Nigeria (1995) 7 NWLR (Part 405) P.1

REPRESENTATION

J. B. Daudu, S.A.N. with A. U. Ibinola (Mrs.) for the Appellant C

A. Bello, D.P.P. Niger State with A. Babadoko, State Counsel Grade II for the Respondent

STATUTES REFERRED TO

Penal Codes. 221(b) D

Constitution of the Federal Republic of Nigeria 1979 s. 33

Criminal Procedure Code ss. 241, 242, 382, 239

Evidence Act s. 34

LEAD JUDGMENT BY ONU JSC

The appellant, Rabbo Damina, was arraigned before the High Court of Niger State sitting in Minna upon a charge transmitted thereto from a preliminary investigation held by a Chief Magistrate for the offence of culpable homicide punishable with death contrary to Section 221 (b) of the Penal Code in that on 18th May, 1983 at Ndazabo, he killed one Bargo. The trial High Court presided over by Umaru Isiyaku Agora, J. (of blessed memory) convicted the appellant who thereupon appealed to the Court of Appeal sitting in Kaduna (Coram: Uthman Mohammed, J.C.A., as he then was, Ogundare and Okunola, J.J.C.A) which affirmed the decision of the trial court and accordingly dismissed the appeal. Being dissatisfied with this decision, the appellant has further appealed to this court. F G

The facts of the case, briefly stated, are that on 18th May, 1983 at Ndazabo Village, the deceased called Bargo (he was also referred to as Audu but by no means were the two names either used interchangeably or reconciled as belonging to one and the same person) who and the appellant married two sisters, were shown to be in the bush together tending cattle where it was alleged the deceased tried unsuccessfully three times to kill the appellant as his (deceased's) gun failed to fire. It is further stated that upon their return to H

the village (Ndazabo) and as the deceased sat on a mat listening to his radio, the appellant, after muttering some words as if engaged in some bickering, removed his cutlass from inside the gown he was then wearing, and dealt stab wounds to the deceased's neck and chest, causing his instantaneous death with the attention of two persons who were nearby being drawn to the noise B made but who could not be said to be eye-witnesses to the stabbing. These men arrived at the scene early enough to see the appellant's escape from the scene of crime.

At the hearing of the case, five witnesses in all testified for the prosecution, the first of whom was Doctor Joy A. Thomas (PW1) who made out the C report of the autopsy performed on the deceased and tendered as Exhibit 1 by Paul Ode (PW 3). Ironically, Exhibit 1 neither contained the name of the deceased nor that of the person who identified his corpse to PW1, PW 2, (Haruna Alhaji Attahiru) asserted that he is the son to the man who employed Mamman Ishaku, Baba Musa (both of whose depositions - Exhibits 3 and 4 were recorded at the Preliminary Investigation at the Chief Magistrate's Court but were nowhere to be found to testify at the trial) as well as the deceased, as herdsmen. He added that on 18th May, 1983 when Mamman Ishaku informed him that the appellant had cut the deceased, he accompanied him and Baba Musa to the village where he saw Bargo's corpse on the ground. He it was E who then reported the matter at the Police Station, Bida where three policemen were detailed to accompany him to the scene and on their seeing the corpse, conveyed it to the Bida General Hospital.

The police witnesses, P.W. 4 (Samuel Maiwuya) and PW 5 (Sergeant Yesuka Dogo) each testified as to the role each played in the investigation of F the case and through PW 5 were tendered the appellant's statement in Hausa Language (Exhibit 2) as well as its English translation. At the trial, the appellant testified and denied ever making Exhibit 2, let alone its translation (Exhibit 2A). The appellant further denied the contents of the charge and knowledge of the said Bargo adding that on the date in question, he was at a place called G Beji, not Ndazabo. He also denied quarrelling with the deceased. He gave an account of the beating he received at the hands of the police and denied that he was lying or gave evidence which amounted to an afterthought.

Written addresses were later filed on the invitation of the learned trial Judge by either side. In his judgment, however, the learned trial Judge suo H motu motu made a re-translation of Exhibit 2A upon which he placed heavy reliance to convict the appellant.

With the Court of Appeal (hereinafter referred to as the court below) confirming the trial court's decision on appeal, the appellant, as here-in-before

pointed out, has further appealed to this court upon two original and with leave, six additional grounds of appeal, the latter re-numbered 3-8 respectively.

The appellant who later filed a brief of argument in accordance with the rules of this court, served the same upon the respondent. Six issues were formulated and submitted by him for our determination. They are:-

1. Whether the re-translation of the alleged confessional statement as contained in Exhibit 2A by the learned trial Judge suo motu, in the course of his judgment is tenable in law and whether this novel procedure did not violate the appellant's right to fair hearing and render all the findings and conclusions of guilt to which the alleged confessional statement was put a nullity?

2. If issue No. 1 is answered in the appellant's favour, what is the appropriate order to be made in the circumstances. Is it a trial de novo or acquittal?

3. If Exhibits 2 and 2A are adjudged as being properly before the court, whether the said statement is not more in consonance with a mixed statement i.e. on which contains both incriminating and exculpatory or self-serving statement than a wholly confessional statement and if so can it be said that the learned trial Judge dealt with the said statement in accordance with the prevailing law i.e. by according to the exculpatory aspects the same weight accorded to the incriminating parts?

4. Whether the entire evidence led by the prosecution disclosed a guilt of the commission of the offence of culpable homicide as found by the High Court and affirmed by the Court of Appeal?

5. Whether the conclusions of the Court of Appeal Kaduna on the issue of the identity of the corpse was correct in the face of fatal flaws in the evidence of the prosecution suggesting that the corpse allegedly examined was not identified as Bargo (Deceased) to the Medical Doctor by any of the prosecution witnesses?

6. Whether, contrary to the conclusion of the Court of Appeal the defences of provocation, private defence and sudden fight are available to the appellant.

On 4th July, 1995, the date fixed for the hearing of this appeal, the learned Director of Public Prosecutions of Niger State, Mr. A Bello moved the application he had earlier brought seeking leave to file the respondent's brief of argument out of time and to deem same as duly filed and served. The application not being opposed by Mr. Daudu, learned Senior Advocate, who had indicated that he had earlier been served a copy, was granted as prayed.

At the hearing of the appeal which proceeded the same day, learned Senior Advocate Mr. J.B. Daudu, after drawing our attention to the six issues set out above and as contained in the appellant's brief at page 9 thereof, elaborated briefly on issues 1 and 2 only. He submitted that the learned trial Judge translated the appellant's confessional statement while rejecting that of the investigating police officer. By so doing, he maintained, the appellant's
 B fundamental right to fair hearing was violated, citing in support thereof the case of Mohammed Duriminiya v. Commissioner of Police (1961) NRNLR 70 at pages 73-74. He urged us to allow the appeal and to discharge and acquit the appellant without ordering a retrial, as to do so, would be oppressive.

C For his part, learned D.P.P. after also adopting the respondent's brief, first submitted that the learned trial Judge was right to have translated the appellant's confessional statement. He, however, changed gear by saying that it was wrong of the learned trial Judge to have undertaken the translation of the statement himself.

D I will now proceed to consider the appellant's six issues which the respondent has apparently adopted as follows:-

Issues 1 and 2:

The learned Senior Advocate in arguing these issues which overlap ground 4 raised what he termed as a fundamental complaint against the conduct of the learned trial Judge vis-a-vis the alleged appellant's confessional statement admitted as Exhibits 2 and 2A. He pointed out how PW 5, Sergeant Yesuka Dogo, testified that he took the statement of the appellant by way of assistance to Sgt. Olude who spoke no Hausa but was assigned to investigate the matter. That in his (Sgt. Yesuka Dogo's) attempt to tender both statements,
 E an objection was raised by the appellant's counsel that the statements were inadmissible on the ground of inducement. At that stage, it is asserted, the
 F trial court ordered a trial within trial.

It is then pointed out that PW 5 did not, in his evidence-in-chief, reach the stage of tendering the interpreted copy, albeit that the interpretation of it done by him from Hausa into English was received as Exhibit '2A'. At the end of the trial within trial, it is stated that Agora, J. ruled as follows:-

G *"For this reason the objection of the defence to tender the confessional statement of the accused is overruled and the confessional statement of Rabbo Damina is to be and is hereby admitted as Exhibit 2 and its English translation as Exhibit 2A."*

H The English translation referred to above, submitted learned Senior Advocate, formed the linch-pin or fulcrum of the prosecution's case for the

sheer fact that all the parties appreciated that there was neither direct nor

circumstantial evidence capable of independently convicting the appellant of the offence charged. The learned trial Judge clearly appreciating this dilemma, he contended, reflected same in his judgment wherein he held as follows:-

“This issue for the decision of the court is whether or not the accused caused the death of the deceased Bargo, and if he did, whether his act was done with the intention of causing the death of the deceased In order to arrive at these findings, it is necessary to fall back on the accused’s own confessional statement Exhibit 2.”

The learned trial Judge, he further pointed out, put various portions of the alleged confessional statement to such extensive use as declaring it to be free and voluntary and that not only upon it was the conclusion that Bargo, the deceased, suffered death through the cut he received from a sword, but that the appellant was the one who cut him with the intention of causing his death. The substance of his complaint, argued learned Senior Advocate, is that the learned trial Judge did not rely on the English translation of Exhibit 2 i.e. Exhibit 2A, which was tendered through P.W.5, but rather on the translation or interpretation carried out by himself of Exhibit 2 to the effect inter alia that:-

“The English translation of the Hausa statement Exhibit 2 is very poor and does not convey the real meaning of the Hausa statement.

The proper translation of the Hausa statement Exhibit 2 is therefore as follows.”

Learned counsel further submitted that the translation embarked upon by the learned trial Judge of Exhibit 2 suo motu, which document is other than Exhibit 2A tendered by PW 5 (a sworn witness), amounted to a serious error with far-reaching consequences to the entire trial as a whole. He thereafter argued that the learned Judge lacked the competence to re-write a document tendered by a witness in a language foreign to the Court no how versed he was in such a language in which it was originally written, adding that the exercise went completely outside the judicial functions of the court and transgressed upon the appellants right to fair hearing as well as having the consequence of the learned Judge substituting PW 5’s evidence with his own evidence. This, he maintained, is not permissible in that the official language of the High Court or the language in which the proceedings were conducted, is the English Language, adding that Section 33(6)(e) of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to as the 1979 Constitution) guarantees to an accused person the right to an interpreter if he cannot understand the language used at the trial of the offence. The cases of *The State v. Gwonto* (1983) 1NCR 19 at 30; *Ajayi v. Zaria Native Authority* (1964)

NNLR 61; Abdu Dan SarkinNoma v. Zaria Native Authority (1963) NNLR 102 were cited in support thereof. So also was our attention drawn to the provisions of Sections 241 and 242(i) of the Criminal Procedure Code dealing with both oral and documentary interpretation in a language foreign to the court and the requirement for an interpreter to take an oath before engaging in such an interpretation, failing which the statement will be rejected. The cases of R. v. Ogbuewu (1949) 12WACA 483; R. v. Zakwakwa (1960) SCNLR 36; Jegah v. The State (1971) NMLR 134 and Makeri v. The State (1994) 3 NWLR (Pt. 330) 55 at 61, were called in aid to exemplify the fact that the learned Judge was statutorily disqualified and so incompetent to engage in interpreting a documentary Exhibit already admitted in evidence, if only to make it contain the kind of incriminating matters he would wish it to contain.

Learned Senior Advocate further submitted that it is settled law that the delicate role of a judge particularly in our adversarial system of justice which demands that a judge must not only be impartial but must be seen to be impartial at all times, included his duty to hold even the balance between the parties. The cases of Fawehinmi v. Akilu (1987) 4 NWLR (Pt.67) 797 at 833; Udo v. The State (19.88) 3 NWLR (Pt. 82) 316 at 333; Okoduwa v. The State (1988) 2 NWLR (Pt.76) 333 at 346 and Akinfe v. The State (1988) 3 NWLR (Pt. 85) 729 were cited in support of the proposition, adding that numerous examples of descent into the judicial arena abound, with the most illuminating being this court's decision in Alhaji I. A. Onibudo v. Alhaji A. W. Akibu (1982) All NLR 207. After posing the question if it could be said having regard to the authorities cited above, that the appellant had had a fair hearing at the court of first instance as confirmed by the court below, learned Senior Advocate urged us to return a negative answer and called in aid the case of Mohammed v. Kano Native Authority (1968) 1 All NLR 424 at 426.

Learned Senior Advocate thereafter drew our attention to two subsidiary issues or points that remained to be considered to wit: an examination of Section 382 of the Criminal Procedure Code (C.P.C. for short) which seeks to save proceedings marred by technical defects, so long as there has not been a failure of justice and the appropriate order to be made should this court come to a conclusion that there has been a failure of justice. After defining what constitutes failure of justice by reference to the two decisions of Buraimah Ajayi v. Zaria N.A. (supra), and Abdu Dan Sarkin Noma v. Zaria N.A. (supra) learned Senior Advocate submitted that where the conduct of proceedings leaves a reasonable person with no other inference than a possibility of injustice, then the appeal ought to be allowed.

In relation to the appropriate order to make in the event that this appeal is allowed on the issues herein considered, learned Senior Advocate submitted that as the options available oscillated between an order of retrial

and an order discharging and acquitting the appellant, the principles enunciated in the locus classicus on the matter - Abodundu v. Queen (1959) SCNLR 162 as restated in Ankwa v. The State (1969) IAll NLR 129 at 133 and Okoduwa v. The State (supra), to the effect that where no useful purpose will be served if an order of retrial is made, the conviction of the appellant will be quashed and a verdict of discharge and acquittal will be entered.

The learned D.P.P. in answer to the two issues herein having conceded that it was wrong of the learned trial Judge to have undertaken the translation of the appellant's statement recorded by P.W. 5 suo motu himself, there is strong merit in the appeal. This is because Exhibit 2 and its English translation (Exhibit 2A) formed the linch-pin or fulcrum upon which the entire prosecution's case revolved - there being neither direct nor circumstantial evidence capable of independently convicting the appellant of the offence charged. Appreciating this dilemma clearly, the learned trial Judge in part of his judgment held as follows:-

"This issue for the decision of the court whether or not the accused caused the death of the deceased Bargo, and if he did, whether his act was done with the intention of causing the death of the deceased In order to arrive at these findings, it is necessary to fall back on the accused's own confessional statement Exhibit 2."

It is noteworthy that rather than rely on the translation from Hausa (Exhibit 2) into English (Exhibit 2A) the learned Judge relied on a translation or interpretation carried out by himself suo motu earlier in his judgment wherein he opined on Exhibit 2 thus:

"The English translation of the Hausa statement, Exhibit 2 is very poor and does not convey the real meaning of the Hausa statement. The proper translation of the Hausa statement Exhibit 2 is therefore as follows:-

'I agree to tell the police as follows, that on 18/5/83 at about 1900 hours, I and Audu who I killed. We live together in Ndazabo village because his father told him to leave the place. Then I told him why did he not tell me then he started to abuse me saying that my father is not competent to tell him that he will not leave the place. From there he took his gun and wanted to kill me but some people told him to stop, they are Mamman and Bawa, with whom we live together. But he did not agree, so when I went to the bush he followed me with a gun again. He shot me three times, but the gun could not fire, so at that stage I severed him with my sword to death. Then I ran with my sword into the bush to Paiko and left my people at Ndazabo village. I remained there until yesterday 24/7/83, when I returned home and the police arrested me. That is what I know (please see Exhibit 2 the original Hausa Statement)."

From the foregoing, it is glaring that the learned trial Judge while rejecting Exhibit 2A, a statement tendered by PW 5 who was sworn, for the purpose, engaged himself in re-writing and/or interpreting Exhibit 2 - an act he lacked the competence to do. This act also was not permissible in that the official language of court being English, by usurping the role of an interpreter and/or a translator, the learned trial Judge was acting in breach of sections 241 and 242(1) of the C.P.C. both of which provide mandatorily with regard to the taking of proceedings in a language not being the language of court as follows:

“241. When any evidence is given in a language by the accused and the accused is present in court, it shall be interpreted to him in a language understood by him.

242(1) when the services of an interpreter are required by any court or justice of the peace the record of the proceedings shall state the name of the interpreter, the languages which and in which he interprets, and the fact that he has been bound in accordance with the provisions of subsection (1) to state the true interpretation of the evidence, statement or other proceedings.”

In Halilu A. Makeri v. The State (supra) the Court of Appeal referred with approval to R. v. Ogbeuwu (supra) and Jegan v. The State (supra) coupled with the Federal Supreme Court case of Queen v. Zakwakwa (supra) the latter whose facts were as follows:

The charge was murdering one Zon Vanya in June, the evidence of the corporal and the dispensary attendant was that they saw the dead body of Zon Vanya on a specified day in June.

The accused made his statement in Mumuye; two police witnesses said it was U. who translated into Hausa; but the statement showed M. as the interpreter into Hausa; and M. was not called. The statement was the only direct evidence of the assault.

It was held by Hubbard, Ag. F.J. that:-

“there is considerable doubt whether the statement of the appellant which is the only direct evidence of his striking Zon Vanya, was properly proved. The appellant made it in Mumuye. According to the evidence of L/Cpl. Umoru and L/Cpl. Sabana Jalingo, it was L/Cpl. Umoru who translated from Mumuye to Hausa. The Hausa version was recorded by L/Cpl. Sabana. According to the English version (Exhibit 3A) of the Statement, however, which is certified as a correct translation by Cp I. Adeyi Ajumbi, it was P. C. Musa Sansidang who translated from Mumuye to Hausa, and Exhibit 3A purports to show that P.C. Musa signed below the Hausa version and above the signature of L/Cpl. Saban a (at the same time a police constable) who recorded the Hausa version. It seems extremely unlikely that L/

Cpl. Sabana would have allowed anyone except the actual interpreter to sign under the words "Interpreted by me." If it was P.C. Musa who did the interpretation, and not L/Cpl, Umoru, then since P.C. Musa was not called as a witness and subject to cross-examination, the Hausa version and the English version are hearsay."

The position in the present case which is distinguishable from the above cases, wherein the convictions were sustained on the facts, is rendered all the more incongruous in that the learned trial Judge here unilaterally translated Exhibit 2 or interpreted it into his own form of English in the face of the supposedly poor interpretation rendered by PW 5; there was no way in which he would not be called as a witness to be cross-examined to show why the original interpretation was incorrect or contained the kind of incriminating matters he would wish it to contain. It is settled law that the delicate role played by a judge in our adversarial system of justice demands that he must not only be impartial, but must be seen to be impartial at all times vide *Fawehinmi v. Akilu* (supra). Furthermore, the learned trial Judge could not play the role of the prosecution and a judge all rolled into one at the same time as he indeed sought to do in limine and suo motu outside the reaction of the parties thereto. See: *Sodipo v. Lemminkainen* or (1986) 1 NWLR (Pt.15) 220. The duty of impartiality includes the duty to hold even the balance between the parties. See *Udo v. The State* (supra) in which Nnaemeka-Agu, J.S.C. at page 333 said:

"Suffice it to say from what I have said so far, there have been breaches of serious principles of fair hearing as well as the statutory and constitutional provisions designed for the prosecution of the appellant. The essence and rationale of fair hearing given by the constitution and laws of this country to a person standing trial for a capital offence are that, in view of the seriousness of the charge in such a case, the trial should not be weighted against an accused person who not being a legal practitioner does not understand or appreciate the language, procedure and technicalities of the court."

See also *Okoduwa v. The State* (supra).

In the instant case, the learned trial Judge had not only unsolicitedly entered the arena by playing the role of a witness unbefitting of an impartial arbiter, thus making his vision not only to be beclouded, but allowed his decision to be twisted or perverted. In *Alhaji I.A. Onibudo v. Alhaji A.W. Akihu* (supra), a case whose similarity to the case in hand lies in the fact that the justice of the Court of Appeal there went outside the record of proceedings to look for evidence to justify their conclusion and frowning on that approach, *Aniagolu, J.S.C.* said at page 89-90:

"With respect, it was no part of the appellate duty of the justices to go on this voluntary voyage of his own aimed at producing evidence for the

parties. His, was to deal with the evidence adduced by the parties and pronounce on it in accordance with the law. Moreover, it was wrong of the court and unfair to the surveyor to condemn the surveyor upon evidence on which the surveyor was not given opportunity to venture opinion. The duty of the production of facts is that of the parties, the duty of evaluation of facts B produced is, in our country that of the trial Judge whose function is to decide on the credibility.....As has been pointed out by this court in Bornu Holding Company Ltd. v. Hassan Bogocco (1971) 1 All NLR 324, if it becomes necessary that a point or points arising for determination in a case should be further clarified by evidence after the close of trial, it is the duty of C the trial judge to invite the parties to supply such evidence or explain such point or points and it will be wrong for the court to proceed to its own views for matters on which there should be but which there was no evidence before the court.”

See also Muhammadu v. Duriminiya v. Commissioner of Police (supra), a trial D upon charges of fraudulent false accounting and stealing, wherein the prosecution put the accused’s books of account in evidence, but only a few out of numerous relevant entries in the books were brought to notice in court by oral evidence or by examination of books in court. On appeal, the High Court of Northern Region of Nigeria held, inter alia, at page 73-74 thus:

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 “It will be said that the appellant’s books, which were in evidence, contain the proof of his guilt. That may be, for, as his judgment shows, the learned magistrate examined the books, and he convicted. We think he was wrong to approach the case in that way, and we will not examine the books F ourselves. The magistrate examined the books but apparently not in court - for the record does not show that he observed or was shown any entries in court, except the few we have mentioned - and in examining them out of court, as appears from his judgment, he observed numerous points which ought to have been brought out in court at the hearing but were not. In G doing this, the magistrates was not trying the case, he was investigating it. A trial is not an investigation, and investigation is not the function of a court. A trial is the public demonstration and testing before a court of the cases of the contending parties. The demonstration is by assertion and evidence, and the testing is by cross-examination and argument. The function of the court H is to decide between the parties on the basis of what has been so demonstrated and tested. What was demonstrated in court at the trial failed to support the prosecution case, and the magistrate should have dismissed his case. It was no part of his duty to do cloistered justice by making an inquiry

into the case outside court - not even by the examination of documents which were in evidence, when the documents had not been examined in court and the magistrate's examination disclosed things that had not been brought out and exposed to test in court, or were not things that at least, must have been noticed in court."

Indeed, it is not the function of a trial Judge, by his own exercise and ingenuity to supply the evidence or carry out the mathematics of arriving at the answer which only evidence tested under cross-examination could supply. See *George Obi Ikenye v. Akpala Ofune & Ors.* (1985) 2 NWLR (Pt. 5) 1 at 13. In *Lim Poh Chop v. Camden & Islington Area Health Authority* (1979) 1 Q.B. 196 Lord Scarman gave an imaginative picture of the judge thus:

"The judge, however wise, creative and imaginative may be, is cabined, cribbed, contined, bound in not, as was Macbeth to his 'saucy doubts and fears' but by the evidence and arguments of the litigants."

In the light of the foregoing, the conduct of the learned trial Judge in the instant case in examining Exhibit 2 outside court, after which he came to a conclusion that that document was poorly interpreted and did not convey the real meaning, coupled with his own exercise of interpreting it without involving the prosecution whose document it was (See *Anofi Opayemi v. The State* (1985) 2 NWLR (Pt.5) 101 at page 109 as well as the defence, to argue the propriety or otherwise of admitting it in evidence, in my respective view, amounted to a grave error culminating in the violation of the appellant's right to fair hearing as enshrined in Section 33(4) of the 1979 Constitution. In the case of *Isiyaku Mohammed v. Kano N.A.* (supra), a case of criminal breach of trust the appellant was originally convicted by the Urban Area Court, Kano and sentenced to 8 years imprisonment with hard labour. He appealed to the High Court of the Kano Judicial Division (as it was then) which dismissed his appeal against conviction but reduced the sentence to 4 years imprisonment with hard labour. Upon his further appeal to the Supreme Court, Ademola, C.J.N. in allowing it observed inter alia as follows:-

"The question we ask ourselves is whether taking into account all these circumstances we have enumerated about the conduct of the case, the appellant has had a fair hearing?"

*For the purpose of the test which counsel has suggested and which mentioned earlier in this judgment, the burden is on the appellant to show that the irregularity and the conduct of the trial complained of led to a failure of justice. In the case of *Buraimo Ajayi & Anor v. Zaria Native Authority* (1963) 1 All NLR 169 this court held that a fair trial was denied to the*

two appellants because the interpretation to them of the proceedings at

their trial was defective. We are of the opinion in the present case that the conduct of inspector Markifa to which we have referred in this judgment must leave an observer with the impression that the appellant has been denied a fair trial.....”

In the present case, having regard to all I have hereinbefore said, I am left in no doubt that the appellant has been denied a fair trial following the self-imposed task embarked upon by the learned trial Judge in setting aside Exhibit 2A and making out his own interpretation thereof.

In this wise, rejecting an already admitted document i.e. Exh. 2A the confessional statement in respect of which both the prosecution and defence had addressed the court and in respect of which he did not, at any stage of the proceedings, draw their attention to the alleged poor interpretation, and the impossibility of making any sense out of same, is the clearest example of failure of justice. In *Buraimah Ajayi v. Zaria N.A.* (supra) Brett, F.J. held “*That there is a failure of justice within the meaning of the Section if the proceedings at the trial fall short of the requirement not only that justice be done but that it may be seen to be done.*” See also *Abdu Dan Sarkin Noma v. Zaria N.A.* (supra) at page 102 where Hurley, C.J. defined what constitutes a failure of justice to connote as follows:-

“*There is a failure of justice not only where the court comes to the conclusion that the conviction was wrong, but also when it is of the opinion that the error or omission in the court below may reasonably be considered to have brought about the conviction, and when on the whole facts and in the absence of the error and omission, the trial court might fairly and reasonably have found the appellant not guilty.*”

Furthermore, there is an automatic failure of justice if one of the appellant’s fundamental rights is infringed by the error as indeed occurred in Ajayi’s case (supra). In the result, the learned trial Judge having rejected Exhibit 2A, there no longer remained any material upon which he could lawfully find that the appellant confessed to the crime of culpable homicide punishable with death, Exhibit 2 (the Hausa Statement) having been written in a language different from that in which proceedings were being conducted i.e English. In other words, Exhibit 2 becomes valueless since the court is presumed not to understand its content without its interpretation. The learned trial Judge’s effort in interpreting Exhibit 2 at judgment stage which afforded neither party the opportunity to raise objection to such a procedure and in the absence of the statutory oath required to be taken by interpreters under Section 242(2) C.P.C. before testifying or interpreting to the best of their ability,

amounts to a breach of the fundamental principles of natural justice and the

appellant's right to fair hearing guaranteed by Section 33(4) and 33(6) and (e) of the 1979 Constitution, as modified by Decree No. 107 of 1993.

Having arrived at the conclusion that there has been a failure of justice in the instant case, the application of the provisions of Section 382 of the C.P.C. to save the proceedings in the trial court which the court below had affirmed, were the same to be marred by technical defects, would, in my view, no longer arise. For purposes of clarity that Section provides as follows:- B

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error, omission or irregularity in the complaint, summons, warrant, charge, public summons, order, judgment or other proceedings under this Criminal Procedure Code unless the appeal court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity.” C

Explanation: In determining whether any error, omission or irregularity in any proceeding under the Criminal Procedure Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.” D

Consequently, the only logical order to make in the circumstances, as I shall show hereunder is not that of retrial but one discharging and acquitting the appellant. E

Now, the locus classicus on the principles governing when an order of retrial can be made is the Federal Supreme Court case of Yesufu Ahodundu v. Queen (1959) SCNLR 162 at 166/167; (1959) IV FSC 70 at 73174 where Abbot, F.J. said: F

“We are of the opinion that before deciding to order a retrial, this court must be satisfied:

(a) that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such character that on the one hand the trial was not rendered a nullity and on the other hand this court is unable to say that there has been no miscarriage of justice and to invoke the proviso to Section 11 (1) of the ordinance; G

(b) that leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant;

(c) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time; H

(d) that the offence or offences of which the appellant was con

victed, or the consequences to the appellant or any other person of the

*conviction or acquittal of the appellant, are not merely trivial;
 (e) that to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it."*

It is now settled law that the above circumstance must co-exist before such an order is made. See: Ankwa v. The State (1969) All NLR 129 at 133.

B Applying the above principles in the instant appeal, I am of the firm view, that the ends of justice will be better served if the appellant's conviction is quashed and the appellant discharged and acquitted than to order a retrial. My reasons are that even if the error is excluded, the issues argued herein and to which I shall shortly advert, it will be difficult if not impossible, to sustain the conviction as other grave errors such as the absence of the identity of corpse of the deceased, regarding which mention will be made shortly, and lack of evidence to establish guilt on the record. Moreover, the fact that the trial of the appellant commenced in the trial court some twelve years ago and that as early as 1986, three years later, witnesses (notably the two witnesses whose depositions at the Preliminary Inquiry were tendered at the trial when their whereabouts could not be traced) had begun to disappear. Thus, greater injustice will be occasioned if an order of retrial is made in the instant case. See: Okoduwa v. The State where Nnamani, J.S.C. said:

E ".....matters to be considered included the seriousness and prevalence of the offence, the possible duration and expense of a new trial, the ordeal to be undergone for a second time by the prisoner, the lapse of time since the commission of the offence and its effect on the quality of evidence and the nature of the case of the prosecution against the prisoner as disclosed in the evidence of the first trial whether substantial or not. See also F Ankwa v. State (1969) All NLR 133 and Okafor v. State (1976) 5 SC 13."

I will for the reasons given above quash the conviction of the appellant and enter a verdict of discharge and acquittal.

Issue 3 and 4:

G In the light of my resolution of issues I and 2 in appellant's favour, issues 3 and 4 which talk of the exculpatory aspects of Exhibit 2 and 2A and what weight to be accorded to the incriminating parts thereof as well as whether the entire evidence led by the prosecution disclosed a guilt of the offence of culpable homicide as found by the trial court and confirmed by the court below respectively, become mere academic or moot points not worthy of a H further discourse by me.

Issue 5:

This issue deals with the appellant's grouse that the absence of a proper, and indeed, accurate identification of the deceased is fatal to the prosecution's case. The shabby handling or treatment by the prosecution

relating to the absence of identification of the corpse of the deceased as epitomized in the autopsy carried out by P.W.1, Doctor A. Thomas, can be best illustrated by the following passages from the judgment of the court below.

“The first question to tackle is that of the identity of the deceased. Whether it was Bargo or Audu. There is nothing on the records to reconcile this conflicting evidence. The Medical Report was also silent on the name of the person on whom the autopsy was performed. The question is whether there was enough satisfactory evidence to show that Bargo was actually Audu. Unfortunately Bawa and Mamman were not available at the trial to produce an answer; and when the prosecution did cross-examine the appellant he said he did not know the deceased.....Although, P.W.1, the Doctor who did the autopsy did not put the name of the deceased in his report, she said that, she examined only one corpse on that day, and this tacked to what PW 2 said regarding the deceased leave but one conclusion that the autopsy was on Bargo.

The appellant confessed to killing Audu in his statement to the police but denied everything at the trial. But he said he killed Audu in Ndazabo village, the locus in quo mentioned by P.W.2 where the deceased was killed. P.W.2 knew both the deceased and appellant, so there was no possibility of mistaken identity even though the deceased was Audu to the appellant but Bargo to P.W.2” (The italics is mine for emphasis).

Be it noted, however, that in the learned trial Judge’s translation of the appellant’s purported voluntary statement and upon which the appellant’s conviction was, in the main based, he (appellant) is given as having stated that the person he killed was one Audu (See page 10 of this judgment) and not Bargo as contained in the charge. “Thus, the court below, in my view, was in error as regards its conclusions on the issues raised on the lack of identification of the deceased’s corpse by P.W.1. In so far as no witness testified to having identified the deceased’s corpse to P.W.1, the conclusions of the court below that the deceased was known to both appellant and P.W.2, who in fact never claimed he identified the corpse to P.W.1, by either or both of the two different names, are not borne out by the record. Besides, there was no iota of evidence to indicate that the two names, Audu and Bargo, were used by the deceased interchangeably to make the conclusion arrived thereat by the court below meaningful and conclusive. The only reasonable conclusion that can be drawn from the evidence on record is that the appellant denied knowledge of Bargo. There being no link established between Bargo and Audu and as

none of the prosecution witnesses including P.W. 2 said Bargo was known by

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any other name such as Audu, the opinions formed by both the trial court and
the court below from Exhibit 1, are no more than mere conjectures and specu-
lations. See Idapu Emine v. State (1991) 3 NWLR (Pt.204) 480 at 497. It was
therefore not established beyond reasonable doubt that the corpse examined
by P.W. I was that of Bargo and that both the evidence of P.W.1 and Exhibit 1
were worthless. Indeed, the court below acknowledge this fact when it found
B as fact that the categorical assertion of P.W. I that no identification of the
corpse was made to her by anybody, was correct.

In the light of this lacuna, it cannot, in my view, be said on this score
that the death of the deceased could be linked, albeit remotely, to the appellant's
acts. Thus as this court had occasion to point out recently in the similar case
C of Princewill v. The State (1994) 6 NWLR (Pt.353) 703 at 713 (Per Iguh, J.S.C.)

*"On the issue of the identity of the deceased, it cannot be overem-
phasized that where evidence of an autopsy is called by the prosecution,
failure to identify the body on which the post mortem examination was car-
ried out by the Doctor as the body of the person allegedly killed by the
D accused person in cases of homicide is a fatal omission. The matter will of
course be different if there is other cogent and conclusive evidence which
identified the deceased as the person, it is therefore one of the essential
E elements the prosecution must prove conclusively in homicide cases that the
body examined during the post-mortem examination is that of the deceased
named in the charge."*

See also R. v. Momodu Laoye & Anor(1940) 6 WACA 6 at 7 and State
v. Nicholas Usoagu (1972) 2 ECSLR (Pt.11)429. Compare Enewoh v. State (1990)4
NWLR (Pt.145) 469 at 482; Edwin v. State (1972) 4 SC 160 and Ndu v. State
F (1990) 7 NWLR (Pt.164) 550 at 571.

The court below therefore erred in the instant case, not to have
quashed the appellant's conviction sequel to the vital error of non-identifica-
tion of the corpse named in the charge as Bargo. This is moreso that the
necessity of such identification has not been excluded by the existence of
G cogent and compelling evidence that it was the appellant that killed the de-
ceased. For as demonstrated in my consideration of issues 1 and 2 above, the
alleged confession upon which the charge was being sustained, has been
shown to be unreliable and there exists no acceptable alternative evidence
except the non-eye-witness accounts embodied in the depositions of Bawa
H Musa and Mamman Isiyaku, admitted in evidence by the trial court as Exhs. 3
and 4, vide Section 239(1) of the C.P.C. See also Section 34 of the Evidence
Act. This issue is accordingly resolved in appellant's favour.

I wish to add in passing that what emanates from the foregoing is a
clear manifestation of the ineptitude of the prosecution in the investigation

and prosecution of the present case. The case is permeated with shabby handling or treatment and the learned trial Judge did not help matters a bit by his conduct in entering the arena whereas he should have played his role well as a detached and an impartial arbiter. The court below by trying to mend the bits and pieces that it inherited on appeal, held, much against the grain, that there had been proof beyond reasonable doubt. In *Kada v. State* (1991) 8 B NWLR (Pt.208) 134, Wali, J.S.C. at 147 held inter alia that:

“A case involving loss of human lives resulting from criminal acts should not and must not be shabbily handled.” See also Felix Nwosu v. State (1986) 4 NWLR (Pt.35) 348 (Per Eso, J.S.C.) and Daniels v. State (1991) 8 NWLR (Pt.212) 715 at 732.”

Issue 6:

In the light of all I have said above, this issue which asks whether contrary to the conclusion of the court below the defences of provocation, private defence and sudden fight are available to the appellant, is in my respectful view, rendered otiose.

The net result of all I have been saying is that this appeal succeed and it is accordingly allowed by me. The decisions of the courts below are hereby set aside. I enter in respect of the appellant’s conviction for the offence of culpable homicide punishable with death, a verdict of discharge and acquittal.

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Onu, J.S.C. I agree that this appeal has merit and that it should be allowed.

The important point raised by Mr. Daudu, learned Senior Advocate, for the appellant, is whether the role played by the learned trial Judge (Agora, J. of blessed memory) in translating suo motu the appellant’s statement to the police, made in Hausa, into English when he came to consider his judgment had occasioned miscarriage of justice. The statement made to the police in Hausa was admitted in evidence at the trial as Exhibit 2. Its translation into English was made by P.W.5, Sgt. Yesuka Dogo, who took down the original statement in Hausa. The English translation was admitted in evidence as Exhibit 2A. P.W. 5 read out Exhibit 2 in court in the course of his testimony. At the conclusion of the case for the defence the trial court directed counsel for the parties to submit their final addresses in writing. Criticism of the translation in

Exhibit 2A came from the written address of the appellant wherein his counsel

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stated as follows in parenthesis:-”(*Translation of Exh. 2 mine as Exhibit 2A
is not a good translation*).”

Neither the prosecution nor the trial Judge took any step on this remark by counsel before the latter considered his judgment. In the judgment, the learned trial Judge stated as follows:-

“ the original Hausa confessional statement and its English translation were admitted in evidence as Exhibits 2 and 2A respectively. The English translation of the Hausa statement Exhibit 2 is very poor and does not convey the real meaning of the Hausa statement. The proper translation of the Hausa statement, Exhibit 2, is therefore as follows:-

‘I agree to tell the police as follows: that on 18/5/83, at about 1900 hrs., I and Audu who I killed, we live together in Ndazabo village then he said that he would leave Ndazabo village because his father told him to leave the place. The I told him why did he not tell me (sic.) Then he started to abuse me saying that my father is not competent to tell that he will not leave the place. From there he took his gun and wanted to kill me, but some people told him to stop, they are Mamman and Bawa with whom we live together. But he did not agree, so when I went to the bush he followed me with a gun again. He shot me three times, but the gun could not fire. So at this stage I severed him with my sword to death. Then I ran away with my sword into the bush at Paiko and left my people at Ndazabo village. I remained there till yesterday, 24/7/83 when I returned home and the police arrested me. This is what I know.’

(Please see Exhibit 2, the original Hausa statement).”

The learned trial Judge relied on the statement in question to convict the appellant of the offence charged against him. For the learned trial Judge held in his judgment, as follows:-

“As earlier on stated in this judgment, I am satisfied from the contents of Exhibit 2, that the confessional statements was free and voluntary. In it, the accused did not only confess that he struck the deceased with his sword to death, but he also went further to relate (sic) the circumstances that led to his doing so; and also what he did after the death of the deceased. His confessional statement was therefore direct and positive. For this reason, I disagree with the submission of the learned counsel for the defence that the statement of the accused in this case cannot be considered for his conviction under Section 221 (b) of the Penal Code.”

Mr. Daudu, learned Senior Advocate, contends that the trial Judge lacked the competence to re-write a document tendered by a witness, albeit in a language that is foreign to the court just because the Judge was versed in

the language in which the document was originally written. He submits that

the exercise carried out by the learned trial Judge went outside the judicial function of a trial court and transgressed upon the right of the appellant to fair hearing. The effect of the action of the learned trial Judge, he said, is that the trial Judge substituted the evidence of P.W.5 with his own. Learned Senior Advocate argued further that the trial Judge is not a competent person to engage in the translation of documents in view of the provisions of Sections 241 and 242 of the Criminal Procedure Code, Cap. 30 of the Laws of Northern Nigeria, 1963. He cited the case of *Fawehinmi v. Akilu* (1987) 4 NWLR (Pt.67) 797 at page 833 to submit that the role of a judge in our adversarial system of justice demands that the judge must not only be impartial but must be seen to be impartial at all times.

Learned Director for Public Prosecutions, Mallam A. Bello conceded. and, in my opinion, rightly too, that the learned trial Judge was in error to have undertaken the translation of Exhibit 2 by himself.

Now it is a matter of common knowledge and indeed of judicial notice that the lingua franca of Nigeria and the official language of the superior courts in this country is English. Therefore, when a witness testifies in any proceedings before the superior courts in any Nigerian Language or vernacular such testimony is simultaneously translated by a court interpreter into English for the benefit of the court and the parties. Similarly, if document written in any language other than English are to be put in evidence, they are caused by the party in the proceedings, who needs them to prove his case, to be translated into English. Where the party omits to have the document so translated, the superior court has a duty to cause the document to be translated by the official interpreter of the court, if any, or by a person that is fluent and competent to do so. Documents properly tendered for admission in evidence cannot be rejected by the courts merely on the ground that the documents have been written in a language or vernacular other than English. If they are so admitted, the courts are expected and indeed obliged to look at them when they come to assess or evaluate the evidence adduced. But they cannot do so unless they have the documents translated into English, and the translated copies put in evidence in the normal way. Thus, the interpreter or translator must be called to give evidence, in the course of which he will be expected to state the qualification which makes him a competent interpreter or translator, and he will be examined, cross-examined and re-examined by the parties in order to ensure that he has done a good job of the translation.

A judge cannot, therefore, engage in the translation or interpretation of such documents since he cannot perform the role of a witness and a Judge at the same time. It is in recognition of this that Section 242 of the Criminal Procedure Code, Cap. 30 provides thus:-

242(1) *When the services of an interpreter are required by any court or justice of the peace for the interpretation of any evidence, statement or other proceedings, he shall be bound by oath or solemn affirmation to state the true interpretation of the evidence, statement or other proceedings.*”

B (2) *When the services of an interpreter are used in any proceedings by a court or justice of the peace the record of the proceedings shall state the name of the interpreter, the languages which and in which he interprets, and the fact that he has been bound in accordance with the provisions of subsection (1) to state the true interpretation of the evidence, statement or other proceedings.*”

C Therefore, when in the present case, the learned trial Judge rejected the translation in Exhibit 2A and took upon himself to translate it in his chambers while writing his judgment, he contravened the provisions of Section 242 of the Criminal Procedure Code, Cap. 30 which have been held by this Court to be mandatory - See: State v. Gwonto (1983) 1 SCNLR 142 at pages 151-152B; D (1983) 3 SC 62 at pages 97-98.

What is more, Section 33 subsection (4) of the Constitution of the Federal Republic of Nigeria, 1979 provides:-

E “33(4) *Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing by a court or tribunal*”

Now, how can any reasonable or knowledgeable observer of the trial before the High Court feel that the learned trial Judge was fair to the appellant when he rejected the translation in Exhibit 2A and took upon himself to translate Exhibit 2 into English in private without the knowledge of the appellant F until the learned trial Judge came to deliver his judgment. And in doing so relied upon that translation made by him (learned trial Judge) to convict the appellant. The dictum of Bello, J.S.C. (as he then was) in the case of Alhaji Onibudo & Ors. v. Alhaji Akibu & Ors. (1982) All NLR 207 at page 226 (1982) 7 G SC 60 at 62-63 (Reprint) is pertinent here:-

H “*It needs to be emphasised that the duty of a court is to decide between the parties on the basis of what has been demonstrated, tested, canvassed and argued in court. It is not the duty of a court to do cloistered justice by making an inquiry into the case outside court even if such inquiry is limited to examination of documents which were in evidence, when the documents had not been examined in court and their examination out of court disclosed matters that had not been brought out and exposed to test in court and were not such matters that at least, must have been noticed in court.*” See also Duruminiya v. Commissioner of Police (1961) NRNLR 70 where

Bate, J. (as he then was) made the following remarks on page 73 and 74 thereof:

“A trial is the public demonstration and testing before a court of the cases of the contending parties. The demonstration is by assertion and evidence, and the testing is by cross-examination and argument. The function of a court is to decide between the parties on the basis of what has been so demonstrated and tested. What was demonstrated in court at this trial failed to support the prosecution’s case, and the Magistrate should have dismissed the case. It was not part of his duty to do cloistered justice by making an inquiry into the case outside court: - not when by the examination of documents which were in evidence, when the document had not been examined in court and the Magistrate’s examination disclosed things that had not been brought out and exposed to test in court, or were not things that, at least, must have been noticed in court..... (Italics mine) B C

Section 382 of the Criminal Procedure Code, Cap. 30 provides that no decision of court should be reversed on the ground of any error, omission or irregularity in any proceedings, trial or judgment of a court, unless miscarriage of justice has been occasioned. The Section reads:- D

“382 Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error, omission or irregularity in the complaint, summons, warrant, charge, public summons, order, judgment or other proceedings before or in any inquiry or other proceedings under this Criminal Procedure Code unless the appeal court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity.” E

The emphasis is on failure of justice having been occasioned. A mere possibility that a failure of justice might have been occasioned is not sufficient to justify the interference by an appeal court - See: Uba Yola v. Kano N.A. (1961) NRNLR 103; (1961) All NLR 549 at Page 551 and Muhammadu Arab v. Bauchi N.A. (1965) NNLR 48 at Page 50. Therefore, it is not every irregularity in a trial that will give rise to miscarriage of justice. The irregularity must go to the root of the case. F G

In Abdu Dan Sarkin Noma v. Zaria N.A. (1963) NNLR 97, Hurley, C.J. observed as follows at Page 102 thereof:-

“There is failure of justice not only when the court comes to the conclusion that the conviction was wrong but also when it is of opinion that the error or omission in the court below may reasonably be considered to have brought about the conviction and when on the whole facts and in the absence of the error or omission, the trial court might fairly and reasonably have found the appellant not guilty.” H

It is very clear to me that but for the translation made by the learned trial Judge, which brought out the purported confession by the appellant and on which the trial Judge heavily relied, the trial Judge could not have convicted the appellant of the offence charged. I will on this account alone allow the appeal. But there is also the failure of the court to observe the provisions of Section 33 subsection (4) of the 1979 Constitution since the appellant did not have a fair hearing in the trial court. This automatically renders the proceedings null and void. Therefore, the trial in the High Court was, for that reason, null and void and of no effect whatsoever. Consequently, the conviction and sentence passed on the appellant cannot stand.

Even if the proceedings were otherwise, there is defect in the identification of the corpse of the deceased to the Doctor that performed the autopsy. In the absence of the nexus establishing that the body examined by the doctor was that of the deceased, the cause of death was not proved. Furthermore, the charge referred to the deceased as Bargo but Exhibit 2 and Exhibit 2A referred to the person attacked by the appellant as Audu. Do these two names apply to one and the same person? No evidence was called to establish that. The testimonies of Mamman Isiyaku and Bawa Musa (who were P.W.1 and P.W. 2 respectively at the preliminary inquiry conducted in the case) which were admitted under the provisions of Section 239 subsection (1) of the Criminal Procedure Code Cap. 30 are not helpful either in resolving the doubt. Both witnesses referred to the deceased as Bargo but made no mention of the name Audu.

On the whole this appeal succeeds and I too allow it. The conviction and sentence passed on the appellant are hereby set aside. In their place I enter a verdict of discharge and acquittal. .

WALI JSC

I have had the privilege of reading in advance the lead judgment of my learned brother, Onu, J.S.C. and I agree that the appeal has merit.

There are two fundamental issues raised in this appeal, and these are:-

1. Re-translation of Exhibit 2 from Hausa into English by the learned trial Judge suo motu.
 2. Contravention of Section 33(4) of the 1979 Constitution.
- Exhibit 2 is the Hausa Statement made under caution by the appellant and taken down in writing by P.W. 5 Sgt. Yesuka Dogo. The same witness

translated Exh. 2 into English which was admitted in evidence as Exh. 2A in the

course of the trial. There was no complaint against it either by the prosecution or the learned trial Judge. But when the trial Judge later came to write his judgment, he found the translation of Exhibit 2A vis-a-vis Exhibit 2 unsatisfactory and he proceeded suo motu to produce another translation on which he heavily relied in convicting the appellant. The learned Judge said:-

"I accepted the statement of the accused as contained in Exhibit 2 as the only truth of what occurred." B

"I am satisfied from the contents of Exh. 2 that the confessional statement was free and voluntary. In it the accused did not only confess that he struck the deceased. with his sword to death, but he also went further to relate the circumstances that led to his doing so; and also what he did after the death of the deceased. His confessional statement was therefore direct and positive." C

Since the language of conducting proceedings in the High Court is English reference to Exh. 2 by the learned trial Judge meant no more than his own version of English translation of that Exhibit. The learned trial Judge by substituting Exhibit 2A with his own English translation. was introducing a new evidence in the proceedings without following the proper procedure, This contravenes Section 242 of the Criminal Procedure Code Law which provides thus:- D

"242(1) When the services of an interpreter are required by any court or justice of the Peace for the interpretation of any evidence, statement or other proceedings, he shall be bound by oath or solemn affirmation to state the true interpretation of the evidence, statement or other proceedings." E

242(2) When the services of an interpreter are used in any proceedings by a court or justice of the peace the record of the proceedings shall state the name of the interpreter, the languages which and in which he interprets, and the fact that he has been bound in accordance with the provisions of sub-section (1) to state the true interpretation of the evidence, statement or other proceedings." F

It was not the function of the learned trial Judge to proceed to translate suo motu the statement of the appellant into English where he found the one already admitted to be very poor. What he should have done at the stage he found Exhibit 2A "very poor" was to bring that to the notice of the parties involved so that an interpreter/translator who satisfied the provision of S. 242 of the Criminal Procedure Code could be assigned to produce the correct and more satisfactory translation. Both sides would then have the liberty and opportunity of examining the translator on its contents to ascertain its accuracy or otherwise. G H

racy or otherwise.

What the learned trial Judge did was like descending into the arena and providing missing evidence in which he heavily relied to convict the appellant. See *Durumin Iya v. Commissioner of Police* (1961) NRNLR 70. The duty of any judge is to be impartial and to abstain from doing anything that may give the impression to any right-minded man that he is taking side. Bello, C.J.N. in *Abiola v. Federal Republic of Nigeria* (199S) 7 NWLR (Pt.405) P. 1 at P. 17 said:-

“Indeed, Justice is rooted in confidence and that courts should abstain from doing anything that may erode the root of justice. The courts should enhance confidence in the administration of justice.”

The act of the learned trial Judge in providing evidence behind the parties was also in contravention of Section 33(4) of the 1979 Constitution, thus affecting the fair hearing of the case.

The irregularity committed in the trial is very substantial that it resulted in failure of justice. See *Sarkin Noma v. Zaria N.A.* (1963) NNLR 97.

On a calm view of the rest of the evidence, particularly the absence of evidence as regards the identity of the corpse linking it with the appellant, and coupled with contravention of Sec. 33(4) of the 1979 Constitution, the question of making an order for a retrial will not be appropriate.

I shall also allow the appeal and enter an order of acquittal and discharge in favour of the appellant.

The conviction and sentence are set aside and the appellant is hereby discharged and acquitted.

F **KUTIGIJSC**

The appellant was in the High Court holden at Minna, Niger State charged as follows:-

“That you Rabbo Damina on or about the 18th day of May, 1983 at about 7.00 p.m at Ndazabo Village, Gbako Local Government, within Niger Judicial Division committed culpable homicide punishable with death in that you caused the death of one Bargo to wit, by cutting his neck with a sword with the knowledge that his death would be the probable consequence of your act and thereby committed an offence punishable under Section 221 (b) of the Penal Code.”

At the trial the prosecution called five witnesses and tendered the depositions of two others (Exhibits 3 & 4 respectively for Mamman Isyaku and Bawa Musa) by virtue of Section 239(I) of the Criminal Procedure Code.

The High Court in its judgment on page 63 of the record said:- *“The prosecution relied on the evidence of Mamman Isyaku and Bawa Musa who*

are the star or principal witnesses in the case, and also relied on the confessional statement of the accused."

The alleged confessional statement was tendered in evidence as Exhibit 2 (Hausa) and Exhibit 2A (English translation). On Exhibit 2A the Court said on page 65 thus:-

"The English translation of the Hausa statement Exhibit 2 is very poor and does not convey the real meaning of the Hausa Statement. The proper translation of the Hausa statement, Exhibit 2, is therefore as follows:

Wherein the learned trial Judge (Agora, J. of blessed memory) then proceeded to render his own translation of Exhibit 2. Having rejected Exhibit 2A tendered by a prosecution witness, I believe, the learned trial Judge lacked the competence to have proceeded unilaterally and suo motu to render the English translation of Exhibit 2 himself. The learned trial Judge could not play the role of a prosecution witness and that of a judge at the same time. The record shows that the learned trial Judge heavily relied on his own personal translation of Exhibit 2 to find the appellant guilty. Again this is what he said on page 68 of the record:-

"The issue for the decision of the court is whether or not the accused caused the death of the deceased Bargo, and if he did, whether his act was done with the intention of causing the death of the deceased or whether it was done with the intention of causing such bodily injury as he knew or had reason to know that death would be the probable and not only the likely consequence of his act; or that the accused knew or had reason to know that death would be the probable and not only the likely consequence of any bodily injury which the act was intended to cause. In order to arrive at these findings, it is necessary to fall back to the accused's own confessional statement, Exhibit 2."

The learned trial Judge was not available or did not make himself available for cross-examination by the appellant or his counsel when he rendered his own personal translation of Exhibit 2. This singular exercise on the part of the learned trial Judge was obviously a grave error which violated appellant's right of fair hearing as enshrined in Section 33(6) of the 1979 Constitution.

The appeal therefore succeeds on this ground.

Another issue of importance which I would also want to comment upon briefly is the issue of the identity of the deceased person. The learned trial Judge quite conscious of the importance of the identity of the deceased in a murder case said on page 68 of the record:-

"..... it is essential to point out that there is no dispute that the death of a human being has occurred. And although the name of the deceased before the court is Bargo, and the accused admitted killing one Audu, the identity of the deceased is not in dispute, because all the evidence

adduced before the court points to no other person other than Bargo as the deceased. It is therefore immaterial whether the deceased is known by the name of Bargo or Audu. The facts still boiled down to the same person, the deceased.

It is also a matter of common knowledge that in this country people are known and called by different names by different people.”

It is unfortunate that the learned trial Judge was again trying to play the role of the prosecutor with this issue of identity of the deceased as he did with the English translation of the appellant’s confessional statement (Exhibit 2) above. The deceased’s name given in the charge was Bargo and not Audu. There was no available evidence from anyone that the name Bargo and the name Audu belonged to one and the same person, the deceased herein. And if the prosecution knew Bargo by any other names. they should have said so and led evidence as well especially when the appellant throughout the trial denied knowing the deceased or any person called Bargo. Even if it is a matter of common knowledge that people are known and called by different names by different people, an explanation proffered by the learned trial Judge, that did not stop or absolve the prosecution from leading evidence to show that Bargo and Audu in the instant case were one and the same person. Certainly, the appellant said he only knew one Audu, but that was in Paiko and not at Ndazabo. The identity of the deceased was therefore a serious issue at the trial as in any murder trial. Regrettably, the issue was never resolved. In fact the issue was compounded by the prosecution itself which tendered the Post Mortem Report (Exhibit I) which did not bear or state the name of the deceased nor the name of any person who identified the corpse to the medical doctor (P.W.1) who performed the post mortem examination. This missing link on the identity of the deceased is in my view, equally fatal to the prosecution’s case. The appeal once again succeeds.

I agree with lead judgment of Onu, J .S.C. which I read before now that this is not a suitable case in which to order a retrial of the appellant. The entire investigation of the case was bungled. The case died long before it got to the court. Nothing anyone can do to save it. There is insufficient evidence to warrant any further prosecution. The appellant is consequently discharged and acquitted.

H **IGUHJSC**

I have had a preview of the judgment just delivered by my learned brother, Onu, J.S.C. and I agree entirely with the reasoning and conclusion herein. Although, Judges, by way of judicial notice, may in arriving at decisions, use their knowledge of the common affairs of life which men of ordinary

intelligence possess, they may not act on their own private knowledge or belief regarding the facts of the particular case before them. See *Peat v. Bolckow. Vaughan and Co.* (1925) 1 K.B.399; *Hennessy v. Keating* (1908) 11R 43 at page 88; *Ingram r. Percival* (1969) 1 QB 548 and *Palmer v. Crone* (1927) 1 K.B. 804. If they have material facts to impart in connection with a cause or matter before them, it seems to me settled that the more proper role for them would be to be sworn in as witnesses and must not, either when sitting alone or with others adjudicate on his own testimony or private knowledge or take any further judicial part in the proceedings. See: *Mitchel v. Croydon* 30 TLR 526. B

In the present case, the learned trial Judge relied heavily in convicting the appellant, not on the contents of the appellant's written statement to the police in the Hausa language, Exhibit 2 and its English translation, Exhibit 2A but on his own translation or interpretation of the said Exhibit 2 which exercise he carried out himself suo motu. The learned trial Judge who would appear to have knowledge of the Hausa language in his judgment rejected the translated version of Exhibit 2 tendered before him, as, according to him, the said translated version, Exhibit 2A, was "*very poor*" and did not convey "the real meaning of the Hausa Statement. The said translation by the learned trial Judge was only made by him in the cause of his judgment without any opportunity to either of the parties to assess the correctness and accuracy thereof. In my view it amounted to a substitution of the prosecution's evidence on Exhibit 2 with the evidence of the learned trial Judge on the interpretation of Exhibit 2. With profound respect, this exercise on the part of the learned trial Judge constituted a grave error of law with far reaching consequences to the entire trial. C D E

It is for the above and the more elaborate reasons contained in the lead judgment of my learned brother, Onu, J.S.C. that this appeal succeeds and it is hereby allowed by me. The conviction and sentence passed on the appellant are hereby set aside and in their place is entered a verdict of acquittal and discharge. F

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