

SUPREME COURT OF NIGERIA
27TH FEBRUARY, 1996. SC. 10/1995
CORAM:- S.M.A. BELGORE, I.L. KUTIGI, M.E. OGUNDARE,
Y.O. ADIO, A.I. IGUH, JJSC

ARAMUDE OHUNYO APPELLANT

V.
THE STATE RESPONDENT

APPEALS - Concurrent findings of fact - Where appellant fails to establish exceptional circumstances - Appellate court will not interfere.

EVIDENCE - Burden of Proof- Murder - Whether prosecution established ml/reasonable doubt - Ingredients of murder as required.

EVIDENCE - Witnesses - Duty of prosecution - To prove facts in issue - Not obliged to call every or any number of witnesses.

EVIDENCE - Witnesses - Failure by prosecution to call a particular witness - Whether a reason to vitiate conviction.

EVIDENCE - Witnesses - Material witness - Whether a witness - Whose testimony does not advance Prosecution's case - Is a material witness.

FACTS

The appellant, along with three others were arraigned before the court of the former Bendel State, Ubiaja and charged with conspiracy to murder and the murder of one Gabriel Akharia on two count information. They each pleaded not guilty. At the trial, the fact gathered is that the deceased, who was sent on an errand with others to invite one Isabi Oseghae to a meeting at Ineme quarters, Ugboha, was attacked by the appellant and others. The appellant was seen inflicting deep matchet cuts and others striking sticks and an iron rod on the deceased who slumped down and the assailants ran away. The deceased who was rushed to the Uromi General hospital, died there the day following. The appellant and the others denied the offence charged against them raising the defence that one Stephen Amedu was the one who accidentally inflicted the deadly cuts on the deceased. The said Stephen Amedu was not called by the appellant as a witness neither did the prosecution call him. At the close of trial, the trial judge discharged and acquitted three of the accused and convicted the appellant for murder as charged.

The appellant's appeal to the Court of Appeal, Benin division against the decision of the trial court was dismissed. It is against that decision of the Court of Appeal that the appellant has now appealed to the Supreme Court, raising a lone issue for determination, but the apex court adopted the two issues formulated by the respondent.

ISSUES FOR DETERMINATION:

“(i) Whether the Prosecution proved the case against the Appellant beyond reasonable doubt as required by law;

(ii) Whether the failure of the Prosecution to call Stephen Amedu as a witness is sufficient to vitiate conviction.”

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

Concurrent findings of fact

1. The appellant in the present case has failed to establish that there exists any exceptional reasons to warrant the interference by this court of above findings which, in my view, are fully supported by evidence and are neither perverse nor patently erroneous. I therefore endorse the concurrent finding of both courts below that it was the appellant who intentionally and maliciously inflicted the fatal machet cuts on the head of the deceased which resulted to his death. (p. 367 E)

Burden of Proof - Murder

2. Upon a careful consideration of the various ingredients that constitute the offence of murder, it seems to me crystal clear that these were fully established beyond reasonable doubt by the prosecution as required by law. The defence of self defence and provocation were considered by the trial court and were found not to be available to the appellant. The court below was of the opinion that the trial court properly evaluated the evidence before it, and came to the right conclusion that the appellant caused the death of the deceased in circumstances which amounted to murder. I, too, affirm this view of the court below. Consequently, the answer to issue number one must in the affirmative. (p. 367 F)

Duty of prosecution

3. It is not and has never been the duty of the prosecution to call evidence, evidence which in some cases may very well be manufactured or non-existent, on which an accused person purports to rely for his defence. The prosecution has the duty only to prove facts in issue, and is not obliged to

call every, or any number of witnesses or, indeed, to call more than one witness on a particular point save where by law, corroboration is prescribed or necessary, or a fact in issue is seriously in contention between the parties. A court can and, is entitled to act, on the evidence of one single witness if that witness is believed, given all the surrounding circumstances; and a single credible witness can establish a case beyond reasonable doubt unless where the law requires corroboration. (p. 368 B)

Material witness

4. In the present appeal, the case of the prosecution as established by P.W. 1, P. W. 2 and P.W. 3 is to the effect that the appellant directly caused the death of deceased by inflicting fatal cuts on his head with a matchet. P.W.1, P. W.2 saw the appellant deliver these fatal matchet cuts on the head of deceased. This evidence was accepted both by the trial court and the Court of Appeal. In my view, there is no question of the said Stephen Amedu being a necessary witness for the prosecution. There is also no question of his testimony advancing the case for the prosecution in any manner whatever. I therefore agree with the submission of the learned counsel for the respondent that by no stretch of the imagination can the said Stephen Amedu be regarded as a material witness for the prosecution. (p. 368 G)

Failure to call a particular witness

5. I entirely agree with the above observations of the Court of Appeal and fully endorse the same. It therefore seems to me clear that failure by the prosecution to call the said Stephen Amedu to testify before the trial court cannot be a valid reason for this court to interfere with the conviction and sentence of the appellant. The law does not impose on the prosecution the duty or function of both the prosecution and the defence. The duty was on appellant who alleged that it was Stephen Amedu who accidentally matchetted the deceased twice on his head to call evidence of what he was asserting. There was no duty on the prosecution to call the witness whose testimony had no bearing with the facts of the case as presented by the said prosecution. In the circumstance, issue number two must be resolved in the native. (p. 369 C)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Duty of trial court to determine credibility of witnesses.

It is trite law that the issue of credibility of witnesses is the pre-eminent

duty of a trial court to determine and that it is not the function of an late court to interfere with such findings of fact of the trial court which are supported by evidence unless they are shown to be perverse or established a miscarriage of justice or a violation of some principles of law or procedure. (p. 365 G)

ADIO JSC

2. Function of the prosecution

The law does not impose any obligation on the prosecution to call a host of witnesses. It is enough if the prosecution call witnesses that are the purpose of proving its case. If the evidence of a witness is very essential to the defence of the accused, it is for the accused to call the witness since the accused is entitled to call a witness not called by the prosecution. The accused should not expect the prosecution to call the witness since the prosecution is not expected to perform the function of the prosecution and the function of the defence. (p. 370 H)

REPRESENTATION

L. O. Akhidenor Esq. with E. I. Esene Esq. for the appellant
Respondent unrepresented.

CASES REFERRED TO

- Overseas Construction Ltd. v. Creek Enterprises Ltd (1986) 3 N.W.L.R. (Part 13) 407
- Akelezi v. The State (1993) 3 KLR132
- Nwodo v. The State (1991)4 N.W.L.R. (Part 185) 341
- Adisa v. The State (1991) 1 N.W.L.R. (Part 168) 490
- Woluchem v. Gudi (1981) 5 S.C. 291
- Bakare v. The State (1987) 1 N.W.L.R. (Part 52)
- Nwosisi v. The State (1976) 6 SC 109
- Enang v. Adu (1981) 11 - 12 S.C. 25 at 42
- Nwadike v. Ibekwe (1987) 4 N.W.L. R (Part 67) 718
- Igwego v. Ezeugo (1992) 6 N.W.L.R. (Part 249) 561 at 579
- Ogoala v. The State (1991) 2 N.W.L.R. (Part 175) 509 at 533
- Onafowokan v. The State (1987) 3 N.W.L.R (Part 61) 538
- Ugwumba v. The State (1993) 7 KLR 190,
- Ali v. The State (1988)1 S.C.N.J. 18 at 30
- Igbo v. The State (1975) 9-11 S.C. 129 at136 etc

STATUTE REFERRED TO

Criminal Code, Cap. 48, vol. 11 Laws of Bendel State of Nigeria, 1976, s. 319(1) and s. 516

LEAD JUDGMENT BY IGUH JSC

The appellant, Aramude Ohunyon, along with three others was on the 9th day of October, 1991 arraigned before the High Court of the former Bendel State of Nigeria, holden at Ubiaja on a two count information. He was charged in count one with the offence of conspiracy to commit felony, to wit, murder contrary to section 516 of the Criminal Code, Cap. 48, Volume II, Laws of the former Bendel State of Nigeria, 1976 and in count two with the murder of one Gabriel Akharia contrary to section 319(1) of the said Criminal Code. Each of them pleaded not guilty to both counts.

At the subsequent trial, the prosecution called four witnesses and closed its case. The fourth accused person was discharged in a no case submission made on his behalf by his learned counsel whilst the appellant, as the first accused, and the two remaining accused persons testified on their behalf and called one witness.

The substance of the case as presented by the prosecution is that on the 29th April, 1990, one Gabriel Akharia, the deceased, with some other persons were holding a meeting in the house of the eldest man in their Ineme quarters, Ugboha. In the course of this meeting, the deceased was sent with others to Ekebo quarters to invite one Isabu Oseghae to the meeting. Following some information received, P.W.1 with some other members of the Ineme quarters ran to the scene of crime. There, they saw the appellant inflict matchet cuts on the head of the deceased while the other assailants used sticks and an iron rod to assault him. As a result of this attack, the deceased slumped on the ground and his assailants ran away.

P.W.1 reported the incident to the Ugboha Police Station. The Police proceeded to the scene of crime with P.W.1 from where the deceased was taken to the General Hospital, Uromi for treatment. He died the following day at the Hospital.

P.W.3, the medical Doctor who treated the deceased at the General Hospital, Uromi testified that the deceased, on admission, was bleeding profusely from his external injuries. These consisted of twin lacerations placed obliquely at both parietal areas of the head, deep enough to expose the skull bone. The left laceration was 7cm long but the one on the right measured 4cm in length. These injuries could have been caused by a sharp object. In his opinion, the cause of death was due to rupture of the vessels in the brain with the attendant internal haemorrhage inside the brain

which caused cerebral disfunction. He explained that the external injuries he described caused cardio vascular collapse or the death of the deceased.

The defence of the appellant and the other two accused persons was a complete denial of the offences charged. They claimed that the fatal cuts were inflicted on the deceased accidentally by one Stephen Amedu. This was while the said Stephen Amedu was trying to attack the appellant with his machet.

At the end of the trial, the 2nd and 3rd accused persons were acquitted and discharged by the learned trial Judge, Onobun, J., while the appellant as the 1st accused was convicted for the offence of the murder of the deceased and was duly sentenced to death.

Dissatisfied with this judgment of the trial court, the appellant appealed to the Court of Appeal, Benin Division against the said conviction and sentence. On the 9th December, 1994, the Court of Appeal dismissed the said appeal. It is against this judgment of the Court of Appeal that the appellant has further appealed to this court.

Both the appellant and the respondent filed and exchanged their respective written briefs of argument. In the appellant's brief, the one issue formulated for resolution is whether the prosecution established the case of murder beyond reasonable doubt as provided by law. The respondent, for its own part, identified two issues in its brief for the determination of this court. These are -

(i) Whether the Prosecution proved the case against the appellant beyond reasonable doubt as required by law;
(ii) Whether the failure of the Prosecution to call Stephen Amedu as a witness is sufficient to vitiate conviction."

The lone issue raised by the appellant for resolution is exactly the same as the first issue identified by the respondent in its brief. I will, in this judgment, adopt the issues raised by the respondent in its brief for the determination of this appeal.

At the hearing of the appeal before us on the 28th November, 1995, learned, counsel for the parties adopted their respective briefs.

The main argument raised on behalf of the appellant is that the court below erred in law by holding that the respondent proved its case beyond reasonable doubt in, the face of failure by the prosecution to call Stephen Amedu as one of its witnesses in the case. It is the appellant's contention that the duty was on the prosecution to call Stephen Amedu whom the defence claimed inflicted the fatal injuries on the deceased. It was submitted that failure by the prosecution to call him to testify at the trial had occasioned substantial injustice for which the appellant ought to

be acquitted and discharged of the offence of murder as charged.

Learned counsel for the respondent in his reply submitted that the prosecution adduced sufficient evidence to establish all the essential elements of the offence for which the appellant was charged. He stressed that this evidence was accepted by the trial court and affirmed by the court below. He therefore contended, citing the decisions in *Overseas Construction Ltd. v. Creek Enterprises Ltd.* (1986) 3 NWLR (Pt.13) 407 and *Basil Akalezi v. The State* (1993) 10 L.R.CN. 264 at 266; (1993) 9 NWLR (Pt.273) 1 at 12 that this court will not interfere with concurrent findings of fact of the trial court and the court below unless exceptional circumstances are established. He argued that the prosecution discharged the burden placed on it by calling material witnesses to prove the guilt of the appellant beyond reasonable doubt and submitted that the evidence of the said Stephen Amedu would not have advanced the case of the prosecution in any way. He added that the appellant was entitled to call Stephen Amedu as his witness if he so wished but declined to call him. He concluded by stressing that failure by the prosecution to call the said Stephen Amedu could not vitiate the conviction of the appellant.

On the first issue for determination in this appeal, it is not in dispute that PW.1 and PW.2 were eye witnesses to the incident that led to the death of the deceased. Both witnesses testified that they saw the appellant when he inflicted machete cuts on the head of the deceased, PW.3, the medical Doctor who performed post mortem examination on the body of the deceased corroborated this evidence of PW.1 and PW.2 to some extent when he testified that the cuts on the head of the deceased could have been caused by a sharp object. PW.3 concluded that these external injuries caused cardio vascular collapse which resulted in the death of the deceased.

As against the above evidence of the prosecution is the testimony of the defence. This is to the effect that it was one Stephen Amedu who, in trying to attack the appellant with a machete, accidentally cut the deceased on the head twice as a result of which the deceased died.

It is trite law that the issue of credibility of witnesses is the pre-eminent duty of a trial court to determine and that it is not the function of an appellate court to interfere with such findings of fact of the trial court which are supported by evidence unless they are shown to be perverse or there is established a miscarriage of justice or a violation of some principles of law or procedure. See *Nwodo v. The State* (1991) 4 NWLR (Pt.185) 341; *Adisa v. The State* (1991) 1 NWLR (Pt.168) 490; *Woluchem v. Gudi* (1981) 5 S.C. 291; *Bakare v. The State* (1987) 1 NWLR (Pt.52) 579 at 581 etc.

The learned trial Judge after an exhaustive consideration of the evidence led on both sides held as follows:-

"I therefore reject out of hand this defence by the three accused persons. I believe and hold that the 1st accused because of the previous quarrel between his Quarters and Ineme Quarters, decided to deal fatal blows with a matchet on the deceased's head twice, which caused the mortal cuts described by the P.W.3 (Medical Doctor) as 7 and 4 cm long, and hold that the blows or cuts were intended to cause grievous harm to the deceased. They did cause grievous harm and it is murder if death resulted from it."

He had also observed -

"I hold therefore that the cause of death of the deceased is the result of the unlawful act of the 1st accused in dealing matchet blows on his head from the totality of the evidence before the court. It is settled law that in a murder charge, the burden is on the prosecution to prove the cause of death. This it can do either by direct evidence or circumstantial evidence that creates no room for doubt or speculation. In the present case the evidence is direct and is supported by medical evidence, the cause of death not being a matter of inference from established facts: R. v. Oledinma (1940) 6 WACA 202; Adetola v. The State (1992) 4 NWLR (Pt.235), 267. See particularly The Queen v. Eguabor (1962) ANLR 451, where the Supreme Court in dismissing appellant's appeal said:-

"Where a wound is caused by a person who assaults another with intent to cause bodily harm, resulting in the death of the deceased, the cause of the death is the wound inflicted and the assailant is guilty of murder."

A little later in his judgment, the learned trial Judge concluded as follows-

"In our instant case the P.W.1 and P.W.2 are not accomplices in the offences charged, nor from their evidence can one conclude that they have their own purpose to serve. In fact, both witnesses told the court that although the 4th accused was present at the scene of this fight, holding a piece of iron-rod, he did not use it on anybody. I therefore accept them as truthful witnesses, whose evidence should be believed and accepted."

The court below endorsed these findings of the trial court, holding that there could be no doubt that it was the appellant who inflicted the fatal matchet cuts on the head of the deceased. Said the Court of Appeal per the lead judgment of Ogebe, J.C.A., with which Ubaezonu and Akpabio, JJ.C.A. agreed:-

"The incident happened in the day time and the question of mistaken identity as to who caused the injury which led to the death of the

deceased could not arise. There is no evidence whatsoever in the record to show that PW.1 and PW.2 were tainted witnesses who had their own interests to pursue. They gave clear and credible evidence that the appellant cut the deceased with a cutlass and caused his death. In summary, it is my view that the learned trial Judge properly evaluated the evidence before him and came to the right conclusion that the appellant caused the death of the deceased in circumstances which amounted to murder. I see no merit whatsoever in this appeal and it is hereby dismissed." B

The law is that where there are concurrent findings of fact by both lower courts then unless those findings are - C

- (1) found to be perverse; or
- (2) not supported by evidence; or
- (3) reached as a result of a wrong approach to the evidence, or
- (4) a result of a miscarriage of justice or a violation of some principles of substantive or procedural law, D

this court, even if disposed to come to a different conclusion upon the printed evidence, cannot do so. See *Basil Akalezi v. The State* (1993) 10 LRCN 264 at 268; (1993) 9 NWLR (Pt.273) 1 at 12; *Enang v. Adu* (1981) 11-12 S.C. 25 at 42; *Nwodike Ibekwe* (1987) 4 NWLR (Pt.67) 718; *Igwego v. Ezeugo* (1992) 6 NWLR (Pt.249) 561 at 579 etc. The appellant in the present case has failed to establish that there exists any exceptional reasons to warrant the interference by this court of the above findings which, in my view, are fully supported by evidence and are neither perverse nor patently erroneous. I therefore endorse the concurrent finding of both courts below that it was the appellant who intentionally and maliciously inflicted the fatal machete cuts on the head of the deceased which resulted to his death. E F

Upon a careful consideration of the various ingredients that constitute the offence of murder, it seems to me crystal clear that these were fully established beyond reasonable doubt by the prosecution as required by law. The defences of self defence and provocation were considered by the trial court and were found not to be available to the appellant. The court below was of the opinion that the trial court properly evaluated the evidence before it and came to the right conclusion that the appellant caused the death of the deceased in circumstances which amounted to murder. I, too, affirm this view of the court below. Consequently, the answer to issue number one must be in the affirmative. G H

The second issue poses the question whether the failure of the prosecution to call Stephen Amedu as a witness is sufficient to vitiate the conviction of the appellant. The said Stephen Amedu was alleged by the de

fence to be the person that accidentally inflicted the two fatal matchet wounds on the head of the deceased.

The first point that must be made here is that while the onus is on the prosecution to prove the charge against an accused person beyond reasonable doubt, the latter has the burden of bringing the evidence on which he relies for his defence. See *Lawrence Odidika and Another v. The State* (1977) 2 S.C. 21 at 24; *Nwosisi v. The State* (1976) 6 S.C. 109 etc. It is not and has never been the duty of the prosecution to call evidence, evidence which in some cases may very well be manufactured or non-existent, on which an accused person purports to rely for his defence. The prosecution has the duty only to prove facts in issue, and is not obliged to call every, or any number of witnesses or, indeed, to call more than one witness on a particular point save where by law, corroboration is prescribed or necessary, or a fact in issue is seriously in contention between the parties. A court can and, is entitled to act, on the evidence of one single witness if that witness is believed, given all the surrounding circumstances; and a single credible witness can establish a case beyond reasonable doubt unless where the law requires corroboration. See *Ogoala v. The State* (1991) 2 NWLR (Pt.175) 509 at 533; *Onafowokan v. The State* (1987) 3 NWLR (Pt.61) 538; *Ugwumba v. The State* (1993) 5 NWLR (Pt.296) 660 at 674. The evidence of one credible witness, accepted and believed by the trial court, is sufficient to justify conviction unless, of course, such a witness is an accomplice in which case his testimony would require corroboration. See *Numa Ali and Another v. The State* (1988) 1 SCNJ 18 at 30; (1988) 1 NWLR (Pt.68) 1 at 14; *1gbo v. The State* (1975) 9-11 S.C. 129 at 136 etc. It is only fatal for the prosecution not to call a material witness available to them to establish a vital or important fact in issue. But as I have observed, they need not call the whole world or host of witnesses on the same point save where corroboration is necessary, but on a vital point where one witness can settle it, he should be called. See *R. v. George Kuree* (1941) 7 WACA 175 at 177. All the prosecution need do is to call enough material witnesses in order to prove their case beyond reasonable doubt. They also have a discretion to call only those witnesses necessary to prove their case as required by law.

In the present appeal, the case of the prosecution as established by P.W.1, P.W.2 and P.W.3 is to the effect that the appellant directly caused the death of the deceased by inflicting fatal cuts on his head with a matchet. P.W.1 and P.W.2 saw the appellant deliver these fatal matchet cuts on the head of the deceased. This evidence was accepted both by the trial court and the Court of Appeal. In my view, there is no question of the said Stephen Amedu being a necessary witness for the prosecution. There is

also no question of his testimony advancing the case for the prosecution in any manner whatsoever. I therefore agree with the submission of the learned counsel for the respondent that by no stretch of imagination can the said Stephen Amedu be regarded as a material witness for the prosecution.

Dealing with this issue, the Court of Appeal stated as follows:-

“P.W.4 the investigating Police Officer testified that from his investigation Stephen Amedu had no link with the death of the deceased. This shows that the prosecution had no interest in bringing Stephen Amedu to testify. It was the duty of the appellant who alleged that Stephen Amedu was the offender to call him to testify. This he failed to do and he cannot now be heard to complain that it was the responsibility of the police to dislodge his allegation against Stephen Amedu”

I entirely agree with the above observations of the Court of Appeal and fully endorse the same. It therefore seems to me clear that failure by the prosecution to call the said Stephen Amedu to testify before the trial court cannot be a valid reason for this court to interfere with the conviction and sentence of the appellant. The law does not impose on the prosecution the duty or function of both the prosecution and the defence. The duty was on the appellant who alleged that it was Stephen Amedu who accidentally matchetted the deceased twice on his head to call evidence of what he was asserting. There was no duty on the prosecution to call the witness whose testimony had no bearing with the facts of the case as presented by the said prosecution. In the circumstance, issue number two must be resolved in the negative.

On the whole, I find no merit in this appeal and it is accordingly dismissed. The conviction and death sentence passed on the appellant by the trial court and affirmed by the Court of Appeal are hereby further affirmed.

BELGORE JSC

I read in advance the judgment of my learned brother, Iguh, J.S.C., and I entirely agree with him that this appeal lacks merit. It is the duty of the prosecution to call all material witnesses to prove its case beyond reasonable doubt. Once this onus probandi is satisfied it does not matter if some witnesses were not called, for it is not the duty of the prosecution to call the entire community to testify if some part of it would suffice. *Adaje v. The State* (1979) 6-9 S.C. 18, 28; *Ogbodu v. The State* (1987) 2 NWLR (Pt.54) 20. If anything is to the knowledge of the person who asserts, it is for him to prove. Except in cases of alibi, immaterial to the case now in

issue, an accused who mentions certain facts peculiarly within his knowledge should not expect the prosecution to take on the extra responsibility of proving the case for the defence. The Case for the defence connotes the defence proving its assertions. I see no merit in this appeal and I agree with my learned brother, Iguh, J.S.C., that the appeal be dismissed. I also dismiss the appeal.

KUTIGI JSC

I have had the privilege of reading before now the judgment of my learned brother Iguh, J.S.C. just delivered. I agree with him that the appeal ought to be dismissed and it is hereby dismissed. The judgment of the lower courts are affirmed.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother, Iguh, J.S.C., just delivered, I agree entirely and I have nothing to add.

ADIO JSC

I have had the advantage of reading, in advance, the judgment just delivered by my learned brother, Iguh, J.S.C., and I entirely agree with it. The appeal has no merit and it is also dismissed by me. I need not state the facts of the case which have been fully stated in the lead judgment.

It was contended for the appellant that it was the duty of the prosecution to call one Stephen Amedu who, according to the defence, inflicted the injuries on the deceased. It was further contended that the failure of the prosecution to call the aforesaid Amedu to testify on the point at the trial of the appellant occasioned a miscarriage of justice warranting the discharge and acquittal of the appellant. It was submitted for the respondent that the prosecution led material evidence which enabled it to prove the charge against the appellant beyond reasonable doubt. That was all that was required for the purpose of proving the prosecution's case against the appellant. The appellant, should have called the said Amedu if the appellant genuinely believed that he (Amedu) could give any evidence that would have helped him to establish his defence.

The question raised under the second issue pertains to one of the functions of the prosecution in criminal proceedings. The law does not impose any obligation on the prosecution to call a host of witnesses. It is enough if the prosecution calls witnesses that are material for the purpose

of proving its case. See *Adaje v. The State* (1979) 6-9 18 S.C. 18at P28; and *Ogbodu v. The State*, (1987) 2 NWLR (Pt.54) 20. If the evidence of a witness is necessary or very essential to the defence of the accused, it is for the accused to call the witness since the accused is entitled to call a witness not called by the prosecution. The accused should not expect the prosecution to call the witness since the prosecution is not expected to perform the function of the prosecution and the function of the defence. See *Asiriyu v. The State*, (1987) 4 NWLR (Pt.67) 109 and *Okonofua v. The State* (1981) 6-9 S.C. 1 at P. 1. B

It is for the foregoing reasons and the detailed reasons given by my learned brother, Iguh, J.S.C., in the lead judgment that I agree that the appeal has no merit. I too dismiss it. C

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