

SUPREME COURT OF NIGERIA
8TH DECEMBER, 2000. SC. 22/2000
CORAM:- A. G. KARIBI-WHYTE, U. MOHAMMED, S. U. ONU,
U. A. KALGO, A. O. EJIWUNMI, JJSC

FRANCIS DURWODE APPELLANT
V.
THE STATE RESPONDENT

***APPEALS** - Issues - Relating to jurisdiction of trial Court - May be raised in the supreme court for the first time.*

***APPEALS** - Issues - Must be based on the decision of the lower Court.*

***CRIMINAL LAW** - Murder - Conviction - Sustained by overwhelming circumstantial evidence - Is consistent with appellant's guilt.*

***CRIMINAL PROCEDURE** - Plea - Arraignment - Legal procedure for taking the plea of an accused.*

***CRIMINAL PROCEDURE** - Plea - Arraignment for trial - Failure of trial Judge to record that the charge has been read and explained to the accused in understandable language - May not amount to miscarriage of justice.*

***CRIMINAL PROCEDURE** - Interpretation, s. 33 (6) (e) of the Constitution - Is not necessary where accused understands the language used in evidence - Even if it is not English language.*

FACTS

The appellant was convicted and sentenced for the offence of murder in the Warri High Court based on very strong circumstantial evidence irresistibly establishing him as the murderer of a seven years young boy, Bomboy Ovie. On the day of the boy's murder, the appellant had

been seen by the deceased person's mother coming out of the bush with a jerry can and a cutlass. The sister to the deceased mother equally remembered having seen the appellant boiling hot water and pouring it into a Jerry can and on being questioned said he was going to hunt for rabbit while carrying the jerry can into the bush. The entire village including the appellant's father had joined hands the 1st day in searching for the child after receiving a report that he was missing without success. On the second day at the information of the deceased mother's sisters, the search party followed the direction the appellant had gone when entering the bush.

They subsequently discovered the jerry can which appellant took into the bush containing what they believed to be human flesh and equally discovered the deceased's head and intestines in a nearby heap. The party then proceeded to the appellant's house and forced their way in at his refusal to let them in and found a paper bag containing 3 pieces of cooked meat which the appellant said was bought for him by his father, but this was denied by his father. The appellant was arrested and charged for the murder of the deceased and the trial Judge found him guilty as charged and sentenced him to death. On appeal the verdict was affirmed and the appellant has now come to the Supreme Court with three issues to be determined by the Court.

ISSUES FOR DETERMINATION

- (1) Whether the trial of Appellant is not a nullity for breach of the mandatory provisions of Sec. 215 of the Criminal Procedure Law, Laws of Bendel State 1976 and Sec. 33(6) A & E of the Constitution of the Federal Republic of Nigeria 1979 and which occasioned a miscarriage of justice”.*
- (2) Whether the circumstantial evidence against the Appellant was positive, cogent and conclusive.*
- (3) Whether the evidence of Pw2, Pw3, Pw4, Pw5 and Pw7 are admissible in law.”*

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

Issues - Must be based on the decision

1. Issue 1 was not canvassed at the Court below and no leave was applied for to raise it, being a new issue. It should be emphasized that issues for determination must be based on the decision of the court from the decision of which the appeal is filed. (p. 3087 A)

Issues - Relating to jurisdiction

2. However an issue challenging the jurisdiction of the trial court can be raised in the Supreme Court for the first time. The matter raised in issue one touches the jurisdiction of the trial court. The appellant is therefore quite in order to raise the matter before us. (p. 3087 B)

Legal procedure for taking plea

3. There are a litany of Supreme Court case law authorities in respect of the procedure and method to be followed in taking the plea of an accused person during arraignment. The provision of the law is clear in this regard. After the charge has been read and explained to the accused he is required to plead personally to it. The requirement that the charge shall be explained in the language the accused understands is more rigid where the accused does not speak English which is the language of the court. Counsel appearing for appellants in a criminal appeal more often than not make heavy weather on the failure of a trial Judge to record that the charge has been read and explained to the accused. A strict observance of the provisions of Section 33(6) (a) of the Constitution and Section 215 of Criminal Procedure Law is however more seriously looked into in a case where the accused is not literate in English Language. (p. 3088 F)

Plea - Arraignment - Failure of trial judge

4. Even if he is not, in my view, where a charge is of one count and the appellant had earlier made a statement to the police on the allegation of the crime which he has been arraigned for trial the failure of the trial

Judge to record that the charge has been read and explained to the accused will not amount to a miscarriage of justice once the trial court is satisfied that the accused understood the nature of the charge framed against him. It is without doubt that the appellant knew that he had been arraigned for the murder of Bomboy Ovie. There was no other count besides the count of murder. The appellant pleaded not guilty to the charge when it was read and explained to him. See *Effiom v. The State* (1995) 1 N.W.L.R. (Pt. 373) 507. I therefore accept that the arraignment of the appellant is in compliance with section 33 (6) (a) of the Constitution and section 215 of Criminal Procedure Law of Bendel State. (p. 3089 A/D)

Murder - Conviction

5. With respect, the learned counsel cannot be correct to say that the learned trial Judge based his finding on speculations. The overwhelming circumstantial evidence in this case is of high degree of probability that any prudent man, considering all the facts as disclosed by the prosecution, would entertain no doubt that the appellant is the person who caused the death of Bomboy Ovie. I agree that the evidence adduced before the trial court is consistent only with the hypothesis of the guilt of the appellant. (p. 3091 A)

Criminal procedure - Interpretation, s. 33 (6) (e)

6. Arguing the third and last issue, learned counsel submitted that the evidence of Pw2, Pw3, Pw4, Pw5 and Pw7 were inadmissible. His reason is that Pw2, Pw3, Pw4 and Pw7 gave evidence in Urhobo language and from the record it was not interpreted to the appellant who speaks Pidgin English. But counsel should not be so pedantic to the rules where the real facts are not apposite to his reasoning. All these witnesses are members of the appellant's family. They all live in the same village together with the appellant. They are Urhobos and they speak Urhobo language. The appellant is an Urhobo and from the record, he had a counsel representing him during the trial. He did not and I believe he cannot complain that he was not understanding what the witnesses were

saying during their testimonies. I now refer to the Provision of Section 33(6) (e) of the Constitution which reads:

“33 (6) (e) Every person who is charged with a criminal offence shall be entitled –

(e) To have without payment the assistance of an interpreter if he cannot understand the language at the trial of the offence”. B

Paragraph (e) says that he can have the assistance of an interpreter if he cannot understand the language at the trial of the offence. Can the appellant say that he cannot understand Urhobo language? The answer is obvious and I need not consider all the irrelevant authorities cited C by the learned counsel on this issue. (p. 3091 C)

NOTABLE POINTS OF INTEREST

KARIBI-WHYTE JSC

1. Circumstantial evidence may be best evidence

It is acceptable as good law that where direct evidence of a fact in issue is not available, evidence of facts surrounding the establishment of the fact is acceptable and is very often the best evidence. (p. 3093 C) E

ONU JSC

2. Mere technicalities will not be considered if no miscarriage of Justice is recorded

Finally, as it has not been suggested that a miscarriage of justice have been occasioned to the Appellant, it is no use resorting to mere technicalities. (p. 3097 A) F

3. Failure to Object to a procedure at trial

I am of the firm view that the Appellant was not prejudiced at all by the evidence of the aforementioned witnesses since neither himself nor his Counsel ever at any time raise any objection to the absence of an alleged interpreter. Failure of a party, as in the instant case, to object to the adverse party at a trial of a procedure adopted could not on appeal be raised. See Eboh v. Akpotu (1968) All NLR 220. Indeed, as it is not every irregularity that will nullify proceedings, a procedure adopted by him in the enforce- G

ment of a judgment, which was not objected to by the respondent, could not ground a ground of appeal. See Ojiegbe v. Okwaranya (1962) All NLR 605 at 608; Indeed, this Court has held times without number (notably in civil appeals) that a party who at the trial consented or proposed the B procedure adopted, albeit wrong and who in fact suffers no injustice, is estopped from complaining on appeal about that procedure. See Ayanwale v. Atanda (1988)1 NWLR (Part 68) 22. (p. 3100 D)

C *4. Duty of accused or his counsel to notify court of inability to understand language of the trial*

In the realm of Criminal justice, it is a cardinal principle of our Criminal jurisprudence that it is the duty of the accused or his Counsel, acting on his behalf, to bring to the notice of the Court, the fact that he does D not understand the language in which the trial is conducted, otherwise it will be assumed that he has no cause for complaint. (p. 3100 H)

REPRESENTATION

E I . E. Imadegbelo, Esq. with Ogunkeye O. E. for the Appellant
C. O. Ogisi (Mrs.) Director of Public Prosecutions, Delta State for Respondent.

F **CASES REFERRED TO**

Ogovi v Umagba (1995) 9 NWLR (Part 419) 283
Erekanure v The State (1993) 5 NWLR (Part 294) 385 at 393
Peter v The State (1997) 12 NWLR Pt. 531
Sunday Kajubo v The State 1 NWLR Pt. 73 Page 721
G Nwankwo v The State (1990) 2 NWLR Pt. 134 Page 627
Effiom v The State (1995) 1 N. W. L. R. (Pt.373) 507
Okpere v The State (1971) All N.L.R Page 1

H **STATUTES REFERRED TO**

Constitution of Nigeria 1979 s.33 (6) (e)
Criminal Procedure Law of Bendel State ss. 33 (6) (e), 215

LEAD JUDGMENT BY MOHAMMED JSC

The appellant was convicted and sentenced of the offence of murder punishable under Section 319 (1) of the Criminal Code by Oditia J. of Warri High Court.

Bomboy Ovie was a child, seven years old. On 18th September, 1985, his mother, Wini Ovie was to travel out of their village. Before she left she directed her children, including Bomboy Ovie, to go to her father's house and stay there until she returned. She returned later in the day and saw the children; but Bomboy Ovie was not among them. Wini Ovie began to search for the child. She met the appellant coming out of the bush holding a jerry can and a cutlass, and she observed that he was sweating profusely. She asked the appellant if he had seen Bomboy. He asked back, "*Is your child missing?*" The appellant said further, "*if it is true that your child is missing, we will look for him*". Later Wini Ovie reported the matter to her sister, Amroghe Mrovhoghare. The sister remembered that she saw the appellant boiling hot water and later pouring the hot water into a jerry can. When she asked him what he was doing with hot water he answered that he was going to hunt for rabbit. She too observed that the appellant was sweating profusely at the time. She then saw the appellant carrying the jerry can with hot water into the bush.

The matter of the missing child was reported to the village elders including the father of the appellant. They all joined hands in conducting a search and when it became dark they stopped and agreed to continue the following day. In the night, the sister of Bomboy's mother; [P-Ov remembered about the behaviour of the appellant on that day and how he boiled water and carried it into the bush. On the following morning when the sister of Bomboy's mother mentioned about the appellant's behaviour of boiling water and carrying it in a jerry can into the bush the search party followed the direction where the appellant carried hot water into the bush. Amroghe, the sister of Bomboy's mother, led the search party to the direction which the appellant followed into the bush. As they were going they saw plantain leaves with blood and a little further they saw a

jerry can. The chairman of the village who was leading the search party opened the jerry can and saw flesh which they believed to be human inside. Amroghe identified the jerry can as the one she saw the appellant pouring hot water inside and later carrying it into the bush. Not far from the jerry can they saw two heaps of sand. When they dug the heaps they saw the head of Bomboy Ovie in one heap and human intestines in another heap.

The search party carried all these items to the compound where the appellant lives. I may pause here to explain that the father of the appellant, the mother of Bomboy Ovie and Amroghe are all of the same parents. The appellant lives in the same compound with Amroghe. The party came to the room where the appellant was living. They asked him to open the door but he refused. When they forced the door open they found a black paper bag containing three pieces of cooked meat. When asked how he came by the meat the appellant answered that his father bought the meat for him. The father who was present denied buying meat for him. The appellant was arrested. He was charged before the High Court for the murder of Bomboy Ovie. At the conclusion of the trial, Odita J. Found the appellant guilty as charged, convicted him and sentenced him to death. On appeal to the court below the verdict of the High Court was affirmed and the appeal dismissed. The appellant has now come finally to the Supreme Court. His counsel, learned Imadegbelo, identified three issues for the determination of the appeal. They read:

“(1) Whether the trial of Appellant is not a nullity for breach of the mandatory provisions of Sec. 215 of the Criminal Procedure Law, Laws of Bendel State 1976 and Sec. 33(6) A & E of the Constitution of the Federal Republic of Nigeria 1979 and which occasioned a miscarriage of justice”.

(2) Whether the circumstantial evidence against the Appellant was positive, cogent and conclusive.

(3) Whether the evidence of Pw2, Pw3, Pw4, Pw5 and Pw7 are admissible in law”.

Learned Counsel for the respondent identified similar issues but couched in different terminologies.

I start with issue 1. **Issue 1 was not canvassed at the Court below and no leave was applied for to raise it, being a new issue. It should be emphasized that issues for determination must be based on the decision of the court from the decision of which the appeal is filed.** See Ogovi v. Umagba (1995) 9 NWLR (Part 419) 283. **However an issue challenging the jurisdiction of the trial court can be raised in the Supreme Court for the first time. The matter raised in issue one touches the jurisdiction of the trial court. The appellant is therefore quite in order to raise the matter before us.**

Learned counsel for the appellant submitted that the learned trial Judge failed to comply with the provisions of Section 215, of the Criminal Procedure Law of Bendel State and Section 33(6) (a) of the Constitution of the Federal Republic 1979 when the appellant was arraigned before him. Counsel referred to the case of Erekanure v. The State (1993) 5 NWLR (Part 294) 385 at 393. In that case Olatawura JSC held as follows:

“In this case on appeal and according to the printed Record there is nothing to show that the court fully complied with these requirements. The five requirements must be satisfied. They are mandatory. The best that could be seen to have been done was that the charge was read to the accused, but in what language? If as it has been shown that it was read, was it explained to him? No. There is nothing on record to show that it was read by the Registrar or an officer of court. Where for instance no officer of the court is capable of interpreting the charge in the language the accused person understands, a sworn interpreter is produced to explain the charge to the accused. As shown on page 26 of the printed Record the Appellant spoke Urhobo language.”

Learned counsel for the appellant argued that the learned trial Judge did not comply with the mandatory provisions of Section 215 of the Criminal Procedure Law because when the appellant was arraigned before him he simply recorded thus:

“Accused person present.

Mr. P.O. Isibor State Counsel for the State

Charge read and explained to the accused person. He says He understands it.

Accused person pleads not guilty.”

Counsel submitted that since the appellant speaks Pidgin English the court should have ordered for the charge to be read and explained to him in Pidgin English. Having failed to do so counsel submits that the trial was a nullity. Counsel supported his submission by reference to Peter V. The State (1997) 12 NWLR Pt. 531 Sunday Kajubo V. The State 1 NWLR Pt. 73 page 721 and Nwankwo V. The State (1990) 2 NWLR Pt. 134 page 627.

The most essential aspect of arraignment is the constitutional requirement that every person who is charged with a criminal offence shall be entitled to be informed promptly in the language he understands in detail of the nature of the offence. See s.33(6) (a) of the 1979 Constitution which was relevant when the appellant was tried. Section 215 of Criminal Procedure Law reads,

“The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service or a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith.”

There are a litany of Supreme Court case law authorities in respect of the procedure and method to be followed in taking the plea of an accused person during arraignment. The provision of the law is clear in this regard. After the charge has been read and explained to the accused he is required to plead personally to it. The requirement that the charge shall be explained in the language the accused understands is more rigid where the accused does not speak English which is the language of the court. Counsel appearing for appellants in a criminal appeal more often than not make heavy weather on the failure of a trial Judge to record that the charge has been read and explained to the accused. A strict observance of the provisions of Section 33(6) (a) of the Constitution and Section 215 of

Criminal Procedure Law is however more seriously looked into in a case where the accused is not literate in English Language. Even if he is not, in my view, where a charge is of one count and the appellant had earlier made a statement to the police on the allegation of the crime which he has been arraigned for trial the failure of the trial Judge to record that the charge has been read and explained to the accused will not amount to a miscarriage of justice once the trial court is satisfied that the accused understood the nature of the charge framed against him.

In the case in hand, the appellant had earlier made a voluntary statement in Pidgin English to the police on allegation that he caused the death of Bomboy Ovie. He knew the facts of the allegation very well before his arraignment. He was charged on a one count charge of murder of Bomboy Ovie and when his plea was to be taken the learned trial judge recorded that the charge had been read and explained to him. The judge recorded further that the accused understood the charge and pleaded not guilty to the charge. **It is without doubt that the appellant knew that he had been arraigned for the murder of Bomboy Ovie. There was no other count besides the count of murder. The appellant pleaded not guilty to the charge when it was read and explained to him. See Effiom v. The State (1995) 1 N.W.L.R. (Pt. 373) 507. I therefore accept that the arraignment of the appellant is in compliance with section 33 (6) (a) of the Constitution and section 215 of Criminal Procedure Law of Bendel State.**

In the second issue, learned counsel for the appellant questioned whether the circumstantial evidence against the appellant was positive, cogent and conclusive. Learned counsel submitted that in a charge of murder the prosecution must prove the following ingredients:-

"(1) That the death of the deceased was as a result of the voluntary act of the appellant.

(2) That the appellant had an intent to cause the death or to cause grievous bodily harm to the deceased;

(3) That the death of the deceased was a direct result of the act of the accused to the exclusion of all probable cause".

It is the view of the learned counsel that the prosecution had failed to prove any of the above ingredients. Before I proceed further in this judgment I must pause here to point out that the conviction of the appellant is based on circumstantial evidence. A conviction cannot be based on
 B circumstantial evidence unless and until all the inferences to be drawn from the whole history of the case point strongly to the commission of the crime by the accused. In this case the trial court analysis the evidence adduced by the prosecution before it agreed that the appellant had committed the
 C offence charged. In its analysis of the judgment of the trial court the court of Appeal, Ibiyeye, J.C.A., held as follows:-

*"The learned trial judge meticulously reviewed the circumstances of the inferential involvement of the appellant in the decapitation of the deceased Bomboy, in such a way that a closely knit chain of implicating
 D events which led to the death of Bomboy was formed. To mention but a few, there is sumptuous evidence that the day Bomboy was reported missing, the appellant was seen carrying boiled water to the bush where the dismembered parts of Bomboy Ovie including the limbs and the
 E severed head were either*

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 G severed head were either unearthed or were found in the jerry can which the PW2 saw the appellant carrying the boiled water into the bush. There were also burns on the skin recovered from the bush. Such burns are consonant with the effect of hot water poured on human skin."*

H The facts are very clear as I have reproduced earlier in this judgment. The learned trial Judge believed those facts. Learned counsel for the appellant argued that the circumstantial evidence is based on speculations and suppositions by the learned trial Judge. He referred to

Okpere V. The State (1971) All N.L.R. Page 1. **With respect, the learned counsel cannot be correct to say that the learned trial Judge based his finding on speculations. The overwhelming circumstantial evidence in this case is of high degree of probability that any prudent man, considering all the facts as disclosed by the prosecution, would entertain no doubt that the appellant is the person who caused the death of Bomboy Ovie. I agree that the evidence adduced before the trial court is consistent only with the hypothesis of the guilt of the appellant.**

Arguing the third and last issue, learned counsel submitted that the evidence of Pw2, Pw3, Pw4, Pw5 and Pw7 were inadmissible. His reason is that P w 2, P w 3, P w 4 and P w 7 gave evidence in Urhobo language and from the record it was not interpreted to the appellant who speaks Pidgin English. But counsel should not be so pedantic to the rules where the real facts are not apposite to his reasoning. All these witnesses are members of the appellant's family. They all live in the same village together with the appellant. They are Urhobos and they speak Urhobo language. The appellant is an Urhobo and from the record, he had a counsel representing him during the trial. He did not and I believe he cannot complain that he was not understanding what the witnesses were saying during their testimonies. I now refer to the Provision of Section 33(6) (e) of the Constitution which reads:

“33 (6) Every person who is charged with a criminal offence shall be entitled –

(e) To have without payment the assistance of an interpreter if he cannot understand the language at the trial of the offence”.

Paragraph (e) says that he can have the assistance of an interpreter if he cannot understand the language at the trial of the offence. Can the appellant say that he cannot understand Urhobo language? The answer is obvious and I need not consider all the irrelevant authorities cited by the learned counsel on this issue. Pw5 told the trial court that he was a Senior Medical Doctor. When asked whether he was a pathologist he answered in the negative. He is indeed

qualified as an expert to conduct a postmortem examination and his testimony is based on that duty. The learned trial Judge did not rely on the evidence of Pw5 where he said that the pieces of bones and flesh were that of a human being. He convicted the appellant based on the circumstantial evidence which he found cogent and compelling and which established beyond all reasonable doubt that the appellant voluntarily caused the death of Bomboy Ovie.

In sum, this appeal has failed. I affirm the judgment of the Court of Appeal in which it dismissed the appellant's appeal against his conviction and sentence passed by the trial High Court.

KARIBI-WHYTE JSC

I have read the judgment of my learned brother U. Mohammed, JSC in this appeal. I agree with him that his appeal lacks merit and should be dismissed. I too will and hereby dismiss the appeal of the appellant against his conviction for the offence of murder punishable under section 319(1) of the Criminal Code by the Warri High Court and affirmed by the Court of Appeal, Benin Division.

The facts have been comprehensively stated in the leading judgment. I adopt them. The three issues formulated in this appeal by learned Counsel to the Appellants are:

“(1) Whether the trial of the Appellant is not a nullity for breach of the mandatory provisions of Section 215 of the Criminal Procedure Law, Laws of Bendel State 1976 and Sec. 33(6) A & E of the Constitution of the Federal Republic of Nigeria 1979 and which occasioned a miscarriage of justice.

(2) Whether the circumstantial evidence against the Appellant was positive, cogent and conclusive.

(3) Whether the evidence of PW2, PW3, PW4, PW5 and PW7 are admissible in law.”

This judgment is concerned only with a consideration of issue (2) and (3) relating to circumstantial evidence and admissibility of the evidence of prosecution witnesses respectively.

On the issue of the evidence relied upon by the learned trial Judge in determining whether the prosecution proved the case against the accused beyond reasonable doubt were as follows –

The appellant is a close relation of the deceased and a member of the family of the deceased. On the day the deceased was reported missing, appellant was seen carrying boiled water into a nearby bush where the dismembered parts of the body of the deceased were either unearthed or found in the jerry can which PW2 saw appellant carrying into the bush. There were also burns on the skin recovered from the bush consistent with the effect of hot water poured on human skin. Appellant was found to have human flesh in a polythene bag in his room.

It is acceptable as good law that where direct evidence of a fact in issue is not available, evidence of facts surrounding the establishment of the fact is acceptable and is very often the best evidence. See Lori v. State (1980) 8-11 SC.81. It is said additri to be evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with mathematical accuracy. It is no derogation to the evidence that it is a circumstantial evidence to support a conviction in a criminal prosecution must be cogent, complete, unequivocal and compelling, leading to the irresistible conclusion that the accused and no other person committed the offence. Learned Counsel to the Appellant has submitted that the circumstantial evidence should be rejected because it is based on speculations and suppositions. He referred to Okpere v. The State (1971) All NLR.1. This is an erroneous consideration of the cumulative appreciation of the facts and circumstances relating to the event.

A careful analysis of the facts of the case concerning the disappearance of the deceased, the unusual and surreptitious movements of the appellant, the connection of materials linked with the Appellant with discovery of the dismembered parts of the deceased and the discovery of human flesh with Appellant, point accurately conclusively and irresistibly to no other direction than to Appellant as the perpetrator of the crime. See Adie v. State (1980) 1-2 SC.116. There is here an unbroken chain of evidence sufficient to point unequivocally that Appellant committed the

crime charged. See Ukorah v. State (1977) 4 SC.167, Omogodo v. State (1981) 5 SC.5.

In this case there is evidence of the death of the deceased. The evidence of circumstances of the events linking Appellant with the commission of the offence unequivocally establishes that death of the deceased was a direct result of the act of the appellant. See Ozo v. The State (1971) 1 All NLR.111 Ogundipe & ORs. V. The Queen (1954) 14 WACA.458. I have not found any evidence tending to weaken the inference of guilt against the appellant that can be drawn from the surrounding circumstances – See the Queen v. Ororosokode (1965)5 FSC.208.

Because of the risk from possibility of error, and the requirement that the prosecution shall prove the guilt of the Appellant beyond a reasonable doubt, I have exercised caution in my consideration of the guilt of the Appellant. The circumstantial evidence in this case is of such a conclusive degree of probability that no reasonable person will entertain any doubt as to the guilt of the Appellant. – See Fatoyinbo v. Attorney General, Western Nigeria (1966) WNLR.4.

The third issue relates to the admissibility of the evidence of PW2, PW3, PW4, PW5, and PW7. Learned counsel to the Appellant challenging the admissibility of their evidence submitted that those witnesses gave evidence in Urhobo language and the record did not indicate their testimony was interpreted to Appellant in Pidgin English, which he speaks. This is an interesting criticism, if not naïve. The evidence is that Appellant is of the same family with PW2, PW3, and PW4, all who gave evidence in Urhobo. Appellant speaks and understands the Urhobo language. Appellant was throughout the trial represented by Counsel. At no stage did Appellant complained that he did not understand the testimony of the witnesses in Urhobo. Indeed the appellant did not require the service of an interpreter to understand the evidence of the testimony in Urhobo.

For the reasons I have stated and the fuller reasons in the judgment of my learned brother U. Mohammed, JSC, this appeal fails. The judgment of the Court of Appeal affirming the judgment of the trial High Court and dismissing the appeal of the Appellant is hereby further affirmed.

ONU JSC

Having been privileged to read the judgment of my learned brother Mohammed, JSC just delivered, I am in complete agreement therewith that the appeal fails. B

My learned brother has in the leading judgment so thoroughly considered that facts and three issues proffered for our determination that I need only make the following brief expatiation on the latter as follows:

ISSUE 1: The query raised on this issue is whether the trial of the Appellant is not a nullity for breach of the mandatory provisions of Section 215 of the Criminal Procedure Law, Laws of Bendel State 1976 and Section 33 (6) (a) and (e) of the Constitution of the Federal Republic of Nigeria 1979 and which occasioned a miscarriage of justice. C
D

The provisions of Section 215 of the Criminal Procedure Law and Section 33(6)(a) and (e) of 1979 Constitution (now Section 36 (a) and (c) of the 1999 Constitution) has been the thorough subject of rigorous and judicial interpretations in both the Court of Appeal and this Court here. It will suffice here to emphasis with clarity the requirements these two amalgamated Sections have spelt out in the case of Edet Effiom v. The State (1995) 1 NWLR (part 373)507, namely that –

“(a) The accused must be present in court unfettered unless there is a compelling reason to the contrary;” F

(b) The charge must be read over to the accused in the language he understands;

(c) The charge should be explained to the accused to the satisfaction of the court;” G

(d) In the course of the explanation, technical language must be avoided;

(e) After requirements (a) – (d) above have been satisfied; the accused will then be called upon to plead instantly to the charge.”

See also this Court’s latest case of Pele Ogunye & others v. The State (1999) 5 NWLR (Part 604) 548 at page 565; (1999) 4 SCNJ 33 at page 48 vis a vis its earlier ones of Samuel Erekanure v. The State (1993) 5 NWLR (Part 94) 385; (1993) 6 SCNJ 73 at 76-77, and Kajubo v. The State H

(1998) 1 NWLR (Part 73) 721; (1988) 3 SCNJ 79.

From the foregoing, I am of the firm view that the trial Judge in the case on appeal before us had meticulously and with a fair degree of precision, complied with Sections 215 of the Criminal Procedure Law and B 36(6)(a) and (e) of the 1979 Constitution (ibid).

Thus, when the Appellant was arraigned before the trial Judge in the instant case on appeal on 19/10/89 the proceedings as can be gleaned from the record went thus:

C *“Accused person present Mr. P.O. Isibor State Counsel for the State. Charge read and explained to the accused person. He says he understands it and Accused pleads guilty. Court ACR High Court, Warri is hereby ordered to assign this case to a Counsel in Warri.”*

This record of proceedings surely infallibly speaks for itself. D The Appellant was thereafter asked whether he understood the charge against him and he answered in the affirmative. Be it noted that the language of the Court was/is English and no finger was raised against its use by either the appellant or his counsel.

E The Appellant who clearly appeared from the foregoing to have understood the language, to wit: English, this procedure cannot, in my opinion, be vitiated by reason only of the alleged absence of a written record of the language used for the explanation. As a matter of fact, the F procedure adopted here being on all fours with that adopted in Effiom v. The State (supra), I see no substance in the Appellant’s complaint. The authorities cited by the Appellant’s Counsel in support of his case, are in my respectful view, inapposite to and/or distinguishable from this case.

G In considering a case of this type where the argument of the Appellant would appear to run much against the grain, Counsel should bear in mind what Wali JSC said in relation to the application of Section 215 of the C.P.L and Section 36(6)(a) of the 1979 Constitution in Okoro v. The State (1998) 14 NWLR (Part 584)181; (1998)2 SCNJ 84 to the H effect that:

“The provision of the law should not be stretched to a point of absurdity by reading into it that the Judge must record that the charge was explained to the accused to his satisfaction before taking his plea. It will

be impeaching the integrity of the Judge to do that as no Judge will take the plea of an accused if he is not satisfied that the charge was read and explained to the accused to his satisfaction."

Finally, as it has not been suggested that a miscarriage of justice have been occasioned to the Appellant, it is no use resorting to mere technicalities. See Okonjo v. Dr. Odje & Ors. (1985) 10 SC.267 AT 268 (PER Eso, JSC) and Nishizawa Ltd. v. Jethwani (1984) 12 SC.234 at 279. This issue is thus resolved against the Appellant.

ISSUE NO. 2

This issue raises the question as to whether the circumstantial evidence against the Appellant was positive, cogent and conclusive.

It is pertinent to observe in the first place, that the prosecution in the instant case called seven witnesses who gave credible and cogent evidence in support thereof. PW2, Amroghe Mroghoghare, the star witness whose evidence PW3 corroborated, testified as regards the circumstances and antecedents of the Appellant. After considering their evidence the learned trial Judge held as follows:-

"The accused also admitted Exhibit "B" contained human flesh. Therefore, the only issue before the court is who killed the deceased Bomboy Ovie? PW1 testified that PW3 reported that her child Bomboy Ovie was missing. The town organized a search party. They failed to find Bomboy. They received information. They proceeded to a bush near the house of the accused. They found Exhibit "B" and the dismembered body of Bomboy here and there. PW2 and PW3 confirmed these The prosecution adduced evidence that the accused person was seen boiling hot water and carried the boiled hot water to the bush where the decapitated body of the deceased was found. There was evidence of prosecution that the butchered body of the deceased was pulled off.... There is evidence by PW2 that she saw the accused fill the jerry can with hot water..... It was this jerry can that contained the head and feet of the deceased. I therefore find as a fact that apart from the cooked meat, there are other evidences (sic) which connect (sic) the accused person with the killing of the deceased Bomboy Ovie. Consequently, I do not agree with the learned Counsel for the accused person that there was

no connection linking the accused with the killing of the said deceased Bomboy Ovie. (Underlining is supplied for emphasis.)

The Court below in confirming the above decision (a finding of fact) of the trial court, held, inter alia, thus:

B “The learned trial Judge meticulously reviewed the circumstances of the inferential involvement of the Appellant in the decapitation of the deceased Bomboy, in such a way that a closely knit chain of implicating events which led evidence that the day Bomboy was reported missing, the Appellant was seen carrying boiled water to the bush where the dismembered parts of Bomboy Ovie including the limbs and the severed head were either unearthed or found in the jerry can which the PW2 saw the Appellant carrying the boiled water into the bush..... There were also burns on the skin recovered from the bush. Such burns were consonant with the effect of hot water poured on human skin.”

The court below proceeded by saying that:

“He failed to call the person from whom he bought the meat as a witness..... His father who was present denied that he bought them for him.”

From the above concurrent findings of fact of the two lower Courts, the prosecution proved its case against the Appellant beyond reasonable doubt. See Adio v. The State (1986) 2 NWLR (Part 24) 585. It is trite that a court can indeed convict on circumstantial evidence as in the case in hand, provided same is compelling, accurate, reliable, cogent and creates no room for doubt or speculation. As Aniagolu, JSC pungently put it in Onah v. The State (1985)12 SC.59:

G “Circumstantial evidence is as good and sometimes better than any other sort of evidence, and what is meant by it is that there is a number of circumstances which are unbroken chains of evidence. If that is established to the satisfaction of the jury they may well and properly act upon such circumstantial evidence.”

H See also Nnamani, JSC in Lori v. The State (1980) 8 – 11 SC.81; Ikomi v. The State (1986) NWLR (part 28)340; Buje v. The State (1991)4 NWLR (part 185) 287 and Kim v. The State (1991)2 NWLR (Part 175) 622.

Indeed, the circumstantial evidence of what I regard as an ac-

completed autopsy by PW1 supported in the evidence of the deceased's relations amounted to a correct and irresistible identification. See Asubiaro v. The State (1078)4 FCA 47 at 49; Osarodion Okoro v. The State (1088) 5 NWLR (Part 94)255 and Rex v. Momodu Laoye 6 WACA 6.

The evidence must be cogent and compelling as to convince a jury of the guilt of the accused; such evidence is also expected to lead irresistibly to the guilt of the accused and must be in consistent with any other rational conclusion. Indeed, there must be no other co-existing circumstances which can weaken such interference as decided in Philip Omogodo v. The State (1985)5 SC.5 at page 24; Igboji Abieke v. The State (1975) 9-11 SC.97 at page 104 and Edobor V. The State (1975) 9 – 11 SC.69 at page 76.

In the case in hand, by a remarkable coincidence and under- signed occurrence of events, learned State Counsel submitted during address, and I share his views in their entirety, that:

“It is remarkable that PW2, 3 and 4 are relatives of the accused person; while PW7 is the father of the accused. Submits that the prosecution has by positive and compelling evidence proved that it was the accused who killed the deceased.”

Thus, the prosecution in the instant case, in my view, has complied with and indeed satisfied the mandatory ingredients required in law to maintain an information of murder as postulated in the case of Nwaeze v. The State (1996)2 NWLR (Part 428)1 where Adio, JSC of blessed memory made a dichotomy and ex-ray of the said ingredients as follows:-

“In a charge of murder, the burden is on the prosecution to prove that:
(a) the deceased had died
(b) the death of the deceased was caused by the accused;
(c) the act or omission of the accused causing the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.”

The witnesses enumerated hereinbefore having in their testimony satisfied the aforesaid conditions, the court below cannot, in my view, be faulted when it inevitably concluded that:

“From the foregoing, it is hardly the province of this court to

disturb the findings of facts which include the credibility of the appellant in the assessment of the learned trial Judge who had the singular opportunity of seeing the prosecution witnesses and the appellant testify and watched their demeanour. Since those findings of facts are, in my view, not perverse or borne out of improper exercise of judicial discretion, I shall not disturb them. (Underlining is mine for emphasis).

My answer to this issue is in the affirmative.

ISSUE 3:

The poser in this issue is whether the evidence of PW2, PW3, PW4 and PW5 are (sic) admissible in law.

It is the Appellant's contention that since the evidence of PW2, PW3, PW4 and PW5 was given in Urhobo language, same ought to have been interpreted by an interpreter vide Section 33(6)(e) of the 1979 Constitution.

I am of the firm view that the Appellant was not prejudiced at all by the evidence of the aforementioned witnesses since neither himself nor his Counsel ever at any time raise any objection to the absence of an alleged interpreter. Failure of a party, as in the instant case, to object to the adverse party at a trial of a procedure adopted could not on appeal be raised. See Eboh v. Akpotu (1968) All NLR 220. Indeed, as it is not every irregularity that will nullify proceedings, a procedure adopted by him in the enforcement of a judgment, which was not objected to by the respondent, could not ground a ground of appeal. See Ojiegbe v. Okwaranya (1962) All NLR 605 at 608; Obajimi v. A.G. (W.N) 1971 All NLR 31. Indeed, this Court has held times without number (notably in civil appeals) that a party who at the trial consented or proposed the procedure adopted, albeit wrong and who in fact suffers no injustice, is estopped from complaining on appeal about that procedure. See Ayanwale v. Atanda (1988) 1 NWLR (Part 68) 22; Akhiwu v. The Principal Lotteries Officer, Mid-Western State (1972) 1 All NLR (Part 1) 229 and Ojiegbe v. Okwaranya (supra).

In the realm of Criminal justice, it is a cardinal principle of our Criminal jurisprudence that it is the duty of the accused or his Counsel, acting on his behalf, to bring to the notice of the Court, the fact that he does not understand the language in which the trial is conducted, otherwise it

will be assumed that he has no cause for complaint. Adio, JSC had occasion to elucidate in Madu v. The State (1977)1 NWLR (Part 482)306 at 402; also (1997) 1 SCNJ 44 at 54 paragraphs C – D as follows:

“The appellant was represented by one Counsel Mr. J.A. Alaku. There was nothing to show on the record that the appellant was or his Counsel requested the High Court to provide him with an interpreter in relation to the evidence of PW4, PW5, PW6 and PW7 which he alleged he did not understand and that the court rejected the request.”

The authority in that case which is on all fours with that in the instant case, his Lordship’s admonition to PW4, PW5, PW6 and PW7 there (now appropriately applicable to PW2, PW3, PW4 and PW5) would be:

“The fact that the accused does not understand the language in which the trial is being conducted is a fact well known to the accused and it is for him or his Counsel to take the initiative of bringing it to the notice of the court at the earliest opportunity or as soon as the situation has arisen. If he does not claim the right at the proper time, He may not be able to have a valid complaint afterwards, for example, on appeal.” (Underlining is for emphasis).

In the result, I take the view that the Appellant’s contention in this regard is a non-starter. See too Karibi-Whyte, JSC’s observation in Ogba v. The State (1992) 2 NWLR (Part 222) 164; (1992)2 SCNJ (Part 1) 106. Where at page 195, paragraphs B – D of the latter Report, (NWLR), Karibi-Whyte, JSC held inter alia as follows:

“Learned Counsel to the Respondent has pointed out and I entirely agree with him that there is sufficient evidence on the record to show by implication that Appellant understood both Igbo and English Language. Appellant’s Statement to the Police Exhibit 2 was in English. His oral testimony at his trial (see page 29 – 30 of the record) to show that there was no interpretation from Igbo language to English and vice versa. The only defect was the absence of a certificate of the trial Judge or note showing that the proceedings were interpreted. There is no doubt there is the useful usual practice to so indicate. There is neither a statutory or constitutional support for the practice. The non-compliance with the practice can therefore not affect the validity of the proceedings.

Appellant could not have raised any objection on that ground.”

This issue is also resolved against the Appellant.

For the above reasons and those fully contained in the leading judgment of my learned brother, Mohammed, JSC, I too dismiss this appeal and confirm the decisions of the two courts below.

KALGO JSC

I have had the advantage of reading in draft the judgment of my learned brother Mohammed JSC just delivered and I agree entirely with the reasoning and conclusions therein. I agree that there is no merit in the appeal and it ought to be dismissed.

The main issue argued by the learned counsel for the appellant in this appeal was whether the appellant was properly convicted for murder on the circumstantial evidence proved at the trial. The general principle of law is that for a conviction to be wholly and properly based on circumstantial evidence, the evidence in support must be cogent, compelling and direct, and must lead to one and only one conclusion – the guilt of the accused. See Atano & Anr V. A.G. Bendel State (1989) 2 NWLR (pt. 75) 201; Lori V. The State (1980) F.N.L.R 475; Popoola V. Commissioner of Police (1964) NMLR 1; R.V. Onufrejezok (1955) 3 Cr. A.R. 1; Raphael Ariche V. The State 6 NWLR (pt. 302) 752.

In this case, there was no eye witness to the commission of the offence, but from the pieces of evidence proved and accepted by the learned trial Judge, together with the surrounding circumstances and the conduct of the appellant in relation to the whole incident, there is some consistency in the chain of the evidence which in my view, lead irresistibly to the guilt of the appellant. See Valentine Adie V. The State (1982) 1 N.C.R. 375 at 393; Deonan Dan Mishra V. The State of Bihar. A.I.R. (1955) S.C. 801.

I therefore agree that this appeal lacks merit and must be dismissed. I accordingly dismiss it and affirm the decision of the Court of Appeal Benin delivered on the 6th day of December, 1999.

EJIWUNMI JSC

I have had the privilege of reading in advance the draft of the judgment just delivered by my learned brother, Mohammed, JSC. In that judgment he not only reviewed the facts fully, but also considered very carefully the issues raised by the appellant before dismissing the appeal in its entirety. I fully agree with the reasons so given for dismissing the appeal.

However, I wish to comment further on the complaints made on behalf of the appellants by his learned counsel. One of such complaints is that the trial court did not read the charge to the appellant in the language he understands.

And secondly in his third issue, learned counsel contends that the evidence of PW2, PW3, PW4, PW5 and PW7 were inadmissible. His reason being that these witnessed gave evidence in Urhobo language and which from the record was not interpreted to the appellant who speaks Pidgin English.

Upon these contentions, learned counsel for the appellant then invited this court to hold that as a result of these breaches, the trial of the appellant must be declared a nullity, as it was conducted in breach of the provisions of section 215 of the Criminal Procedure Law and section 33(6) (a) and (e) of the Constitution of 1979, which reads:

“Every person who is charged with a Criminal Offence shall be entitled: (a) to be informed promptly in the language that he understands and in detail of the nature of his offence;

(b)

(c)

(d)

(e) To have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence.”

Section 215 of the Criminal Procedure Cap 49, Laws of Bendel State 1976 reads:-

“The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause

otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith.”

Now by reason of this contention, it is necessary in respect of the first question to refer to the record where Mr. P.O. Osibor, State Counsel for the state. Accused person present the trial court noted in the record thus:-

“Charge read and explained to the accused person. He says he understands it and accused plead, not guilty.”

There certainly can be no question that the learned counsel for the appellant has properly drawn attention to the manner in which the appellant was invited to plead to the offence.

Learned counsel then submitted that having regard to the evidence at pages 14 – 16 of the printed record that the appellant only speaks Pidgin English, there is no evidence to suggest that the appellant understood the charge as read to him above. This submission is principally based on the absence in the printed record of the language in which the charge was read to the appellant. It is further argued for the appellant that by virtue of the provisions of S. 215 (supra) the following requirements must be satisfied, the breach of any of which will order the trial of an accused person a nullity.

- i) The accused must be present in court unfettered unless there is a compelling reason to the contrary;
- ii) the charge must be read out to the accused in the language he understands;
- iii) The charge should be explained to the accused to the satisfaction of the court;
- iv) That in course of the explanation, technical language should be avoided;
- v) After requirements (i) – (iv) above have been satisfied, the accused will then be called upon to plead instantly to the charge.

In support of the above, reference was made to Erekanure V.

The State (1993)5 NWLR (pt. 294) 385 at 392 – 393. Olatawura JSC, quoted the above requirements for a proper plea of an accused at the inception of his trial before the trial court as spelt out in Sunday Kajubo V. The State (1988)1 NWLR (pt 73) 721/731 and 737, before he went on to say that:-

“In this case on appeal, and according to the printed record, there is nothing to show that the court fully complied with these requirements. The five requirements must be satisfied. They are mandatory. The best that could be seen to have been done was that the charge was read to the accused, but in what language? If as it has been shown that it was read, was it explained to him? No....”

If I may pause here. In the instant case, it is manifest in the printed record that the charge was read and explained to the appellant. The learned trial Judge thereafter noted thus:- *“He says he understand it”* and the appellant then pleaded guilty. I think it is clear that the instant case is distinguishable from Erekanure case (supra). This is made manifest by the fact that although the language in which the charge was read to the appellant was not noted in the record, and English being the language of the Court, the appellant must have understood the charge as was explained to him.

While it must be borne in mind at all times that the provisions of S. 215 of Criminal Code Law (Supra) must be strictly followed by trial courts, an appellate court concerned with the matter on appeal must be able to take an overview of the facts as recorded in each particular case. I would therefore resolve this issue against the appellant. The learned counsel for the appellant in a reverse argument next sought to void the trial of the appellant by claiming that he did not understand the evidence given by certain of the prosecution witnesses as they gave their evidence in the Urhobo language. It is submitted for the appellant that he should have been provided with an interpreter to interpret the Urhobo language to Pidgin English which the appellant understood. For this proposition he cited the provisions of S.33 (6) (e) supra. The short answer to this complaint is that learned counsel for the appellant has, and with due respect to him, perhaps not taken into consideration the fact that the

appellant and the witnesses are not only Urhobos, but were shown in the printed record to be members of the same family. Secondly, the appellant was represented by Counsel throughout his trial, and there is nothing to suggest that there was any suggestion during that period that he did not understand the evidence.

While it is always open for learned counsel appealing for an appellant to make submissions on behalf of his appellant, I think such submissions must be grounded upon facts which are tenable and would assist in arriving at decisions that are just and fair.

In my respectful view, the case under consideration in this appeal is one of the most atrocious cases of murder that I have had to consider. The guilt of the appellant was established beyond reasonable doubt, and I cannot find any relieving features in the case to merit his acquittal. I would therefore dismiss the appeal for the above reasons and the fuller reasons given in the lead judgment of my brother Mohammed JSC.

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