

**SUPREME COURT OF NIGERIA**  
7TH JULY, 2000. SC 71/1999  
**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU,**  
**S. U. ONU, A. I. IGUH, E. O. AYoola, JJSC**

THE STATE ..... APPELLANT  
V.  
GODFREY AJIE ..... RESPONDENT

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***APPEALS** - Findings of fact - Of trial courts - Interference with - Where such findings are inferences from findings properly made - The Court of Appeal is in as good a position as the trial court to come to a decision*

***APPEALS** - Issues - Failure to pronounce on all material issues - The Appellant must establish that the failure to give a decision on the issues - Led to a miscarriage of justice*

***APPEALS** - Judgment - Findings that are perverse - The appellate court will interfere with such findings*

***CRIMINAL PROCEDURE** - Burden of proof - Lies on the prosecution - While the standard of proof is proof beyond reasonable doubt*

***CRIMINAL PROCEDURE** - Evidence - Duty of the prosecution to place before the court all available relevant evidence - What it means*

***CRIMINAL PROCEDURE** - Witnesses - Material witness - Hostile witness - Where a material witness will not give evidence favourable to the accused person - The witness ought to be called by the prosecution - For purposes of cross examination.*

***EVIDENCE** - Admissibility - Medical report - When tendered and admitted in evidence - Is regarded as sufficient evidence of the facts stated therein*

**EVIDENCE** - Evaluation of evidence - The phrase “I believe” - When used by a trial judge is not final or conclusive - There must be a reason for believing one witness and disbelieving the other

**JUDGMENTS** - Appeal - Retrial order - Where a trial court fails to treat all issues in controversy fully - And there is sufficient material before the appellate court for the resolution of the matter - An order of retrial will not be made

**JUDGMENTS** - Perverse decision - When a decision is said to be perverse

**MURDER** - Defence - Allegation that it was somebody else who killed the deceased - It is incumbent on the prosecution to rebut the allegation by evidence

**WORDS & PHRASES** - Miscarriage of justice - What it means

### **FACTS**

Before the High Court, the respondent was charged with murder punishable under section 319 (1) of the Criminal Code. The evidence of PW1, PW2 and PW3 was that the respondent hit the deceased at the back of the neck. One Dr. Chinwa of the University of Port - Harcourt Teaching Hospital (U P T H) a medical doctor, performed a post - mortem examination on the body of the deceased. The identification of the deceased's body was made by his brother called Christian Okpara who testified as P. W. 5. The prosecution sought to tender the medical report through P.W.5 but the defence objected. The report was admitted as Exhibit "E" through the 6th P. W. to whom Dr. Chinwa had handed it before he travelled overseas. The medical evidence is that the cause of death was due to "extensive skull fracture with severe hemorrhage" which occurred on the left side of the head.

The respondent in his defence alleged that it was one Onyebuchi Okoro who killed the deceased. The said Onyebuchi Okoro gave the

Police conflicting accounts of his whereabouts when the incident occurred. He was not called as a witness. At the conclusion of trial, the trial court returned a verdict of guilty against the respondent and accordingly sentenced him to death. The Court of Appeal, Port - Harcourt, to which the respondent appealed reversed the trial court's decision and acquitted him. Dissatisfied, the prosecution has appealed to the Supreme Court raising four issues. The respondent raised two issues which were considered adequate by the court to dispose of the appeal.

**ISSUES FOR DETERMINATION**

*"A. was the Court below right in making use of the contents of Exhibit 'E' in arriving at the decision it handed down in the Appeal before it (Ground 4 of the Grounds of Appeal).*

*B. If Exhibit 'E' was properly admitted in evidence was the Court below justified in their decision that the trial Court did not arrive at a fair decision on the case before it as presented by the prosecution and the Defence?*

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

***Admissibility - Medical report***

1. A Medical Officer in the service of a State for purposes of undertaking a post-mortem examination is a pathologist and his report is a certificate as envisaged in Section 42(1) (a) of the Evidence Act (ibid). The Certificate when tendered and admitted in evidence is regarded as sufficient evidence of the facts stated therein. The situation is very similar to what happened in the case of **EHOT v. THE STATE** (1993) 4 NWLR (Part 290) 644 at page 657G to page 658B wherein it was held as perfectly permissible for such a report to be tendered where the doctor who authored it was out of the Country. As in the analogous case of **EHOT** (supra), the defence in the instant case never requested for Dr. Chinwa to present himself for cross-examination. The trial Court was therefore bound to accept Dr. Chinwa's certificate as sufficient evidence of the facts therein stated. (p. 2757 C)

***Appeals - Failure to pronounce on all material issues***

2. The general rule is that a Court has a duty to pronounce on all material issue raised before it. But the result of a Court of Appeal not complying with this general rule depends on the facts and circumstances of each B case. See Onifade v. Olayiwola (1990) 7 NWLR (Part 161) 130 at page 165 G-H. The question to ask is the nature of the act or omission about which a complaint has been laid. In this case the complaint is that the Court below cannot be said to have considered and given a decision on C the question whether or not the trial Court should have admitted Exhibit 'E'. In order to answer that question I humbly refer to two well established rules for dealing with the question.

The first rule may be stated as follows:-

*"where an Appellate Court is satisfied that the Court of Trial has D been guilty of improper use of its powers in the performance of its adjudicative functions, it must go further and ask itself whether the error was such that it could be corrected from the evidence in cold print without injustice to either side. If it is, then the Appellate Court can correct the E error, but if it is not, it must order a retrial."*

per Nnaemeka-Agu, JSC in Sanusi v. Ameyogun (1992) 4 NWLR (Part 237) 527 at P. 549 F-G.

The second rule defines the position in relation to substantive or F procedural defects in the course of a trial. Karibi-whyte, JSC put it this way in Ejelioku v. The State (1993) 7 NWLR (Part 307) 554 at p. 583 D.

*".....I venture to suggest that for a condition to nullify G judicial proceeding, it must be a substantive provision which affects the jurisdiction or competence of the Court, or a procedural defect in the proceedings which would result in a miscarriage of justice....."*

See also Onifade v. Olayiwola (supra) per Agbaje, JSC, at .p 168 D-E. Appellant must establish any prejudice to him for failure by the Court below to give a decision on admissibility vel non of Exhibit 'E' bearing in H mind the highly probative value of that Exhibit. I am therefore of the firm view that the record of appeal contains all the pieces of evidence needed to determine whether Exhibit 'E' is admissible and therefore properly admitted in evidence. (p. 2758 E)

***Words & Phrases - Miscarriage of justice***

3. Miscarriage of justice has been variously defined in the case of Total (Nigeria) Limited & Anor. v. Wilfed Nwako & Anor. (1978) 5 S.C. 1 at p.14 where this court adopted its definition as:

".....Such a departure from the rules which permeate all judicial process as to make what happened not in the proper sense of the word judicial procedure at all" vide Devi v. Roy (1946) A. C. 508 at 521. See also Nnaji for v. Ukonu (1986) 4 NWLR (Part 36) 505 at pages 516-517 - where the above definition was approved.

What will constitute a miscarriage of justice may vary, not only in relation to particular facts, but also with regard to the jurisdiction which has been invoked by the proceedings in question, and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceeding said to be affected by the miscarriage. See Adigun v. A. G. of Oyo State (1988) 1 NWLR (Part 53) 628. It is enough if what is done is not justice according to law. See Okonkwo v. Udo (1997) 9 NWLR (Part 519) 16 at page 20. (p. 2759 H)

***Appeals - Retrial order***

4. Where a trial Court or the Court below fails to advert its mind and treat all issue in controversy fully and there is sufficient material before the Appellant Court for the resolution of the matter, an order of retrial will not be made. See Okeowo & Son v. Migliore & Ors. (1979) ANLR 280, at page 381 and Awote v. Owodunni (N0.2) (1987) 2 NWLR (Part 57) 367 at 369 E-F. The Court itself will resolve the issue. (p. 2760 D)

***Appeals - Findings of fact***

5. It is my firm view that in the determination of the issue, the trial court failed to draw the proper conclusions and inferences from the evidence before it and the court below so found.

Appellate Court ought not to interfere with findings of fact of trial Courts which had the unique opportunity of seeing and hearing the

witnesses give evidence and observing their demeanour in the witness box. There are however, a number of exceptions to this rule, a major exception being that where such findings are in fact inferences from findings properly made, the Court of Appeal is in as good a position as the trial Court to come to a decision. See Chief Frank Ebba v. Chief Warri Ogodu (1984) 4 S.C. 84 at pages 98 - 100; Fabunmi v. Agbe (1985) 1 NWLR (Part 2) 200 at 314; Fatoyinbo v. Williams (1955) 1 F. S. C. 87 and Ukatta v Ndinaeze (1997) 4 NWLR (Part 499) 257 at page. 263. (p. 2761 B)

### ***Appeals - Findings that are perverse***

6. An Appellate Court will also interfere with findings of fact where such findings are perverse.

In the instant case, I take the firm view that the Court below was justified in interfering with the findings of fact of the learned trial Judge which as herein demonstrated, were in fact perverse. While the evidence of PW1, PW2 and PW3 was categorical that the Respondent hit the deceased at the back of the neck, Exhibit 'E' is positive that the cause of death was due to "extensive skull fracture with severe hemorrhage" which occurred on the left side of the head. From the evidence the finding of the learned trial Judge:-

*"that during the fight the accused took the plank Exhibit 'C' pursued late Barrister Okpara hit him with the plank on the Upper part of his neck particularly at the left hand side of his head"*  
cannot be supported.

These contradictions, which bring out the conflict between the assertions of the prosecution witnesses and Exhibit 'E' as to the cause of death were too serious to be ignored that the doubt thus created, I must say, should be resolved in favour of the accused (Respondent herein ). See Namsuh v. The State (1993) 5 NWLR (Part 292) 129 at page 145 E-F and page 146 paragraphs A-13 (p. 2761 F/H)

### ***Judgments - Perverse decision***

7. A decision is said to be perverse:-

(a) When it runs counter to the evidence; or

(b) Where it has been shown that the trial Court took into account matters which it ought not to have taken into account or shuts its eyes to the obvious; or

(c) When it has occasioned a miscarriage of justice. B

See Missr v. Ibrahim (1974) 5 S. C. 55; Incar Ltd. v. Adegboye (1985) 2 NWLR. 455 and Ramonu Atolagbe v. Shorun (1985) 4 S.C. (Part 1) 250 at 282. (p. 2761 F)

### ***Evaluation of evidence***

8. Resort to the phrase "I believe" or "I find as a fact" when used by a trial Judge is not final and conclusive. They must be backed by substance which led to the conclusion. Indeed, there must be a reason for believing one witness and disbelieving the other. See Board of Customs & Excise v. Ibrahim Barau (1982) 10 S. C. 48 at 137. (p. 2762 F) D

### ***Evidence - Duty of the prosecution***

9. It is trite that the prosecution has a duty to place before the Court all E available relevant evidence. This does not mean that a whole host of witnesses must be called upon the same point, but what it does mean is that if there is a vital point in issue and there is one witness who will settle it one way or the other, that witness ought to be called. See Opayemi v. The State (1985) 2 NWLR (Part 5) 101 at 108H-109E. (p. 2763 C) F

### ***Criminal procedure - Burden of proof***

10. In Criminal Cases the burden of proving the charge lies on the prosecution while the standard of proof is proof beyond reasonable doubt. G See Asariyu v. The State (1987) 4 NWLR (Part 67) 709; Paul Ameh v. The State (1978) 6/7 S. C. at 35. (p.2763 E)

### ***Murder - Defence***

11. Where therefore a person accused of murder raises the defence that H it was somebody else who killed the deceased, it is part of the onus on the prosecution to prove its case beyond reasonable doubt to disprove

that assertion and defence. It is incumbent on the prosecution to rebut the allegation by evidence. See Obri v. The State (1997) 7 NWLR (Part 513) 352; Opayemi v. The State (supra). (p. 2763 F)

**B Criminal procedure - Hostile witness**

12. The evidence on oath by Onyebuchi Okoro could surely have helped to resolve the issue as to how the deceased's skull came to be broken. He was therefore, in my view, a material witness. It is a settled principle of law that if the accused feels a witness is material he should call him. See Ohunyon v. The State (1996) 3 NWLR (Part 436) 264. In the instant case, the witness (Onyebuchi Okoro) will definitely not give evidence favourable to the Respondent; thus the issue of a hostile witness would arise, I agree with the Respondent that the witness ought to have been called if not for anything but for the purposes of being tendered for cross-examination by the prosecution as rightly found by the Court below. See Rex v. Thompson Udo Essien (1938) 4 WACA 112. (p. 2764 D)

E

**NOTABLE POINT OF INTEREST**

**ONU JSC**

**F 1. Why it is necessary to call an essential witness**

The need to call witnesses at all arises from the duty the law imposed on the prosecution to prove the essential ingredients of the crime. In a case of murder such as the one in hand, the contentious issue is not usually that the deceased is dead but as to who killed him. A lone witness, if believed can establish this issue. An Appellate Court will only intervene where an essential witness has not been called. See Ali v. The State (1988) 1 NWLR (Part 68) 1 at pages 17G-18C. (p. 2763 H)

**H REPRESENTATION**

Okiemute Mudiaga Odje Esq. for the Appellant  
Nwobidike Nwanodi Esq. for the Respondent



**CASES REFERRED TO**

Namsoh v. The State (1993) 5 NWLR (Part 292) 129  
Kalu v. The State (1988) 4 NWLR (Part 90) 503  
Ogoala v. The State (1991) 2 NWLR (Part 175) 509 at page 526 G-H  
State v. Danjuma (1997) 5 NWLR (Part 506) 512 at 528 H-529 D B  
Chukwu v. The State (1996) 7 NWLR (Part 465) 686  
Opayemi v. The State (1985) 2 NWLR (Part 5) 101 at 108H-109E  
Ogoala v. The State (1991) 2 NWLR (Part 175) 509  
Asariyu v. The State (1987) 4 NWLR (Part 67) 709 C  
Ameh v. The State (1978) 6/7 S. C. at 35  
Omogodo v. The State (1981) 5 S. C. 5 at 21  
Obri v. The State (1997) 7 NWLR (Part 513) 352  
Ohunyon v. The State (1996) 3 NWLR (Part 436) 264  
Rex v. Essien (1938) 4 WACA 112 D

**STATUTE REFERRED TO**

Evidence Act, Cap.112, Laws of the Federation of Nigeria, 1990, s. 42(1) E

**LEAD JUDGMENT BY ONU JSC**

On 4th May, 2000, I summarily dismissed this appeal and reserved the reasons for my decision therefor to today. We did not feel obliged to call on the learned counsel for the Respondent to reply. I F herein proffer my reasons briefly as follows:-

At the conclusion of the prosecution's case before the trial High Court against the Respondent for murder punishable under Section 319 (1) of the Criminal code, that Court (per Olukole, J.) sitting at Omoku G returned a verdict of quality against the Respondent and accordingly sentenced him to death by hanging on 18th October 1991. The Court of Appeal, holden at port-Harcourt (Coram: katsina-Alu, Uwaifo, JJ, CA as they then were and Nsofor, J.C.A) to which the Appellant's appeal lay, after a dispassionate appraisal of the case reversed the trial Court's decision by holding, inter alia, as follows:- H

*"It will be seen plainly that the cause of death is consistent with the version of the Appellant. His case was that he was held by the de-*

*ceased and Onyebuchi Okolo who was armed with a stick (sic) took an aim at his head. He dodged and the deceased was hit on the left side of his head.*

*The deceased slumped and was taken to Hospital. The medical evidence is that the deceased suffered a fractured skull. He did not suffer a broken neck which would have been consistent with the evidence called by the prosecution.*

*In conclusion, the failure of the learned trial Judge to consider and examine the defence of the Appellant led to a miscarriage of justice. Secondly, the prosecution failed to establish that it was the act of the Appellant that caused the death of the deceased. It was unsafe to convict the Appellant on the evidence available. The conviction cannot stand."* (Underlining above is mine for emphasis).

*Not satisfied with the decision of the Court below, the prosecution have most unusually, appealed to this Court on five grounds of Appeal against the accused/respondent's acquittal. The Appellant has submitted four issues for our determination, while the Respondent for his part, even though equally proffering four issues, has ultimately condensed them into two as arising for consideration. I am of the view that the two Respondent's issues are enough to dispose of the appeal. The two issues ask:-*

*"A. was the Court below right in making use of the contents of Exhibit 'E' in arriving at the decision it handed down in the Appeal before it (Ground 4 of the Grounds of Appeal).*

*B. If Exhibit 'E' was properly admitted in evidence was the Court below justified in their decision that the trial Court did not arrive at a fair decision on the case before it as presented by the prosecution and the Defence? (Grounds 1, 2, 3 and 5),"*

ISSUE NO. 'A'.

*I will first of all consider Issue No. A. which questions whether the Court below was right to use Exhibit 'E' in arriving at its decision. In answer thereto, it is pertinent to stress that Exhibit 'E' is the Medical Report obtained by the police in the course of their investigation into the death of the deceased, Barrister Okpara (Barrister was his first name and*

does not indicate his profession). One Dr, Chinwa of the University of Port-Harcourt Teaching Hospital (UPTH), a medical doctor, performed a post-mortem examination on the body of the deceased. The identification of the deceased's body was made by his brother called Christian Okpara, who testified as PW. 5 through whom the prosecution sought to tender this report but was objected to by the defence. The learned trial Judge gave a considered ruling and admitted the report as Exhibit 'E' through the 6th P.W. to whom Dr. Chinwa had handed it before he travelled Overseas. The learned Judge's Ruling was Further explained in his judgment by stating that what the 6th P. W. did was to comply with Section 42(1) of the Evidence Act, Cap. 112 Laws of Federation of Nigeria. **A Medical Officer in the service of a State for purposes of undertaking a post-mortem examination is a pathologist and his report is a certificate as envisaged in Section 42(1) (a) of the Evidence Act (ibid). The Certificate when tendered and admitted in evidence is regarded as sufficient evidence of the facts stated therein.**

The learned trial Judge's ruling, as later explained in his Judgment, cannot in my view, be faulted. **The situation is very similar to what happened in the case of EHOT v. THE STATE (1993) 4 NWLR (Part 290) 644 at page 657G to page 658B wherein it was held as perfectly permissible for such a report to be tendered where the doctor who authored it was out of the Country. As in the analogous case of EHOT (supra), the defence in the instant case never requested for Dr. Chinwa to present himself for cross-examination. The trial Court was therefore bound to accept Dr. Chinwa's certificate as sufficient evidence of the facts therein stated. A fortiori, the Court below was justified in confirming that ruling. For come to think of it, the issue in the Court below was whether Exhibit 'E' and the evidence of Pw. 4 Dr. M. Gogo-Abiti, of University of port-Harcourt Teaching Hospital, Port-Harcourt are legally admissible.**

For the purpose of this judgment nothing further will be said about the evidence of D. W. 4 as there has been no complaint about it. Our query therefore relates only to the admissibility of Exhibit 'E' and whether the Court below came to any decision on it. I am satisfied that

the court below did satisfy itself that Exhibit 'E' was admissible before making use of it in arriving at its decision notwithstanding the fact that it was not stated categorically that its admissibility was being decided upon. In the course of the leading judgment (Per Katsina Alu, JCA as he then was) the Court below stated, inter alia thus:

*"Exhibit 'E' is a medical report. It was issued by Dr. Chinwa who performed the post-mortem examination on the body of the deceased. Exhibit 'E' was received in evidence through P.W.6 Inspector Bamidele Araba. Dr. Chinwa was out of the country at the time of the proceedings....."*

I am of the firm view that based on the above statement that sufficient reasons had been given in the judgment for the admissibility of Exhibit 'E'. I also hold that the omission of a statement such as:

*"for these reasons we hold that Exhibit 'E' is admissible in evidence."*

is not enough to warrant the conclusion that the issue as to admissibility of Exhibit 'E' was raised but not decided.

Assuming but not conceding, that I am wrong in the view I have taken, I must ask myself whether the absence of words indicating a definite statement that the Court below came to a decision on the issue of admissibility of Exhibit 'E' led to a miscarriage of justice in this case.

**The general rule is that a Court has a duty to pronounce on all material issue raised before it. See Olowolagba & Ors. v Bakare & Ors. (1998) 3 NWLR (Part 543) 528 at page 534 and Ukpai v. Okoro (1983) 2 SCNLR 380. But the result of a Court of Appeal not complying with this general rule depends on the facts and circumstances of each case. See Onifade v. Olayiwola (1990) 7 NWLR (Part 161) 130 at page 165 G-H. The question to ask is the nature of the act or omission about which a complaint has been laid. In this case the complaint is that the Court below cannot be said to have considered and given a decision on the question whether or not the trial Court should have admitted Exhibit 'E'. In order to answer that question I humbly refer to two well established rules for dealing with the question.**

The first rule may be stated as follows:-

*"where an Appellate Court is satisfied that the Court of Trial has been guilty of improper use of its powers in the performance of its adjudicative functions, it must go further and ask itself whether the error was such that it could be corrected from the evidence in cold print without injustice to either side. If it is, then the Appellate Court can correct the error, but if it is not, it must order a retrial."*

per Nnaemeka-Agu, JSC in Sanusi v. Ameyogun (1992) 4 NWLR (Part 237) 527 at P. 549 F-G.

The second rule defines the position in relation to substantive or procedural defects in the course of a trial. Karibi-whyte, JSC put it this way in Ejeliwu v. The State (1993) 7 NWLR (Part 307) 554 at p. 583 D.

*".....I venture to suggest that for a condition to nullify judicial proceeding, it must be a substantive provision which affects the jurisdiction or competence of the Court, or a procedural defect in the proceedings which would result in a miscarriage of justice....."* See also Onifade v. Olayiwola (supra) per Agbaje, JSC, at .p 168 D-E. Appellant must establish any prejudice to him for failure by the Court below to give a decision on admissibility vel non of Exhibit 'E' bearing in mind the highly probative value of that Exhibit. I am therefore of the firm view that the record of appeal contains all the pieces of evidence needed to determine whether Exhibit 'E' is admissible and therefore properly admitted in evidence.

It is common ground that Exhibit 'E' was tendered by the Appellant (Prosecution). It is also clear from the records that the Appellant (Prosecution) never cross-appealed on it's (Exhibit E's) admissibility in the court below. As I earlier pointed out on the position in relation to substantive or procedural defects in the course of the trial, any attack based on alleged lack of consideration of the issue relating to Exhibit 'E' must show that the lack of consideration led to a miscarriage of justice. Miscarriage of justice has been variously defined in the case of Total (Nigeria) Limited & Anor, v. Wilfed Nwako & Anor. (1978) 5 S.C. 1 at p.14 where this court adopted its definition as:

".....Such a departure from the rules which permeate all judicial process as to make what happened not in the proper sense of the word judicial procedure at all". vide Devi v. Roy (1946) A. C. 508 at 521. See also Nnaji for v. Ukonu (1986) 4 NWLR (Part 36) 505 at pages 516-517 - where the above definition was approved.

What will constitute a miscarriage of justice may vary, not only in relation to particular facts, but also with regard to the jurisdiction which has been invoked by the proceedings in question, and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceeding said to be affected by the miscarriage. See Adigun v. A. G. of Oyo State (1988) 1 NWLR (Part 53) 628. It is enough if what is done is not justice according to law. See Okonkwo v. Udo (1997) 9 NWLR (Part 519) 16 at page 20.

However, where a trial Court or the Court below fails to advert its mind and treat all issue in controversy fully and there is sufficient material before the Appellant Court for the resolution of the matter, an order of retrial will not be made. See Okeowo & Son v. Migliore & Ors. (1979) ANLR 280, at page 381 and Awote v. Owodunni (N0.2) (1987) 2 NWLR (Part 57) 367 at 369 E-F. The Court itself will resolve the issue. The issue is accordingly answered in the affirmative.

ISSUE NO. B:

The question posed in this issue is, whether the Court below was justified in its decision on the case before it as presented by the prosecution and defence. It is my desire to consider this issue on two planks. The first plank which is coterminous with the Appellant's 3rd Issue and whose grouse is as to whether the Court below came to the proper conclusion when it held that the trial court considered only case for the prosecution without considering the defence before convicting the Respondent. In other words, did the court below properly evaluate and assess the evidence of the prosecution and make proper findings thereon?

Did the trial Court at that point in time, namely, at that early stage of the case accept that:-

"..... the death of the deceased was caused by the blow inflicted on him on 30/1/88.....?"

Or that:-

".....the only point of dispute is whether the death was caused by the voluntary act of the accused person in this case and that to me is the only point for determination which I shall proceed straight to find out from the evidence the admissible evidence before me....."

**It is my firm view that in the determination of the issue, the trial court failed to draw the proper conclusions and inferences from the evidence before it and the court below so found.**

**Appellate Court ought not to interfere with findings of fact of trial Courts which had the unique opportunity of seeing and hearing the witnesses give evidence and observing their demeanour in the witness box. There are however, a number of exceptions to this rule, a major exception being that where such findings are in fact inferences from findings properly made, the Court of Appeal is in as good a position as the trial Court to come to a decision. See Chief Frank Ebba v. Chief Warri Ogodu (1984) 4 S.C. 84 at pages 98 - 100; Fabunmi v. Agbe (1985) 1 NWLR (Part 2) 200 at 314; Fatoyinbo v. Williams (1955) 1 F. S. C. 87 and Ukatta v Ndinaeze (1997) 4 NWLR (Part 499) 257 at page. 263.**

**An Appellate Court will also interfere with findings of fact where such findings are perverse. A decision is said to be perverse:-**

(a) When it runs counter to the evidence; or  
(b) Where it has been shown that the trial Court took into account matters which it ought not to have taken into account or shuts its eyes to the obvious; or

(c) When it has occasioned a miscarriage of justice.  
See Missr v. Ibrahim (1974) 5 S. C. 55; Incar Ltd. v. Adegboye (1985) 2 NWLR. 455 and Ramonu Atolagbe v. Shorun (1985) 4 S.C. (Part 1) 250 at 282.

**In the instant case, I take the firm view that the Court**

below was justified in interfering with the findings of fact of the learned trial Judge which as herein demonstrated, were in fact perverse. While the evidence of PW1, PW2 and PW3 was categorical that the Respondent hit the deceased at the back of the neck, Exhibit 'E' is positive that the cause of death was due to "extensive skull fracture with severe hemorrhage" which occurred on the left side of the head. From the evidence the finding of the learned trial Judge:-

*"that during the fight the accused took the plank Exhibit 'C' pursued late Barrister Okpara hit him with the plank on the Upper part of his neck particularly at the left hand side of his head"*

cannot be supported.

These contradictions, which bring out the conflict between the assertions of the prosecution witnesses and Exhibit 'E' as to the cause of death were too serious to be ignored that the doubt thus created, I must say, should be resolved in favour of the accused (Respondent herein ). See Namsoh v. The State (1993) 5 NWLR (Part 292) 129 at page 145 E-F and page 146 paragraphs A-13; Kalu v. The State (1988) 4 NWLR (Part 90) 503 at page 150 'F' at page 513 A-D; Ogoala v. The State (1991) 2 NWLR (Part 175) 509 at page 526 G-H; State v. Danjuma (1997) 5 NWLR (Part 506) 512 at 528 H-529 D; and Chukwu v. The State (1996) 7 NWLR (Part 465) 686 at 697-698 C and 701 G-H. The learned trial Judge having failed to properly evaluate the evidence before him the lower Court was duty bound to intervene and evaluate same for reasons earlier given. Besides, I am to stress that **resort to the phrase "I believe" or "I find as a fact" when used by a trial Judge is not final and conclusive. They must be backed by substance which led to the conclusion. Indeed, there must be a reason for believing one witness and disbelieving the other. See Board of Customs & Excise v. Ibrahim Barau (1982) 10 S. C. 48 at 137.** The learned Counsel for Appellant's assertions by the use of epithets such as no "attempt whatsoever to assemble, collate, assess, discuss, evaluate and or review the respective versions of the evidence led by the prosecution and the defence ..... "and "jumped the gun into rejecting and



reversing .....findings of fact made by the trial Judge" are untenable and lacked force and reasoning.

The Lower Court evaluated the evidence and found that it did not support the finding by the learned trial Judge. I hold that the justices of the Lower Court were justified in reversing his decision for reasons I B had herein -before given.

Onyebuchi Okoro - a material witness not called.

Coming to the second plank of Issue B, the question posed is as to whether there was adequate and proper investigation of the allegation that Onyebuchi C Okoro was responsible for the death of the deceased and therefore a material and essential witness who ought to have been called by the prosecution.

**It is trite that the prosecution has a duty to place before D the Court all available relevant evidence. This does not mean that a whole host of witnesses must be called upon the same point, but what it does mean is that if there is a vital point in issue and there is one witness who will settle it one way or the other, that witness ought to be called. See Opayemi v. The State (1985) 2 NWLR (Part E 5) 101 at 108H-109E; Ogoala v. The State (1991) 2 NWLR (Part 175) 509. In Criminal Cases the burden of proving the charge lies on the prosecution while the standard of proof is proof beyond reasonable doubt. See Asariyu v. The State (1987) 4 NWLR (Part 67) F 709; Paul Ameh v. The State (1978) 6/7 S. C. at 35 and Philip Omogodo v. The State (1981) 5 S. C. 5 at 21.**

Where therefore a person accused of murder raises the defence that it was somebody else who killed the deceased, it is part of the onus on the prosecution to prove its case beyond reasonable doubt G to disprove that assertion and defence. It is incumbent on the prosecution to rebut the allegation by evidence. See Obri v. The State (1997) 7 NWLR (Part 513) 352; Opayemi v. The State (supra) and Ozaki v. The State (1990) 1 NWLR (Part 124) 120 D-E and 125 D-E in H relation to the defence of alibi.

The need to call witnesses at all arises from the duty the law imposed on the prosecution to prove the essential ingredients of the crime.

In a case of murder such as the one in hand, the contentious issue is not usually that the deceased is dead but as to who killed him. A lone witness, if believed can establish this issue. An Appellate Court will only intervene where an essential witness has not been called. See Ali v. The State (1988) 1 NWLR (Part 68) 1 at pages 17G-18C. The contention of the Appellant's Counsel on the failure of the prosecution to call Onyebuchi Okoro is misconceived. It is not the case of failing to call a witness but failing to call a material and essential witness whom the accused (Respondent) alleges has committed the offence - a witness who when the police arrested and confronted him, gave conflicting accounts of his whereabouts vide Exhibits 'D' and 'F'. No reason was given by the prosecution for the police failure to continue this line of investigation. See Theophilus v. The State (1996) 1 NWLR (Part 423) 139 at page 151 C-D.

**D. The evidence on oath by Onyebuchi Okoro could surely have helped to resolve the issue as to how the deceased's skull came to be broken. He was therefore, in my view, a material witness. See Akpan v. The State (1991) 3 NWLR (Part 182) 646 at page 659 E-F, and Ali v. The State (supra). It is a settled principle of law that if the accused feels a witness is material he should call him. See Ohunyon v. The State (1996) 3 NWLR (Part 436) 264.**

**In the instant case, the witness (Onyebuchi Okoro) will definitely not give evidence favourable to the Respondent; thus the issue of a hostile witness would arise, I agree with the Respondent that the witness ought to have been called if not for anything but for the purposes of being tendered for cross-examination by the prosecution as rightly found by the Court below. See Rex v. Thompson Udo Essien (1938) 4 WACA 112.**

The police were similarly inclined and that accounts for Okoro being arrested twice wherein he gave two stories of his whereabouts when the incident occurred. As earlier pointed out, since Onyebuchi Okoro's conflicting statements were inconclusive, it was incumbent on the police to have ensured that they filled in the gaps or if they believed they had enough "eye-witnesses" to produce Onyebuchi Okoro for the Respondent to cross-examine him. See Akpan v. The State (supra) at page 659.

The case of Idowu v. The State (1998) 13 NWLR (Part 582) 391 upon which the Appellant strongly relied is, with due respect, inapplicable to the peculiar facts of this case. The witnesses that were not called in Idowu's case (supra) were neither eye-witnesses nor witnessess when the Respondent allegedly committed the offence. In the instant case, B there was a conflict between the evidence of PW1, PW2 and PW3, the so called eye-witnesses. This fact was absent in the Ohunyon's Case (supra), in which the trial Court found that the prosecution's evidence was direct and supported by medical evidence. Furthermore, the investigating police Officer in Ohunyon's case testified that from his investigation C the culprit had no link with the death of the deceased. Contrast this with the present case where the police arrested Onyebuchi Okoro, took two statements from him, which were conflicting and did not exculpate the said Onyebuchi Okoro. Two other persons, Kenneth Banigo and DW3, D according to the police (PW4) said Onyebuchi Okoro was the culprit. DW2 confirmed that Onyebuchi Okoro made two statements which were conflicting and did not exculpate the said Onyebuchi Okoro. DW2 also confirmed that Onyebuchi Okoro was in Okposi on the date of the incident and that the earlier reported him to the police. From the totality of the evidence it is palpable that the prosecution withheld a material and essential witness who would have weakened its case at the trial. The Court below rightly so held and I see no reason to interfere there with. E F

It was for these reasons for judgment that I too dismissed this appeal and affirmed the judgment of the Court below on the 4th day of May, 2000.

G

### KARIBI-WHYTE JSC

After hearing learned Counsel to the Appellant on the appeal against the judgment of the Court of Appeal, port Harcourt Division, on the 4th May, 2000, we unanimously dismissed the appeal without calling upon H learned Counsel to the Respondent for his reply. I reserved the reasons for my decision for today.

I have read the reasons given by my learned brother onu, JSC

for dismissing this appeal. I agree entirely with them, and since they accord in toto with my own reasons, I do not consider it necessary to duplicate the reasons. I herein adopt the reasons given in the judgment of my learned brother Onu, J. S. C. as my own.

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**OGWUEGBU JSC**

C I have read in draft the reasons for judgment just delivered by my learned brother Onu, J. S. C., in this appeal and I entirely agree. It was for those reasons, which I adopt, that I dismissed the appeal on 4th May, 2000..

D **IGUH JSC**

On the 4th day of May, 2000, I dismissed this appeal and then indicated that I would give my reasons for so doing today.

E I have since had the privilege of reading in draft the reasons for judgment just delivered by my learned brother, Onu, J. S. C. and I agree entirely with the reasoning and conclusions therein reached.

F This appeal is devoid of merit and the same is hereby dismissed. The acquittal and discharge of the respondent by the court below is hereby affirmed.

**AYOOLA JSC**

G Having had the privilege of reading in draft the reasons for decision given by my learned brother, Onu JSC, and being in agreement with the reasons he gives, I am content to adopt his reasons for my decision to dismiss this appeal. I do not wish to add anything to the reasons he gives.

H