

SUPREME COURT OF NIGERIA
20TH APRIL, 2001. SC. 200/2000
CORAM: A. G. KARIBI-WHYTE, I. L. KUTIGI, O. ACHIKE,
A. O. EJIWUNMI, E. O. AYOOLA, JJSC.

CHIMA IJIOFFOR APPELLANT
V.
STATE RESPONDENT

APPEALS - Judgment - Hearsay evidence - Conviction based on hearsay evidence - Appellate court may quash such conviction - In the absence of other evidence (H 4)

CRIMINAL PROCEDURE - Proof - Beyond reasonable doubt - Circumstantial evidence - Conviction based on circumstantial evidence - Is proof beyond reasonable doubt in this case (H 8)

CRIMINAL PROCEDURE - Witnesses - Prosecution's duty - Lies in calling such witnesses - Required to establish the case (H 7)

EVIDENCE - Circumstantial evidence - Conviction - Based on circumstantial evidence - Is permitted - But the evidence relied on must be narrowly considered (H 5)

EVIDENCE - Circumstantial evidence - Conviction - What must be established - Before circumstantial evidence can sustain the conviction of an accused (H 6)

EVIDENCE - Hearsay evidence - Meaning of hearsay evidence (H 1)

EVIDENCE - Hearsay evidence - Witnesses - Where they gave evidence - Only upon what they saw and or experienced - Having regard to the provisions of s. 77 of the Evidence Act - It cannot be said that they gave hearsay evidence (H 2)

EVIDENCE - Hearsay rule - Rationale for the rule (H 3)

FACTS

_____ In the High Court sitting at Benin City, the appellant was charged upon an information filed by the State, that on or about the 29th day of November, 1994 at Benin City, he murdered one Endurance Osayima, punishable under Section 319(1) of the Criminal Code Cap. 48 Vol.II Laws of Bendel State of Nigeria, 1976, applicable in Edo State. The appellant denied committing the offence. The prosecution called six witnesses in support of its case. The case of the prosecution is that the appellant and P.W.1 were lovers and as a result of that relationship, P.W.1 first became pregnant in 1993 for the appellant. That pregnancy was terminated at the request of the appellant because according to him, his family would not accept a pregnancy in such circumstances. After the pregnancy was aborted they continued with their relationship which culminated in another pregnancy. The appellant again insisted that P.W.1 aborts it but she refused to abort the pregnancy. Eventually she delivered a baby boy who was named Endurance Osayima, the deceased who was later allegedly murdered by the appellant.

However, the appellant did not relent to his opposition to P.W.1 having a child for him having regard to the nature of their relationship. He showed this sometime after the birth of the deceased when he visited the house of P.W.1. On that day after he had enquired about the parents of P.W.1 and was told that they were not at home, he threatened that he would kill the child since the mother had refused to abort the pregnancy as he had requested her to do. He came again to P.W.1's house on 29th November, 1994 at about 7:30pm. After learning that the parents of P.W.1 were not at home, he left. Sometime afterwards on the same day, the appellant returned to the house of P.W.1. He met P.W.1 and other children of the family dancing. The appellant requested P.W.1 to bring the deceased to him. P.W.1 complied. She left the deceased with the appellant and went to the backyard to wash the soiled baby's pant. The other children were given N20 by the appellant to go and buy coke for themselves.

Few minutes thereafter, P.W.1 heard the baby crying rather

loudly and she ran at once to the room where the baby and the appellant were. The appellant handed the deceased over to P.W.1 who noticed that the deceased's mouth was white. P.W.1 asked the appellant what he put in the baby's mouth but there was no answer. Appellant instead urged P.W.1 to breast-feed the deceased. P.W.1 attempted to breast-feed the deceased but he refused to suck the breast, rather she noticed the baby stretched. It was at this time that the appellant ran away through the bush. Soon afterwards the deceased was rushed to the hospital where he was pronounced dead. The doctor P.W.6 who performed the post-mortem affirmed the cause of death to be corrosive poisoning resulting in chemical burns and shock. The appellant admitted visiting P.W.1's house on the ill fated day. He saw that the deceased was crying and couldn't suck the mother's breast. But he denied having anything to do with his death.

At the close of the hearing, the learned trial judge held that the prosecution had established their case beyond reasonable doubt and convicted the appellant as charged, sentencing him to death by hanging. The appellant appealed to the Court of Appeal unsuccessfully. He has now appealed to the Supreme Court raising four issues, while the respondent raised two issues similar to the issues raised by the appellant. The appeal was determined on the respondents two issues.

ISSUES FOR DETERMINATION

(1) whether the circumstantial evidence was sufficient to warrant the conviction of the appellant for the offence of murder and

(2) whether the prosecution proved the case of murder against the appellant beyond reasonable doubt.

HELD (Unanimously dismissing the appeal per lead judgment of EJI-WUNMI JSC)

Evidence - Hearsay evidence

1. Hearsay evidence or hearsay rule has been succinctly formulated by professor Cross thus:-

"Express or implied assertions of persons other than the witness who is testifying and assertions in documents produced to the court when

no witness is testifying are inadmissible as evidence of that which is asserted." (p. 1357 C)

Hearsay evidence - Witnesses

- B 2. After a careful perusal of the evidence of each of these witnesses, I cannot find any part of their evidence where anyone stated that the appellant gave acid to the deceased. Each of these witnesses gave evidence only upon what they saw, and or experienced during the incident. C It certainly cannot be said having regard to the provisions of S. 77 of the Evidence Act (supra) referred to above that any of these witnesses gave evidence of what he did not see or hear himself. (p. 1358 A)

Evidence - Hearsay rule

- D 3. The hearsay rule is a very salutary rule indeed. It is a rule which is grounded upon common sense as the focus of it is to prevent a person from being accused or found guilty of an offence which he did not commit. It is a self evident fact that malevolent people could manufacture such evidence as they could to falsely accuse persons of offence which E they did not commit. By reason of this rule, courts are enjoined and indeed under a duty not to accept and/or convict an accused person upon testimony of witnesses who did not see, hear, or had not perceived by any other sense or in any other manner, the facts given in their tes- F timony at a criminal trial of an accused person, as in the instant case, or even in a civil case. This rule, except for such exception as the res gestae rule and certain recognised statutory exceptions, which we are not concerned with in this case, is mandatory for all courts. (p. 1358 B)

G Appeals - Judgment

4. Should a trial court convict an accused upon evidence adjudged to be "hearsay" evidence an appellate court may quash such conviction, if there are no other evidence upon which the conviction of the accused could be properly and safely be convicted (sic affirmed). (p. 1358 E)

H Evidence - Circumstantial evidence

5. The appellant was not convicted upon hearsay evidence, I must

therefore say that the learned counsel for the appellant was wrong with regard to that submission. Contrary to his submission the appellant was clearly convicted upon a specie of evidence generally referred to as circumstantial evidence. Circumstantial evidence is receivable in criminal as well as in civil cases; and, indeed, the necessity of admitting B such evidence is more obvious in the former than the latter; for, in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not C available, the judge sitting alone as a judge of law and facts is permitted to complete the elements of guilt or establish innocence. In other words the judge is permitted to raise a presumption from the proof of some fact the existence of another fact without further proof of that other fact. In raising this inference the evidence relied upon must be D narrowly considered. (p. 1360 D)

Circumstantial evidence - Conviction E

6. For circumstantial evidence to sustain the conviction of an accused, it must be established that the evidence relied upon must be consistent with the prisoner's guilt and inconsistent with any other rational conclusion. It is also necessary before drawing the inference of accused's F guilt to be sure that there are no other co-existing circumstances which would weaken such inference. See *Obalum Anekwu v. The State* [1976] 10 S.C. 255; 264. (p. 1364 E)

G Witnesses - Prosecution's duty

7. The prosecution's duty lies in calling such witnesses as they would require to establish their case against an accused person. See *Buba v. State* (1992) 1 N.W.L.R. (pt. 215). The question is, as always, what this witness would say that would affect the proof or not of the guilt of the H appellant. And that question remains to be answered in the argument set forth for the appellant. Therefore in my respectful view, the contention that the prosecution failed to call a particular witness, namely the

grandmother of p.w.1, does not avail the appellant. (p. 1366 F)

Proof beyond reasonable doubt

8. The trial court and the lower court duly considered and evaluated all the evidence relevant to the case as it affected the guilt or otherwise of the appellant. In the result though the appellant was convicted upon circumstantial evidence, it is, nevertheless, proof beyond reasonable doubt of the guilt of the appellant. (p. 1367 B)

C NOTABLE POINTS OF INTEREST

EJIWUNMI JSC

1. Why circumstantial evidence is often the best evidence

In drawing inference of the guilt of an accused person from circumstantial evidence, great care must be taken not to fall into serious error based on fallibility of inference. Circumstantial evidence must always be narrowly examined. On the other hand, it has been said that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of Mathematics. It is no derogation of evidence to say that it is circumstantial. (p. 1364 F)

2. Test which circumstantial evidence must satisfy

It may also be noted that there is no yardstick by which any circumstantial evidence can be measured before a conviction can be entered against an accused person charged with the offence for which the circumstantial evidence is the only one available. Each case depends on its own facts but the one test which such evidence must satisfy is that it should lead to the guilt of the accused person and leave no degree of possibility or chance that other persons could have been responsible for the commission of the offence. (p. 1364 H)

ACHIKE JSC

H 3. Prosecutor's responsibility as regards fielding witnesses

The prosecutor's responsibility is to establish its case beyond reason-

able doubt in order to secure the conviction of the appellant. How they get around achieving this is entirely the business of the prosecution. Whether they field one, two or more witnesses in satisfaction of such proof will surely depend on the circumstances of each case. But under no circumstances will the accused person dictate to the prosecution regarding the person or number of persons that they must field as witness or witnesses. In the case under consideration, the trial court nodded approval that the prosecution proved the case against the appellant to the hilt and this decision was affirmed by the lower court. Learned counsel for the appellant has merely argued that the prosecution's failure to field a particular witness was fatal to their case without expressly pinpointing how that contention has in fact affected the prosecution's case in any way. This appellant's assertion, without more, cannot seriously affect or dent the case of the prosecution whose duty it was to field such witnesses as it may desire in discharged of their duty to establish the guilt of the appellant upon the high standard of proof, to wit, proof beyond reasonable doubt. (p. 1375 G)

REPRESENTATION

I. E. Imadegbelo (with him, J. O. Bamidele) for the Appellant.
M.O. Omozeghian, A.C.L.O., Min. of Justice, Edo St. for Respondent.

CASES REFERRED TO

R. v. Sala Sati (1938) 4 W. A. C. A. 10
Stephen Ukorah v. The State (1977) 4 S.C. 167
Valentine Adie v. The State (1980) 1-2 S.C. 116
Paulinus Udedibia & Ors. v. The State (1976) 11 S.C. 133; (1976) N.S.C.C. 1
Obalum Anekwe v. The State (1976) 10 S.C. 255
Igho v. The State (1978) N. S. C. C. 166
Ann Nash (1911) 6 C. A. R. 255
Lori v. State (1980) 8-11 S.C. 81
Ewewoh v. The State (1990) 4 N. W. L. R. (pt. 145) 469
Buba v. The State (1992) 1 N. W. L. R. (pt. 215)

STATUTE REFERRED TO

Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, s.77

BOOKS REFERRED TO

Cross on Evidence, 4th Edition, p.387

B ACHIBOLD Criminal Pleading Evidence and Practice, 39th Ed. Para. 1143.

LEAD REASONS FOR JUDGMENT BY EJIWUNMI JSC

C At the conclusion of the hearing of this appeal on the 25th of January 2001, this appeal was dismissed by me. Thereafter I indicated that my reasons for its dismissal would be given on the 20th April 2001.

D The appellant was charged upon an information filed by the State, that on or about the 29th day of November, 1994 at Benin City in the Benin Judicial Division, he murdered one Endurance Osayima, punishable under section 319(1) of the Criminal Code Cap. 48 Vol. 11 Law of Bendel State of Nigeria, 1976, applicable in Edo State. Following the plea of the appellant that he was not guilty of the offence, the State called six witnesses in support of the case for the prosecution. The appellant then gave evidence in his own behalf. He did not call any other witness to testify on his behalf.

F The facts of the case made out for the prosecution may be set out thus. The appellant and Magdalene Airhuoyuwa, p.w.1, were evidently lovers and as a result of that relationship, the p.w.1 first became pregnant in 1993 for the appellant. That pregnancy was terminated as the appellant clearly told p.w.1, that his family would not accept a pregnancy in such circumstances. After that pregnancy was aborted they continued with their relationship which culminated in another pregnancy. Upon being informed of her condition by p.w.1, the appellant again told p.w.1 to abort it. Though according to p.w.1, appellant gave her sum of N1,800 for that purpose, she refused to abort the pregnancy. Eventually, she delivered a baby boy who was named Endurance Osayima and who later became the victim of this murder. He would be referred to as Endurance from now. It would appear that the appellant did not relent in his opposition to p.w.1 having a child for him having regard to the nature of their relationship. This he made

manifest sometime after the birth of Endurance when he visited the house of p.w.1. On that day after he had enquired after the parents of p.w.1 and was told that they were not at home, he threatened that he would kill the child since the mother had refused to abort the pregnancy as he wanted her to do. He came again to the p.w.1's house on the 29th November, 1994 at about 7.30 p.m. When he came, after learning that the parents of p.w.1. were not at home, he left. Sometime afterwards and on the same day, i.e., 29th November, 1994, the appellant returned to the house of p.w.1. When he came in this time, he met p.w.1 and other children in the family dancing. The appellant then asked p.w.1 to bring the baby, i.e. late Endurance to him, where he was sitting on the bed. Though the mother, p.w.1, explained to the appellant that the baby had excreted in his pant, he insisted that the baby be handed over to him. P.w.1 then gave the baby to him after she had removed the dirty pant. About that time, appellant gave the children the sum of twenty Naira to go out to buy coke for themselves. Soon after handing over baby Endurance to the appellant, p.w.1, went to the backyard to wash the baby's pant that was soiled.

E While washing the pant at the backyard, p.w.1 heard the baby crying loudly and she ran immediately into the room where she left the appellant and baby Endurance. The appellant then gave her the baby, but p.w.1 notice immediately that the mouth of the baby was white. P.w.1 then asked immediately the appellant what he had put in the mouth of baby Endurance. Appellant did not answer that question. Rather he kept saying repeatedly, "breastfeed the baby". P.w.1 dutifully offered her breast to the baby, but to her dismay baby Endurance could not suck the breast, rather she noticed the baby stretching. At that moment, appellant ran away through the bush facing the house of the father of p.w.1.

H Soon after the appellant ran away baby Endurance was rushed immediately by p.w.1 to where her mother was. From there baby Endurance was carried to the hospital where he was pronounced dead.

Dr. Suleiman Abu, the Chief Consultant pathologist, was invited by the police on 29/11/94 to carry out a post-mortem examination on

the body of the deceased, baby Endurance. The corpse was identified to the doctor by one Felix Airuoya. The evidence of the doctor following the post-mortem reads, inter alia, thus:-

"The corpse was that of a male child of average nutrition. Rigor mortis had passed away. There was no external injury. On examination internally there was yellowish necrotic substance (dead tissue) in the mouth. That extended down through the mouth to the gullet, stomach and to the intestine. There was some bleeding into the stomach. I took a scraping of the yellowish substance. The test on it was positive for acid litmus meaning acid test. All other systems appeared normal. I gave the cause of death in my opinion to be corrosive acid poisoning resulting in chemical burns and shock. The deceased was 10 weeks old. And under cross-examination the witness said, inter alia, as follows:-

"I did a blue litmus test and it turned pink. This irritates acid. The strength of the acid was unknown but the burns it created made me to estimate that it was a corrosive acid. A weak acid cannot be corrosive."

The appellant at the close of the case for the prosecution elected to give evidence in his behalf. But he did not call any witnesses in his defence. In the course of his evidence in chief he duly admitted his relationship with p.w.1 and the fact that p.w.1 became pregnant again for him which resulted in the birth of the deceased son, Endurance. It is also significant that he admitted that he went to the house of p.w.1 on the 29th of November, 1994. He claimed that when he got there he found p.w.1 with the child crying. He then told her to breastfeed the child, and she did so in his presence. But the child continued to cry, he had to take the child from the mother. However as the child continued to cry, he handed him over to the mother and left them. He further claimed that when he came back to the house later the same evening, he was arrested and beaten by the relations of p.w.1, who took him to the police station. It was at the police station that he learnt that the child had died as a result of acid poisoning. He denied that he had anything to do with the death of his son, baby Endurance. The learned counsel appearing thereafter addressed the court.

After a careful review of the evidence led at the trial, the learned trial judge gave a well considered judgment at the end of which the

learned trial judge held that the prosecution had established beyond reasonable doubt the guilt of the appellant for the offence of murder of baby Endurance as charged. The appellant was therefore convicted of the offence and sentenced to death by hanging.

The appellant thereafter lodged an appeal to the court below. His appeal was however dismissed. Hence, his further appeal to this court. Pursuant thereto, the learned counsel for the appellant, 1.E. Imadegbelo, Esq. filed and served the appellant's brief. And for the state, the respondent's brief was also filed and served.

For the appellant his learned counsel set down in the appellant's brief the following as the issues for the determination of the appeal:-

1. Whether the circumstantial evidence relied upon against the appellant was positive, cogent and conclusive.
2. Whether the failure of the prosecution to call a vital and material witness is not fatal to the prosecution's case.
3. Whether the prosecution proved its case beyond reasonable doubt against the appellant.
4. Whether or not the appellant was convicted on properly evaluated evidence.

For the State, however, two issues were identified for the determination of the appeal in the respondent's brief. They are (1) whether the circumstantial evidence was sufficient to warrant the conviction of the appellant for the offence of murder and (2) whether the prosecution proved the case of murder against the appellant beyond reasonable doubt.

It is my respectful view that the issues for the determination of his appeal set down for the appellant and respondent are not dissimilar. It is I think right to say that a proper appraisal of the grounds of appeal, the evidence revealed in the record and the judgments of the court below that the two issues for the determination of the appeal are as identified in the respondent's brief.

They first issue that falls to be considered is whether the circumstantial evidence relied upon against the appellant was positive, cogent and conclusive.

The thrust of the argument of learned counsel for the appellant

in the appellant's brief and in his oral submission before us is that the lower courts were wrong to have convicted the appellant upon evidence wrongly considered as circumstantial evidence. Though it is conceded that there was no direct evidence as to who killed the deceased, however
 B the learned counsel for the appellant classified the evidence of p.w.1, p.w.2, p.w.3 and p.w.4 relied upon to convict the appellant as doubtful circumstantial and hearsay evidence. He then went on to specifically contend that the evidence of those witnesses as to the poisoning of the
 C deceased by the appellant is hearsay, not circumstantial evidence. The premise of that his submission appears to be that none of them was present at the scene when the appellant allegedly gave the deceased corrosive acid.

In this context, it is his submission that the learned trial judge wrongly acted on this inadmissible hearsay when she held that:-

D "Since the child was alright before the accused came and accused was left alone with the deceased before the distress cry of the deceased the circumstantial evidence points to the accused and no other person as the person who gave the child corrosive acid which
 E caused the death of the deceased."

He further argued that the learned justice of the Court of Appeal, per Ba'aba, J.C.A., also fell into error when in upholding the finding of the trial court held thus:-

F "I agree with the finding of the learned trial judge that the circumstantial evidence points only to the appellant as the person who gave the child the corrosive acid which caused his death. As can clearly be seen, the evidence of p.w.2 corroborates the evidence of the prosecution, remained unchallenged and uncontroverted, despite the
 G rigorous cross-examination by the defence counsel."

In support of his submission learned counsel referred to several authorities. I will later in this judgment refer to them as deemed necessary.

H The learned counsel for the State has in opposition to the above position of the learned counsel for the appellant argued in the respondent's brief that the lower court was right to have upheld the

finding of the learned trial judge. He further argued that the finding and conclusion reached by the lower court be upheld. Several cases which would be considered in the later portion of his judgment were also referred to, to buttress the submission of learned counsel for the respondent.

It is manifest from the contending arguments of learned counsel that the crucial issue to be resolved in this appeal acutely rested on whether the appellant was properly convicted upon evidence adjudged to be circumstantial evidence.

C The contention of learned counsel for the appellant that the lower courts relied wrongly upon hearsay evidence to convict the appellant will first be considered. Hearsay evidence or hearsay rule has been succinctly formulated by professor Cross thus:-

D "Express or implied assertions of persons other than the witness who is testifying and assertions in documents produced to the court when no witness is testifying are inadmissible as evidence of that which is asserted."

(See cross Evidence, 4th Edition, p. 387).

E The above formulation of the hearsay rule, encompasses the provisions of section 77 subsections (a),(b),(c)and(d) of the Evidence Act, cap. 112 of Vol. V111 of the laws of Nigeria, 1990 which apart from the provisions thereto, read thus:-

F Section 77: Oral evidence must be, in all cases whatever, be direct-

"(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact.

(b) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact.

(c) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense in that manner.

(d) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds."

Having regard to the complaint of the appellant that p.w.1, p.w.2, p.w. 3 and p.w.4, each gave hearsay evidence that it was the appel-

lant who gave the deceased acid, I decided to re-read the evidence of these witnesses. After a careful perusal of the evidence of each of these witnesses, I cannot find any part of their evidence where anyone stated that the appellant gave acid to the deceased. Each of these witnesses gave evidence only upon what they saw, and or experienced during the incident. It certainly cannot be said having regard to the provisions of S. 77 of the Evidence Act (supra) referred to above that any of these witnesses gave evidence of what he did not see or hear himself. The hearsay rule is a very salutary rule indeed. It is a rule which is grounded upon commonsense as the focus of it is to prevent a person from being accused or found guilty of an offence which he did not commit. It is a self evident fact that malevolent people could manufacture such evidence as they could to falsely accuse persons of offence which they did not commit. By reason of this rule, courts are enjoined and indeed under a duty not to accept and/or convict an accused person upon testimony of witnesses who did not see, hear, or had not perceived by any other sense or in any other manner, the facts given in their testimony at a criminal trial of an accused person, as in the instant case, or even in a civil case. This rule, except for such exception as the *res gestae* rule and certain recognised statutory exceptions, which we are not concerned with in this case, is mandatory for all courts. Should a trial court convict an accused upon evidence adjudged to be "hearsay" evidence an appellate court may quash such conviction, if there are no other evidence upon which the conviction of the accused could be properly and safely be convicted (sic affirmed).

Returning to the instant case, I must hold that there is no merit in the contention of the appellant that p.w.1, p.w.2, p.w.3 and p.w.4 gave hearsay evidence. It is my respectful view that learned counsel for the appellant apparently misconceived the conclusion of the courts upon the pieces of the evidence before those courts that the appellant could be convicted upon circumstantial evidence, having regard to the totality of the evidence led at the trial of the appellant.

How then, did the courts below reach this conclusion? The trial court at pages 37-38 considered the question thus:-

"She (p.w.1), heard the child crying and she rushed back. She

saw that the mouth of the child was whitish and the child could not suck again and was stretching. Since the child was alright before the accused came and the accused was left alone with the deceased before the distress cry of the deceased the circumstantial evidence points to the accused and no other person as the person who gave the child corrosive acid which caused the death of the deceased. See *peter v. State* [1997] 54 L.R.C.N. p. 2786 (sic).8. For circumstantial evidence to support a conviction, it must not only be cogent, complete and unequivocal, but compelling and lead to irresistible conclusion that the prisoner and no one else is the murderer. *Yongo v. C.O.P.* [1992] 8 N.W.L.R. (pt.257) 36 and *Alake v. The State* [1992] 9 N.W.L.R. (pt. 265) 260 referred to. It must leave no room to reasonable doubt. In this case the circumstantial evidence is mathematically accurate that it points to the one and only irresistible conclusion that the accused was the one responsible for the death of that defenceless child. The evidence of p.w.1, (sic) the Doctor is very clear as to the cause of death, that is poison, corrosive acid. The offence could not have been (sic) committed by any other person. Everything points to the accused as the murderer. It was a premeditated and wicked act. I do not believe that the deceased took the acid by himself although the Doctor said it was possible. There would have been evidence of the acid burning his hand. There is no such evidence."

In the above excerpt from the judgment of the learned trial judge, the evidence before the court was in my view carefully reviewed. And having also considered the evidence of the accused which is mainly to the effect that he did not commit the offence, the learned trial judge proceeded quite properly to find him guilty upon the basis of circumstantial evidence. It is of course common ground that there was no direct evidence that connected the appellant with the commission of the despicable murder of the innocent child.

The approach of the court below to whether the appellant was properly convicted is not dissimilar to that of the trial court. In the course of the judgment of Ba'aba, J.C.A., of the court below, some of the leading authorities germane to the question raised with regard to the conviction of an accused person upon circumstantial evidence were

carefully reviewed before the conclusion was reached that the trial court was right to have convicted the appellant upon such evidence. The following are some of the cases referred to by the court below:- R.v. Sala Sati [1938] 4 W.A.C.A. 10; Teper v. The Queen [1952] A.C. 480; Stephen B Ukorah v. The State [1977] 4 S.C.167, Paulinus Udedibia & Ors. v. The State [1976] 11 S.C. 133 at 138-139; Valentine Adie v. The State [1980] 1-2 S.C. 116.

In all these cases, the courts have pronounced with varying C formulations what circumstantial evidence means and when such evidence would be called in aid to establish the guilt of a person that charged with a criminal offence.

D In view of what I perceived as the misconception of learned counsel for the appellant with regard to his submission that the appellant was found guilty upon hearsay evidence, I think it is necessary to observe, first, that the appellant was not convicted upon hearsay evidence, I must therefore say that the learned counsel for the appellant was wrong with regard to that submission. Contrary to his submission the appellant was clearly convicted upon a specie of evidence generally E referred to as circumstantial evidence. Circumstantial evidence is receivable in criminal as well as in civil cases; and, indeed, the necessity of admitting such evidence is more obvious in the former than the latter; for, in criminal cases, the possibility of proving the matter charged by F the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not available, the judge sitting alone as a judge of law and facts is permitted to complete the elements of guilt or establish innocence. In other words the judge is permitted to raise a presumption from the G proof of some fact the existence of another fact without further proof of that other fact. In raising this inference the evidence relied upon must be narrowly considered. Also, while circumstantial evidence may be conclusive, it is prudent and necessary to be sure that before drawing the inference of the accused's guilt from circumstantial evidence that H there are no other co-existing circumstances which would weaken or destroy the inference.

The learned authors of Archibold: Criminal pleading, Evidence

and practice has in its 39th Edition at paragraph 1143 stated that such presumption of fact are usually divided into three classes. They read:-

"Violent presumption, where the facts and circumstances proved raised a presumption so strong that guilt almost necessarily follows:- Probable presumptions, where the facts and circumstances B proved raised a presumption upon which the jury may be directed that if satisfied by the evidence that the facts alleged by the prosecution are established and no explanation is offered, they may find a verdict of guilty. Light or rash presumption, which have very little weight or validity at all, See 3 BL. Comm. 372; Co. Litt 6b; and see also R.v. Stoddert, C 2. Cr. App. R. 217 at p. 241."

The first type of presumption may be illustrated with the following examples:-

"If upon an indictment for murder, it were proved that the D deceased was murdered and that the defendant was immediately afterwards seen running out of it with a bloodstained knife in his hand, these facts would raise a violent presumption that the defendant was the murderer; for the blood, the weapon and the hasty flight, are all E circumstances necessarily attending the fact presumed, namely the murder. Co Litt 6b. Upon an indictment for stealing in a dwelling house if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, there would arise a violent F presumption of his having stolen them, but if they were found in his lodgings sometime after the theft and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption G merely, but if the property were not found recently after the loss, as for instance. not till sixteen months after, it would merely be a light or rash presumption and entitled to very little weight. (See: R.v. Adams, 3. C & p. 600; R.v. Cooper, 3 C & K 318 per. 1144 Archibold Criminal pleading, Evidence & practice 39th Edition.)" H

I will now briefly refer to some of the leading cases where the courts have either held that circumstantial evidence upon which the appellant was convicted was cogent enough to establish that it was the

appellant who committed the offence and no other. In *Teper v. R.* 1952 A.C. 480, at the trial of the appellant on a charge of maliciously and with intent to defraud setting fire to a shop in which he carried on the business of a dry goods store, evidence given by a police constable was admitted for the purpose of identification and without objection. The incriminating evidence consisted of what the constable heard from a woman who did not herself give evidence at the trial. It was also common ground that the incident took place at a distance of more than a furlong from the site of the fire and that it happened not less than 26 minutes after the fire was started. The appellant was convicted by the trial court and he thereupon appealed to the House of Lords in England. It was held that the word spoken by the woman did not form part of the *res gestae* and were not therefore exempted from the fundamental rule against the admission of hearsay evidence. The evidence was wrongly admitted and there being no other evidence of identification which was any of the value and the circumstantial evidence which alone the Crown had to rely on to connect the appellant with the commission being inclusive for the purpose, the conviction was set aside. Lord Normand who delivered the judgment of the court made the following memorable observation in the course of his judgment.

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cause suspicion on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sack's mouth of the youngest,' and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstance which would weaken or destroy the inference."

R.v. Sala [1938] W.A.C.A. 10 and *R.v. Onufrezyk* [1955] 1 Q.B. 388; 39 Cr. App.R.1 are authorities for the proposition that the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the defendant has made no confession of any participation in the crime.

I think reference should also be made to such cases as *Valentine Adie v. The State* [1980] 1-2 S.C. 116 at 122, this court set aside the conviction of the appellant for murder. Appellant's conviction was based upon what the lower courts perceived to be circumstantial evidence as there was no direct evidence connecting the appellant with the injuries that resulted in the death of the deceased. The oral evidence of the doctor who performed the post-mortem was found to be inconsistent with what was stated in the post-mortem report made at the examination of the deceased. The evidence of the doctor was therefore rejected. As there was no evidence other than the circumstantial evidence which was found inconclusive the appellant's appeal was upheld. He was discharged and acquitted.

In the case of *Stephen Ukorh v. The State* [1977] 4 S.C. 167, the conviction of the appellant was based on circumstantial evidence, this court allowing the appeal and setting aside the conviction and sentence had this to say:-

"What has to be established is the link between the appellant (or his actions) with the death of the deceased and in the absence of clear unequivocal evidence:

(1) that the deceased died directly from the assault by the appellant on him, or

(2) that the appellant was armed with any sharp instrument during the assault on the deceased, it becomes necessary to have a medical evidence on the cause of death so as to eliminate the problem raised by the existence of a long deep cut on the body of the deceased. And until that problem is eliminated we are of the firm view that it must be very unsafe to convict for murder as charged on the circumstantial evidence available."

In that case, the evidence which was before the trial court was that on the night preceding the death of the deceased, the appellant got hold of the deceased and started to beat up the deceased with his fists. The witness who gave his evidence left the appellant and the deceased as he had to run away for his own protection. The next morning he went back to where the deceased and himself were the previous night. There he found the dead body of the deceased with a deep cut. At the trial of

the appellant no evidence was give about how the deceased sustained the injury that presumably caused his death. There was also no medical evidence to that effect so as to establish the cause of death. Hence the appellant was discharged and acquitted as aforesaid. Idigbe, J.S.C., gave the reasons for setting aside the conviction of the appellant when he said, inter alia, thus:-

"from the foregoing facts it is, we think, pretty clear that the circumstances surrounding the death of the deceased given in evidence when accepted (as, indeed they were by the trial court) do not make such a "complete and unbroken chain of evidence" as would justify a jury (or a trial court) in coming to the irresistible conclusion that the prisoner at the bar (in this case) the appellant and no one else was the murderer."

It is therefore manifest from the cases to which I have referred to and indeed other relevant cases to which have not been referred to in this judgment, that for circumstantial evidence to sustain the conviction of an accused, it must be established that the evidence relied upon must be consistent with the prisoner's guilt and inconsistent with any other rational conclusion. It is also necessary before drawing the inference of accused's guilt to be sure that there are no other co-existing circumstances which would weaken such inference. See *Obalum Anekwu v. The State* [1976] 10 S.C. 255; 264; *Teper v. Queen* (supra). In the latter case it was said that in drawing inference of the guilt of an accused person from circumstantial evidence, great care must be taken not to fall into serious error based on fallibility of inference. Circumstantial evidence must always be narrowly examined. On the other hand, it has been said that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of Mathematics. It is no derogation of evidence to say that it is circumstantial. It may also be noted that there is no yardstick by which any circumstantial evidence can be measured before a conviction can be entered against an accused person charged with the offence for which the circumstantial evidence is the only one available. Each case

depends on its own facts but the one test which such evidence must satisfy is that it should lead to the guilt of the accused person and leave no degree of possibility or chance that other persons could have been responsible for the commission of the offence.

In *Igho v. The State* [1978] N.S.C.C. 166, the appellant was charged with the murder of the deceased. The deceased left her house for a religious service and never returned. The appellant was the last person with whom she had been alive as 3 witnesses testified that she was last seen riding at the back of the appellant's bicycle. The appellant denied ever carrying her at the back of his bicycle. The appellant was convicted of murder and he appealed, contending that the circumstantial evidence did not point irresistibly to the guilt of the accused. This court dismissed that contention. And it was held that the only irresistible inference from the circumstances presented by the evidence is that the appellant killed the deceased as no other reasonable inference can be raised having regard to the facts which were accepted by the learned trial judge. Those facts amply supported by evidence, called for an explanation and beyond the untrue denials of the appellant (as found by the learned trial judge) none was forthcoming. See *Ann Nash* [1911] 6 C.A.R. 225 at 228; *Udedibiah & Ors. v The State* [1976] N.S.C.C. 669 at 672; *Lori v. State* [1980] 8-11 S.C. 81; *Ewewoh v. The State* [1990] 4 N.W.L.R. (pt. 145) 469 at 478; *Adepetu v. State* [1998] 185 at 224.

I now turn to the instant case. The evidence of p.w.1., p.w.2, p.w. 3 and p.w.4 which the learned trial judge believe and accepted have earlier been considered in this judgment. I do not need to go over them again. Suffice it to say that the evidence of these witnesses established that the deceased child was handed over to the appellant hale and hearty. That shortly afterward the baby was found with a whitish substance in his mouth and crying. Indeed it was his cry that attracted the immediate attention of his mother who then rushed from the backyard to where she left him with his father. She tried to calm him down by offering her breast to him, but the baby could not suck. Following this incident the child died.

The Doctor p.w.6 who performed the post-mortem affirmed

that the cause of death to be corrosive acid poisoning resulting in chemical burns and shock. The appellant denied that it was his act, though he admitted that when he visited the house of p.w.1, he saw that the baby, a ten week old baby, was crying and couldn't suck the mother's breast.

The learned trial judge accepted quite properly the evidence that the child died as a result of the burns as a result of the corrosive acid introduced into the system. It is of course patent that there was no direct evidence as to who gave the corrosive acid to the deceased. The trial court had only circumstantial evidence of the witnesses who gave evidence at the trial. And after due consideration of the evidence, the learned trial judge came to the conclusion the appellant must have been the one and no other who introduced the corrosive acid into the deceased.

I have also carefully considered the evidence on the printed record, and I am satisfied that the court below was right to have affirmed the conviction of the appellant.

It has also been argued for the appellant that a witness who happened to have been the grandmother of p.w. 1, was in the house at the time of the incident and should have been called as a witness. I do not think that there is any merit in this contention. The prosecution's duty lies in calling such witnesses as they would require to establish their case against an accused person. See *Buba v. State* (1992) 1 N.W.L.R. (pt. 215); *Saidu v. The State* [1982] 13 N.S.C.C. 70; *Oguala v. The State* [1991] 2 N.W.L.R. (pt. 175) 509.

The question is, as always, what this witness would say that would affect the proof or not of the guilt of the appellant. And that question remains to be answered in the argument set forth for the appellant. Therefore in my respectful view, the contention that the prosecution failed to call a particular witness, namely the grandmother of p.w.1, does not avail the appellant. It is also argued for the appellant in the appellant's brief that the lower court was wrong to have upheld the judgment of the trial court as it is the view of learned counsel for the appellant that the trial court failed to evaluate the evidence led at

the trial.

After a careful consideration of the evidence and the arguments of counsel, I am of the view that learned counsel for the appellant must have misunderstood the purport of the case against the appellant. With due respect to learned counsel for the appellant, I must reject his contention. The trial court and the lower court duly considered and evaluated all the evidence relevant to the case as it affected the guilt or otherwise of the appellant.

In the result though the appellant was convicted upon circumstantial evidence, it is, nevertheless, proof beyond reasonable doubt of the guilt of the appellant.

For these reasons, I dismissed the appeal.

KARIBI-WHYTE JSC

After hearing argument in this appeal on the 25th January, 2001, I summarily dismissed the appeal of the appellant against his conviction for murder under section 319(1) of the Criminal Code Cap. 48, Vol. 11, Laws of Bendel State of Nigeria as applicable in Edo State. I indicated that I will give my reasons for so doing today the 20th April, 2001. Herein below are my reasons.

I have read the leading judgment of my learned brother, Ejiwunmi, J.S.C., in this appeal. I agree entirely with his summation of the facts, the reasoning and his conclusion.

The conviction of the appellant would seem to have founded entirely on circumstantial evidence linking appellant with the murder of the deceased. This is also the first issue for determination in his appeal.

The facts are that appellant was the putative father of the deceased child whose murder appellant was accused of. Appellant and p.w.1, Magdalene Airhuoyuwa the mother of the deceased child were lovers. Appellant has been responsible for the pregnancy in 1993 of p.w.1. Appellant who did not want the pregnancy, insisted that the p.w.1 commit abortion of the pregnancy. p.w.1 reluctantly complied. The relationship continued and developed in another pregnancy. Appellant again insisted on p.w.1 committing another abortion and gave her N1,800.00 for the purpose. P.W.1 refused on this occasion to commit

the abortion. She gave birth to a baby boy who was named Endurance Osayima, who later became the deceased, the victim of the murder in this episode.

The appellant would appear to have continued his opposition to being a father. He demonstrated this attitude sometime after the birth of the child when he visited p.w.1 at her residence. He threatened that he would kill the child since p.w.1 had given birth to the baby boy and had refused to obey him and abort the pregnancy. Appellant visited again on 29th November, 1994, when he met p.w.1 and other children in the family dancing. The parents of p.w. 1 were not at home.

Appellant asked the baby to be brought to him where he was sitting on the bed. p.w.1 handed the baby to him. Appellant gave the children N20 to go and buy a bottle of coke for him. Soon after p.w.1 went to the back of the house to wash the soiled pant of the baby. Whilst washing the soiled pant, p.w.1 heard the baby's shrill cry. p.w.1 ran to the room where she left the baby with appellant. Appellant handed the baby to p.w.1 who noticed at once that the mouth of the baby was white. P.W.1 asked appellant immediately what he had put into the mouth of the baby. Appellant instead of answering the question repeatedly urged p.w.1 to breast-feed the baby. P.W.1 complied but observed that the baby could not or would not suck the breast. She noticed the baby was restless. Appellant immediately ran away through the bush facing the house of the father of p.w.1.

P.W.1 rushed the baby to her mother and from there the baby was rushed to the Hospital where he was pronounced dead. Dr. Suleiman Abu, the Chief Consultant pathologist who conducted the post-mortem examination on the body of the deceased baby, gave the following evidence.

"The corpse was that of a male child of average nutrition. Rigor mortis had passed away. There was no external injury. On examination internally there was yellowish necrotic substance (dead tissue) in the mouth. That extended down through the mouth to the gullet, stomach and to the intestine. There was some bleeding into the stomach. I took a scraping of the yellowish substance. The test on it was positive for

acid litmus meaning acid test. All other systems appeared normal. I gave the cause of death in my opinion to be corrosive acid poisoning resulting in chemical burns and shock. The deceased was 10 weeks old.

Under cross-examination the witness added:-

"I did a blue litmus test and it turned pink. This irritates acid. The strength of the acid was unknown but the burns it created made me to estimate that it was a corrosive acid. A weak acid cannot be corrosive."

Appellant denied that he had anything to do with the death of the child.

The first issue is whether the circumstances surrounding the death of the deceased can be said to be positive, cogent and conclusively pointing inexorably at the appellant. The contention of the appellant is based on the absence of direct evidence of the act of appellant leading to the death of the deceased. The absence of direct evidence is indeed the very essence of resort to circumstantial evidence. Where direct positive evidence is elusive with respect to the commission of an offence surrounding circumstances of positive, cogent and compelling evidence inescapably linking the accused with the commission of the offence is acceptable.

It has been accepted without question that the 'judges and sage of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow' - See Omyehund v. Barker [1745] 1 Atkin. 21 at p.49. Hence, it has always been accepted that where direct evidence of eye witnesses is not available, the court may infer from the facts proved the existence of other facts that may logically tend to proved the guilt of an accused person. See Idowu v. State [1998] 11 N.W.L.R 354 S.C Section 149 of the Evidence Act enables the court to draw inferences from established facts bearing in mind the common course of natural events. Oftentime's circumstantial evidence is all that is available on points on which direct evidence would ordinarily be required.

There is no direct evidence in the instant case linking the appellant and leading to the death of the deceased. There was however, evidence of p.w.1, p.w.2 and p.w.3 that the deceased child was hale and hearty when he was handed over to appellant. Shortly after the p.w. 1

was attracted to where appellant was carrying the deceased by the shrill cry of the deceased. p.w.1 noticed a whitish substance in the mouth of the deceased child. The deceased child was cried persistently and could not be calmed by the p.w.1, his mother. Appellant was around and urged breastfeed of the baby. P.W.1 tried to breastfeed the deceased, who was unable to suck the breast. The deceased child was rushed to the Hospital but died before reaching the Hospital. The p.w.6 who performed the autopsy testified that death was due to corrosive poisoning resulting from chemical burns and shock. There was no evidence that before the appellant was left alone with the deceased baby, the baby was ill. Appellant did not even make that suggestion. There was evidence that the deceased baby started the distress cry when he was left alone with the appellant. There was evidence that p.w.1 who came on being attracted by the distress cry, observed a white substance in the mouth of the deceased baby. The white substance was probably what the p.w.6 found to be corrosive substance which caused the death of the deceased.

There is no direct evidence of the fact that appellant gave the corrosive substance i.e. acid to the deceased. But the circumstances of the fact that he had not wanted the deceased baby to be born; had earlier threatened to kill the baby and on the day the child died had sent the children with him to go and buy a bottle of coke, when p.w.1 went into the back of the house to wash the soiled pant of the baby. This stratagem gave him sufficient opportunity to introduce the corrosive acid into the mouth of the baby. On the facts before the courts no other person had the opportunity to do so.

The evidence though indirect, is cogent, positive and compelling, pointing to appellant and to no other person for the commission of the offence. It can be observed from the evidence before the courts and construing the facts narrowly that the inevitable force of the circumstances lie in the unmistakable aim of the totality of the evidence which by an undesigned coincidence points in the direction of the guilt of the accused. See the State v. Ugwu [1972] 1 S.C. 128. The State v. Apollo & Ors. [1976] 11 S.C. 133. It has been consistently held in our courts that to sustain a conviction based on circumstantial evidence,

the circumstances relied upon must lead conclusively and indisputably to the guilt of the accused-See The State v. Edobor [1975] 9-11 S.C. 69. This court has held in several decided cases, that the evidence in support of conviction must be cogent and compelling to convince the court of the guilt of the accused and inconsistent with any other rational conclusion. There must be no other co-existing circumstances which can weaken such inference. See Lori v. The State [1980] 8-11 S.C. 81; Udedibia v. State [1976] 11 S.C. 133; Adepetu v. State [1998] 9 N.W.L.R. 185. Accordingly, for circumstantial evidence to be believed and to justify the inference of guilt, the evidence must be incompatible with the innocence of the accused.- See Fatoyinbo v. A-G Western Nigeria [1966] W.N.L.R. 4, Omogodo v. State [1981] 5 S.C.3.

Applying these principles to the facts in the instant case, it cannot be disputed that the evidence before the trial court which was affirmed in the court below was positive, cogent, compelling and irresistible, that appellant was responsible with for introducing the corrosive substance into the mouth of the deceased child. This is incompatible with the denials of the accused and his innocence. Appellant has not given any evidence of co-existing circumstances which can weaken such inference- The State v. Muhtari Kura [1975] 2 SC 83 at p.89. There is no doubt the circumstantial evidence in this case has proved beyond any reasonable doubt that the appellant was responsible for the murder of the deceased child. Appellant was properly convicted for the offence of murder with which he was charged. The court below was right in affirming the conviction. The reasons I have give in this judgment and for the fuller reasons in the judgment of my learned brother, Ejiwunmi, J.S.C., are my reasons for dismissing this appeal on the 25th January, 2001.

KUTIGI JSC

We dismissed the appeal herein on 25/1/2001 and said we shall give our reasons for doing so this morning.

I read before now the Reasons for judgment by my learned brother, Ejiwunmi, J.S.C. I do not wish to repeat or add anything to them.

I adopt them as mine.

ACHIKE JSC

On 25th January, 2001, after the hearing of this appeal, I dismissed the appeal on the bench as it was completely devoid of merit but indicated that I would give my reasons today for dismissing the appeal.

Appellant was arraigned for the offence of the murder of one Endurance Osayima, a baby-boy. He was the offspring of the relationship between one Magadlene Airhuoyuwa, p.w.1 and the appellant, who at all material time were lovers. Their relationship had resulted in pregnancy in 1993 but at the instance of the appellant, the pregnancy was aborted as the appellant had indicated to p.w.1 that his family would be opposed to the pregnancy resulting from such relationship. But after the termination of the pregnancy p.w.1 and the appellant maintained their relationship, leading to the pregnancy of p.w.1. The appellant on being apprised of the pregnancy, again pleaded for its termination, having made the sum of N1,800 available to her for that purpose. P.W.1. stiffly opposed the termination of the pregnancy and went ahead to deliver the child of that pregnancy who was named Endurance Osayima.

Appellant made two earlier visits to the residence of p.w.1 and threatened to kill Endurance Osayima as he was opposed to her birth. On 29/11/1994, p.w. 1 made the third visits to the house of p.w.1. On his arrival he met p.w.1 and other children dancing. He requested p.w.1 to bring the baby to him; p.w.1 complied and went to the backyard to wash the soiled baby's pant. The other children were given N20 with which they were requested to buy cake.

Few minutes thereafter, p.w.1 heard the baby crying rather loudly and she ran at once to the room where her baby and the appellant were. The appellant handed the baby over to p.w.1 who noticed that the baby's mouth was white. P.W. 1 asked the appellant what he put in the baby's mouth to which there was no answer rather appellant repeatedly implored p.w. 1 to "breastfeed the baby". P.W.1 attempted to breastfeed the child but it refused to suck the breast, rather she noticed

the baby stretched. At this juncture, appellant ran away through the bush.

Soon afterwards, the baby was rushed to the hospital where he was declared dead.

A post-mortem examination was performed on the body of the deceased baby p.w.6, a Chief Consultant pathologist, attached to the Central Hospital, Benin City. Examination showed yellowish necrotic substance in the mouth which extended to the gullet, stomach and intestine. There was some bleeding into the stomach. Cause of death was given to be corrosive acid poisoning resulting in chemical burns and shock.

At the close of the prosecution's case appellant testified on his own behalf but called no witness. He substantially admitted visiting p.w.1's residence on the ill-fated day and that while the baby was crying persistently, he handed him over to p.w.1. He however flatly denied doing anything that led to the death of the baby. At the close of the case, the learned trial judge readily held that the prosecution had establish their case beyond reasonable doubt and convicted the appellant as charged, sentencing him to death by hanging.

Appellant's appeal to the Court of Appeal was unsuccessful hence the present appeal to this court.

In the appellant's brief of argument, his learned counsel I. E.. Imadegbelo, Esq. identified four issues for determination, namely,

(1) Whether the circumstantial evidence relied upon against the appellant was positive, cogent and conclusive.

(2) Whether the failure of the prosecution to call a vital and material witness is not fatal to the prosecution's case.

(3) Whether the prosecution proved its case beyond reasonable doubt against the appellant.

(4) Whether or not the appellant was convicted on properly evaluated evidence.

The respondent on its part identified two issues for determination, namely,

(1) Whether the circumstantial evidence was sufficient to war-

rant the conviction of the appellant for the offence of murder;

(2) Whether the prosecution proved the case of murder against the appellant beyond reasonable doubt."

The crux of this appeal is clearly whether the circumstantial evidence led by the prosecution was sufficient to ground the conviction of the appellant. Consequently, appellant's issues Nos. 1,3 and 4 can be taken together and equated with respondent's issues Nos. 1 and 2. It is common ground that there was no eye-witness to the offence with which the appellant was charged but each of the two lower courts respectively upheld that the circumstantial evidence surrounding the death of the baby boy "points to the appellant and no other person as the person who gave the child corrosive acid which caused the death of the deceased," as stated by the trial judge. Similarly, the Court of Appeal on its part, re-echoed, in its leading judgment, "that the circumstantial evidence points only to the appellant as the person who gave the child the corrosive acid which caused his death."

The only forceful argument made by appellant's learned counsel against these firm views of the circumstantial evidence by the two lower courts was counsel's submission that the evidence relied upon as circumstantial evidence by the trial court, which the appellate court erroneously affirmed was the said evidence tendered by the prosecution through p.w.1, p.w.2 p.w.3 and p.w.4 should be rejected as being inadmissible hearsay evidence and that the entire evidence of these witnesses was predicated on suspicion.

This submission was the real thrust of the argument by appellant's learned counsel. Be that as it may we were taken aback by this line of strange submission. It may be recalled that p.w.1 and p.w.2 were rigorously cross-examined by learned counsel for the appellant at the trial court. Surely, if the evidence of these prosecution witnesses did not amount to direct evidence of what they attested to they would easily have caved in under the thrust of the rigorous cross-examination. Hearsay is generally regarded as one of the most complex subjects in the entire law evidence. It was reformulated by Rupert Cross as follows:-

"Assertions of persons other than the witness who is testifying

(including statements relied on as equivalent to assertions, although not primarily intended as such by their maker and conduct relied on as conduct equivalent to the actor's assertion of any fact other than his contemporaneous state of mind or physical sensation, although not so intended by him) are inadmissible as evidence of the truth of that which are asserted"

-see Cross, "The Scope of the Rule against Hearsay."

It is manifest that the evidence of p.w.1, p.w.2, p.w.3 and p.w.4 was direct evidence of what each and every one of the witnesses saw or observed. Quite apart from cross-examining these witnesses as would normally be expected, at no time was any effort made to exclude these piece of evidence on the ground that they were inadmissible under the hearsay rule. On the contrary, we were satisfied that the evidence of these four witnesses were admissible as direct evidence under section 77 of the Evidence Act. Certainly, learned appellant's contention in this regard was completely devoid of merit because it was glaring that appellant could be convicted on the circumstantial evidence of the prosecution's star witnesses. The law is now trite that the trial court can convict an accused for an offence relying on circumstantial evidence if the said evidence is cogent, pointing directly, irresistibly and unequivocally and compellingly at the accused. See *Ogba v. The State* [1992] 8 L.R.C.N. 362 at 366, *R.v. Sala* 4 W.A.C.A. 10 and *R.v. Onufrejezyk* [1955] 1 QB 388.

I am also satisfied that the lower court rightly affirmed the conviction of the appellant on the ample evidence before it.

Under the second issue, appellant strongly submitted that failure of the prosecution to call a vital and material witness was fatal to the prosecution's case. The material witness referred to by the appellant in the instant case is the grandmother of p.w.1. I do not think that that argument will avail the appellant. The prosecutor's responsibility is to establish its case beyond reasonable doubt in order to secure the conviction of the appellant. How they get around achieving this is entirely the business of the prosecution. Whether they field one, two or more witnesses in satisfaction of such proof will surely depend on the cir-

cumstances of each case. But under no circumstances will the accused person dictate to the persecution regarding the person or number of persons that they must field as witness or witnesses. In the case under consideration, the trial court nodded approval that the prosecution proved the case against the appellant to the hilt and this decision was affirmed by the lower court. Learned counsel for the appellant has merely argued that the prosecution's failure to field a particular witness was fatal to their case without expressly pinpointing how that contention has in fact affected the prosecution's case in any way. This appellant's assertion, without more, cannot seriously affect or dent the case of the prosecution whose duty it was to field such witnesses as it may desire in discharged of their duty to establish the guilt of the appellant upon the high standard of proof, to wit, proof beyond reasonable doubt.

I would only mention by way of completeness that quilt apart from merely formulating the fourth issue, that the appellant has not advanced any argument of substance showing that the prosecution failed properly to evaluate the evidence before court. The two lower courts were satisfied that all the evidence tendered by the parties was given a proper evaluation. And at the end of the day, the two lower courts were satisfied that the evidence so evaluated established the criminality of the appellant in relation to the death of the baby Endurance Osayima.

It is in consequence of the absence of any substance in the appellant's case against the respondent in this appeal to this court that the court refrained from inviting M.O. Omozeghian Esq., learned counsel to the respondent, to address the court.

All in all, all the issues in this appeal have been resolved against the appellant. The appeal fails for lacking in merit and it is dismissed by me in its entirety.

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Ejiwunmi, J.S.C. I am in entire agreement with the reasons for judgment dismissing the appeal of the appellant on 25th January, 2001. I adopt his reasons as my reasons