

SUPREME COURT OF NIGERIA
FRIDAY 5TH APRIL, 2002. SC. 44/2001
CORAM:- U. MOHAMMED, U. A. KALGO, S. O. UWAIFO,
A. O. EJIWUNMI, E. O. AYOOLA, JJSC

YOUNG UKAUWA UGURU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Charges - Amendment of - Prosecution does not need leave to amend charges - But applies to court to accept the amendment - Pursuant to Criminal Procedure Law s. 163 (H1)

CRIMINAL PROCEDURE - Charge - Amendment of - Validity - Since prosecution complied with Criminal Procedure Law s. 163 - The amended charge is therefore valid (H2)

CRIMINAL PROCEDURE - Charge - Amendment of - Fair hearing - Trial of appellant complied with rules of court - Hence here is nothing to justify allegation of unfair hearing (H3)

COURTS - Fair hearing - Allegation of breach - Sustainability - Mistake of trial judge in wrong usage of evidence - Did not contravene principles of fair hearing - And will not vitiate the trial proceedings (H4)

MURDER - Ingredients - Proof - Prosecution must establish death of deceased - And an intentional act or omission of accused - Which caused the death (H5)

MURDER - Cause of death - Proof - Death can be established by direct or circumstantial evidence - But nothing shows that act of appellant - Caused the death of deceased (H6)

MURDER - Cause of death - Proof - Direct evidence - Such evidence as post mortem result - Must connect death of deceased with act of accused (H7)

MURDER - Cause of death - Failure to prove - No evidence was given at trial as to nature of injuries sustained by deceased - Hence cause of the death was not proved (H8)

CRIMINAL PROCEDURE - Unlawful assault - Conviction - Correctness of - Accused can be rightly convicted of the offence pursuant to Criminal Code s. 355 - Although he was not specifically charged with same (H10)

FACTS

Appellant was found at a village square attacking the deceased - Mark Ukeagu with a machete. As a result of the machete cuts, deceased was taken to two different hospitals for treatment. Deceased nevertheless died four days after the incident. Appellant was arrested and taken to police station. He was subsequently arrested and was arraigned along with two others before the High Court of Imo State for murder contrary to section 319 (1) of the Criminal Code Cap 30 Laws of Eastern Nigeria 1963. The charge was later amended, read and explained to accused persons. Appellant did not object to the amendment of the charge.

At the trial, prosecution failed to adduce medical evidence of the treatment and cause of death of the deceased. At the end of trial, the learned trial judge convicted appellant and the two others of murder. They were thus sentenced to death by hanging. Being dissatisfied, they filed appeal at the Court of Appeal. The court dismissed appellant's appeal but allowed that of the others. Appellant was aggrieved. He appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether there was a valid amended information properly filed before the trial court on which the entire proceedings in the de novo trial beginning with the fresh plea up to the judgment of the trial court was founded?"

2. Whether in all the circumstances of this case particularly having regard to the orders made suo motu by the learned trial judge on 25/4/86 the appellant's constitutional right to fair hearing was violated?"

3. Whether the guilt of the appellant was established beyond reasonable doubt as laid down by law before he was convicted for

murder and sentenced to death?”

HELD (Unanimously allowing the appeal per **KALGO JSC**)

Charges - Amendment of

1. This section empowers a court to alter, amend or add to any charge in any criminal case before it at any time before judgment is given in the case. It does not give any condition precedent to its application but ensures that the amended charge be read out and explained to the accused. This means that whenever the prosecution decides to amend the charge already before the court, it can proceed to do so without asking for permission or leave to do so. It then applies to the court to accept the amendment pursuant to the provisions of section 163 (ibid) and the court after hearing the parties, may or may not accept or allow the amendment. If it allows the amendment, the amended charge shall replace the original charge and shall be read and explained to the accused as the new charge. If it rejects the charge, the original charge remains. This is what obtains in criminal matters pertaining to amendment of charges generally. (p. 1075 A)

Charge - Amendment of - Validity

2. I have read the numerous legal authorities cited by the learned counsel for the appellant in his challenge to the amended charge in this issue, and I am satisfied that they do not apply to the present circumstances. On the other hand, I find the procedure of applying for the amendment of the charge by the prosecution in this case as regular and proper and is in accordance with the provisions of section 163 of the C. P. L. The amended charge is therefore valid, and I answer issue one in the affirmative. (p. 1076 A)

Charge - Amendment of - Fair hearing

3. But it is significant to observe that in spite of that order, and the amendment of the charge, the proceedings of the trial court

thereafter was fully in accordance with the law and rules of the court. Pleas were taken after the amended charge was read and explained in Ibo language to the appellant, his mother and sister. Witnesses who gave evidence for the prosecution were cross-examined by the counsel for the appellant. The appellant gave evidence and called witnesses in his defence without any let or hindrance. The counsel for the parties including that of the appellant was given the opportunity to address the court which he did at length before judgment in the case was reserved. The learned counsel for the appellant did not raise any objection to the appellant's trial at any stage of the proceedings.

In the instant case, as I indicated above, the trial of the appellant and the conduct thereof was in accordance with the relevant law and rules of the court and I cannot see anything to justify the allegation of unfair hearing or trial of the appellant in contravention of section 33 (1) of the 1979 Constitution. (p. 1077 A/F)

Fair hearing - Allegation of breach - Sustainability

4. It was however very clear and this was admitted by the learned counsel for the appellant in his brief, that the learned trial judge "was completely wrong in doing so because ...the prosecution must prove its case anew by calling afresh all its witnesses including Dr. Ezi". I agree with this entirely and further hold that in my view what the trial judge did could not constitute a contravention of the principles of fair hearing envisaged under section 33 (1) of the 1979 Constitution. I therefore do not think that the mistake committed by the trial judge in using the evidence of Dr. Ezi in the instant case would be sufficient to vitiate the trial proceedings in the case. I have carefully examined all the legal authorities cited by the learned counsel in his submissions on this issue and I do not find any of them to be relevant to the effect that what the trial judge did constituted a denial of fair hearing or trial to the appellant in this case. The de novo proceedings of the trial court are therefore in order. I answer this issue in the negative. (p. 1077 H)

MURDER - Ingredients - Proof

5. In a murder charge, for the prosecution to discharge its burden of proving the case beyond reasonable doubt, it must prove: (a) The death of the deceased; (b) The act or omission of the accused which caused the death; and (c) That the act or omission of the accused stated in (b) above was intentional with knowledge that death or grievous bodily harm was its probable consequence. (p. 1078 E) B

MURDER - Cause of death - Proof

6. Cause of death can be proved by direct or circumstantial evidence. It can also be inferred where the person injured or attacked died immediately on him. But in the instant appeal, there is no evidence medical or otherwise as to what type of injury was suffered by the deceased as a result of the attack on him or that the act of the appellant was the cause of his death. (p. 1079 A) C

MURDER - Cause of death - Proof - Dire

7. The direct evidence required to prove the cause of death must be such as would connect the death of the deceased person with the act of the accused. This may include the evidence of a medical officer who examined or performed post mortem examination on the deceased and certifies that the injuries inflicted on the deceased by the accused are those that caused the death of the deceased, particularly if the deceased did not die in the course of the act of his assailant. (p. 1079 C) E

MURDER - Cause of death - Failure to prove

8. In the instant case, the deceased died about four days after the infliction of the injuries on him according to the evidence. He was taken to two different hospitals within the four days but no evidence was called or given at the trial about the nature of the injuries he sustained or the treatment given in respect thereof or to prove the cause of his death. The evidence of Dr. Ezi referred to earlier in this judgment cannot be used in this case to convict the appellant in the joint trial where the F

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appellant was convicted. The record is very clear on this. The learned trial judge did not find that the cause of death of the deceased was proved throughout his judgment.

I also agree with the Court of Appeal on the findings that P.W. 2 and P.W. 3 saw the appellant (who was 1st accused at the trial and 1st appellant in the Court of Appeal) inflicting machete blows on the deceased according to the evidence. But this evidence is not evidence of proof of what caused the death of the deceased, since his death took place four days thereafter, and the Court of Appeal did not, like the learned trial judge, advert its mind to the cause of death of the deceased. It seems to me that they both assumed that the fact that the deceased received machete blows by the appellant until he fell down, he (deceased) must have died as a result of the machete blows despite the fact that there was no medical report to that effect. This is certainly a wrong assumption in law and conviction based upon it cannot stand. This was also conceded by the learned counsel for the appellant. I therefore find that the cause of death, an important ingredient of the offence of murder, has not been proved in this case. I answer issue three in the negative. (pp. 1079 F/1080 D)

Unlawful assault - Conviction - Correctness of

9. This is not the end of the matter. I have earlier said that I agree with the trial court and the Court of Appeal that there is overwhelming evidence of P.W. 2, P.W. 3, and the confession of the appellant himself to the effect that the (appellant) inflicted machete blows on the deceased until he fell down before he was carried to the hospital for treatment. By this act the appellant must have committed an unlawful assault on the deceased. This is a criminal offence for which the appellant can be convicted of, even though he was not specifically charged with it. See Section 179 of the Criminal Code. It is a lesser offence from the murder charge with which the appellant was originally charged. It is an offence punishable under section 355 of the Criminal Code and carries a maximum sentence of three years. (p. 1080 H)

NOTABLE POINT OF INTEREST

KALGO JSC

1. Medical evidence is not always essential to prove cause of death

This is what is always referred to as medical evidence which is not essential in all cases to prove the cause of death. See Oguntolu case (supra) for example where a person was attacked and he or she dies immediately or so soon after the infliction of the injury on him or her, medical evidence is not necessary to prove the cause of the person's death. The cause of death in that case is the injury inflicted on the person and the accused who inflicted the injury is guilty of the offence charged. (p. 1079 E)

REPRESENTATION

B. E. I. Nwofor for the appellant

Chief Mike Ozekhome, with M. Eriofoloh Esq. for the respondent

CASES REFERRED TO

Ibrahim v. State (1991) 4 NWLR (Pt. 186) 397

Kada v. State (1991) 8 NWLR (Pt. 208) 134

Oguntolu v. State (1996) 2 NWLR (Pt. 432) 503

Onogwu v. State (1995) 6 NWLR (Pt. 401) 276

Ariche v. State (1993) 6 NWLR (Pt. 302) 752

Atano v. A. G. Bendel State (1989) 2 NWLR (Pt. 75) 201

Gira v. State (1996) 4 NWLR (Pt. 443) 375

Nwaeze v State (1996) 2 NWLR (Pt. 428) 1

Ogba v. State (1992) 2 NWLR (Pt. 222) 164

Ononuju v. The State (1976) 5 SC 1

Omogodo v. The State (1981) 5 SC 5

Onyenakeye v State (1964) 1 All NLR 151

R. v. Oledima (1940) 6 WACA 202

STATUTES REFERRED TO

Criminal Procedure Law, s.163

Criminal Code Cap. 30 Laws of Eastern Nig 1963, ss.179, 319(1) & 355

Constitution of Federal Republic of Nigeria 1979, s.33(1)

LEAD JUDGMENT BY KALGO JSC

In an amended charge or information, the appellant Young Ukauwa, his mother, Ijeoma Ukauwa and his sister Nwanyisunday Ukauwa were charged with murder contrary to section 319 (1) of the Criminal Code, Cap. 30, Laws of Eastern Nigeria, 1963. The charge was read and explained to them and they all separately pleaded not guilty. Both the prosecution and the defence called witnesses at the trial and at the end thereof, the learned trial judge Njiribeako J, found as follows:-

"I am satisfied from the evidence before me that the prosecution has proved beyond reasonable doubt the offence of murder as enunciated in either section 316(a) or (b) reproduced above against the 1st accused and by virtue of section 7(b) C.C. the 2nd and 3rd accused are equally guilty of the offence as the 1st accused. In the final result I find the three accused guilty of the offence of murder contrary to section 319 (1) C.C."

The learned trial judge then proceeded to sentence the three accused persons, including the appellant, *"that each of you shall be hanged by the neck until you be dead. May the good Lord have mercy on your souls"* The appellant, his mother and sister appealed to the Court of Appeal against their conviction and sentence. The Court of Appeal heard the appeal whereby the appellant's appeal was dismissed and that of his mother and sister was allowed and they were discharged and acquitted. The appellant therefore appealed to this court on three grounds.

Learned counsel for the parties filed and exchanged their respective briefs as required by the rules of court. At the hearing of the appeal they both adopted their respective briefs and expatiated orally some issues argued in their briefs. The issues for determination in the appeal which were formulated by the appellant in his brief are substantially the same as those raised by the respondent in his brief. I shall however consider those set out by the appellant for the purpose of this appeal which read thus:

"1. Whether there was a valid amended information properly filed before the trial court on which the entire proceedings in the de novo trial beginning with the fresh plea up to the judgment of the

trial court was founded?

2. *Whether in all the circumstances of this case particularly having regard to the orders made suo motu by the learned trial judge on 25/4/86 the appellant's constitutional right to fair hearing was violated?*

3. *Whether the guilt of the appellant was established beyond reasonable doubt as laid down by law before he was convicted for murder and sentenced to death?* ^B

Before considering the issues for determination in this appeal, I think it is useful to set out albeit briefly the facts giving rise to the case as produced at the trial. The deceased, Mark Ukeagu was a neighbour to one Micha in their village called Akpahia Obiohuru, Ohuhu in Imo State. On the 10th of March, 1985, at about 7.30 p.m., Mark Ukeagu told Micha that he observed that whenever Micha was away from his house, his son Osadebe, had converted the house into a rendezvous for persons of bad character. He, Ukeagu therefore advised Micha to talk to his son about this. While Mark Ukeagu was talking to Micha, Osadebe rushed out of the house infuriated, came to Ukeagu and asked if Ukeagu was calling him a thief. Ukeagu replied "no" but he repeated the advice he gave to Osadebe's father about bad characters using his house whenever he was away. Osadebe then left his father and Mark Ukeagu together and went away. Shortly after that, some screaming noise and shouts were heard in the direction of the village square. When people arrived at the village square, it was discovered that the appellant was attacking Mark Ukeagu with a machete. He inflicted many machete cuts on his body that Mark Ukeagu fell on the ground and had to be carried by his children and other villagers from the village square to the hospital for treatment. One of the villagers (P.W. 2) was able to chase the appellant after he inflicted the machete cuts, arrested the appellant and took away the machete from him. The machete was later handed over to the Police in the course of investigation into the case. Mark Ukeagu was first taken to a private hospital and later to the Queen Elizabeth Specialist Hospital Umuahia where he died on the 14th of March 1985. According to the evidence, Osadebe Micha's son, is a friend of the appellant. This is the gist of what happened as far as the appellant was concerned. ^C ^D ^E ^F ^G ^H

I do not consider it necessary to say anything about the involvement of the mother and sister of the appellant with whom he

was tried and convicted because they were discharged and acquitted by the court of Appeal and no cross-appeal was filed by the prosecution in respect of either of them.

I now proceed to consider the issues ad seriatim. Issue one is essentially a complaint on the amended charge or information which was used in what was referred to as the de novo trial. It is pertinent to observe that originally only appellant was charged with the offence of murder of deceased Mark Ukeagu, but after the trial judge heard the evidence of some prosecution witnesses, he ordered as follows: -

“In the light of the evidence of the witness I order for the arrest of the mother of the accused and the sister of the accused. The information should be amended...”

The main complaint of the learned appellant’s counsel in his brief and oral argument is that the prosecution did not first obtain the permission of the trial court before it proceeded to amend the charge. He contended that what the prosecution did in this case was to preempt the decision of the trial court by amending and filing the information before obtaining the order to do so which was a condition precedent. Therefore the amended information he argued was incompetent and invalid, and the whole trial based on it was a nullity.

For the respondent, the learned D.D.P.P., David Onyieke, in his brief and in oral argument submitted that the amendment of the charge was regular and proper and that even if there was any irregularity (which was denied) it did not occasion any miscarriage of justice. Learned counsel also pointed out that as the appellant had pleaded to the charge as amended and was represented by a counsel throughout the trial, and the counsel did not object to the charge at that time, it is now too late to raise the objection. He cited in support the following cases:- A-G Edo State v. Jessica Trading Co. Ltd. (1999) 5 NWLR (pt. 604) 500 at 514; Ogenyi v. C.O.P (1962) 2 SCNLR 157, Okeke v. C.O.P (1946) 12 WACA 363, R. V. Ntia (1946) 12 WACA 54, Ejilikwu v. State (1993) 7 NWLR (Pt. 307) 544 at 583, Ichi v. State (1996) 9 NWLR (pt. 470) 84.

Section 163 of the Criminal Procedure Law under which the amendment was made provides:-

“Any court may alter or add to any charge at anytime before judgment is given or verdict returned and every such alteration or addition shall be read and explained to the accused.”

This section empowers a court to alter, amend or add to any charge in any criminal case before it at any time before judgment is given in the case. It does not give any condition precedent to its application but ensures that the amended charge be read out and explained to the accused. This means that whenever the prosecution decides to amend the charge already before the court, it can proceed to do so without asking for permission or leave to do so. It then applies to the court to accept the amendment pursuant to the provisions of section 163 (ibid) and the court after hearing the parties, may or may not accept or allow the amendment. If it allows the amendment, the amended charge shall replace the original charge and shall be read and explained to the accused as the new charge. If it rejects the charge, the original charge remains. This is what obtains in criminal matters pertaining to amendment of charges generally.

On page 27 of the record, the amendment was dealt with in this way:-

“Ejelonu: My Lord, I apply to amend the information. I apply to add two more persons to the charge. The persons are Ijeoma Ukauwa and Nwanyisunday Ukauwa. The amendment affects the particulars of offence merely by adding the names I make the application under Section 163 C.P.L. I have filed the amended charge I assume has been served to the defence counsel.

Imo: I do not oppose the application.

Court: Application to amend is granted. The information will be read afresh and plea taken.

Charge is amended and fresh plea taken after charge is read out in English and explained to the accused (sic) in Ibo”. (Underlining mine)

The record makes it very clear that the application by the prosecution counsel to amend the charge was properly made to the court under section 163 of the C.P.L. and the court granted it after the learned counsel for the defence said that he had no objection to it. The record also showed that the amended charge was filed and read out to the accused persons in English and explained to them in Ibo, the language they understand before their pleas were taken. There was nothing to show any objection or disagreement by the learned

counsel for the defence throughout the proceedings at the material time or even in his address at the end of the trial.

I have read the numerous legal authorities cited by the learned counsel for the appellant in his challenge to the amended charge in this issue, and I am satisfied that they do not apply to the present circumstances. On the other hand, I find the procedure of applying for the amendment of the charge by the prosecution in this case is regular and proper and is in accordance with the provisions of section 163 of the C.P.L. The amended charge is therefore valid, and I answer issue one in the affirmative.

Issue two deals with the question whether in the circumstance of this case, the appellant's constitutional right to fair trial has been infringed or violated. In dealing with this issue learned counsel for the appellant referred particularly to the order by the learned trial judge to arrest the mother and the sister of the appellant and the use of the evidences of Dr. Ngozi Wosu Ezi (who was P.W. 6 in the first trial before the charge was amended) in his judgment in the trial conducted under the amended charge where the said doctor did not even given evidence. Learned counsel submitted in his brief that by the cumulative effect of these two acts of the trial judge in this case, seen by an outsider would appear to be that he stepped into the arena in the matter and has ceased to be an unbiased umpire as he should be in dealing with the case of the appellant. He finally submitted that the conduct of the learned trial judge in this case has portrayed him as a biased and partial judge and that his actions constituted a denial of fair hearing to the appellant contrary to the provisions of section 33 (i) of 1979 constitution (then applicable) which renders his decision a nullity. He cited many legal authorities both Nigeria and from overseas in support of his submissions. For the respondent, it was submitted in the brief that the appellant had a fair trial throughout the proceedings in the trial court. He had all the time been charged with murder and the arrest of his mother and sister did not change the situation, or prejudice him in any way.

The order for the arrest and prosecution of the appellant's mother and sister made by the learned trial judge on page 25 of the record was made "*in the light of the evidence of the witness.*" That witness he was referring to was P.W. 4 in the first trial. The Court of

Appeal has found that the trial judge was wrong in doing so and since there is no cross-appeal by the prosecution on this point, I do not intend to say anything about it. ***But it is significant to observe that in spite of that order, and the amendment of the charge, the proceedings of the trial court thereafter was fully in accordance with the law and rules of the court. Pleas were taken after the amended charge was read and explained in Ibo language to the appellant, his mother and sister. Witnesses who gave evidence for the prosecution, were cross-examined by the counsel for the appellant. The appellant gave evidence and called witnesses in his defence without any let or hindrance. The counsel for the parties including that of the appellant was given the opportunity to address the court which he did at length before judgment in the case was reserved. The learned counsel for the appellant did not raise any objection to the appellant's trial at any stage of the proceedings.***

According to the case of Mohammed v. Kano N. A. (1968) All NLR 411 cited by learned counsel for the appellant in his brief, the term "fair trial" and "fair hearing" are synonymous and mean the same thing and according to the provisions of section 33 (i) of the 1979 Constitution which applies to this case, the term "fair hearing" in relation to a case in my view, means that the trial of the case or the conduct of the proceedings thereof, is in accordance with the relevant law and rules in order to ensure justice and fairness. See Salu v. Egeibon (1994) 6 NWLR (pt. 348) 23; Mohammed v. Olawumi (1990) 2 NWLR (pt. 133) 458. ***In the instant case, as I indicated above, the trial of the appellant and the conduct thereof was in accordance with the relevant law and rules of the court and I cannot see anything to justify the allegation of unfair hearing or trial of the appellant in contravention of section 33 (1) of the 1979 Constitution.***

Learned counsel for appellant also discussed at length the use, by the learned trial judge in his judgment, of the evidence of Dr. Ngozi Nwosu Ezi to convict the appellant of murder when Dr. Ezi did not in fact testify in the de novo trial. There is nothing to suggest in my respectful view that this act on the part of the learned trial judge is enough to show he was biased against the appellant or that he supported the prosecution. ***It was however very clear, and this***

was admitted by the learned counsel for the appellant in his brief, that the learned trial judge “was completely wrong in doing so because ...the prosecution must prove its case anew by calling afresh all its witnesses including Dr. Ezi”. I agree with this entirely and further hold that in my view what the trial judge did could not constitute a contravention of the principles of fair hearing envisaged under section 33 (1) of the 1979 Constitution. I therefore do not think that the mistake committed by the trial judge in using the evidence of Dr. Ezi in the instant case would be sufficient to vitiate the trial proceedings in the case. I have carefully examined all the legal authorities cited by the learned counsel in his submissions on this issue and I do not find any of them to be relevant to the effect that what the trial judge did constituted a denial of fair hearing or trial to the appellant in this case. The de novo proceedings of the trial court are therefore in order. I answer this issue in the negative.

The 3rd and last issue is whether the guilt of the appellant was established beyond reasonable doubt as required by law for the offence of murder.

In a murder charge, for the prosecution to discharge its burden of proving the case beyond reasonable doubt, it must prove:-

- (a) *The death of the deceased;*
- (b) *The act or omission of the accused which caused the death; and*
- (c) *That the act or omission of the accused stated in (b) above was intentional with knowledge that death or grievous bodily harm was its probable consequence.* See *Gira v. State* (1996) 4 NWLR (pt. 443) 375 at page 383; *Nwaeze V State* (1996) 2 NWLR (pt. 428) 1 at page 11; *Ogba V. State* (1992) 2 NWLR (pt. 222) 164.

From the evidence of the prosecution witnesses which was accepted by the learned trial judge, there is sufficient evidence that the deceased, Mark Ukeagu died on the 14th of March, 1985. There is also evidence particularly of P.W. 2 and P.W. 3 which was also believed and accepted by the learned trial judge that the appellant, on the 10th of March, 1985 at the Obiahum Ohuru village square, dealt

repeated machete blows on the body of Mark Ukeagu until he fell down. ***Cause of death can be proved by direct or circumstantial evidence.*** See Ariche v. State (1993) 6 NWLR (pt. 302) 752; Atano v. A-G Bendel State (1989) 2 NWLR (pt. 75) 201. ***It can also be inferred where the person injured or attacked died immediately on him.*** See Akpan v. State (1994) 9 NWLR (pt. 368) 347. ***But in the instant appeal, there is no evidence medical or otherwise as to what type of injury was suffered by the deceased as a result of the attack on him or that the act of the appellant was the cause of his death.***

The direct evidence required to prove the cause of death must be such as would connect the death of the deceased person with the act of the accused. See Oguntolu v. State (1996) 2 NWLR (pt. 432) 503. ***This may include the evidence of a medical officer who examines or performed post mortem examination on the deceased and certifies that the injuries inflicted on the deceased by the accused are those that caused the death of the deceased, particularly if the deceased did not die in the course of the act of his assailant.***

This is what is always referred to as medical evidence which is not essential in all cases to prove the cause of death. See Oguntolu case (supra) for example where a person was attacked and he or she dies immediately or so soon after the infliction of the injury on him or her, medical evidence is not necessary to prove the cause of the person's death. The cause of death in that case is the injury inflicted on the person and the accused who inflicted the injury is guilty of the offence charged.

In the instant case, the deceased died about four days after the infliction of the injuries on him according to the evidence. He was taken to two different hospitals within the four days but no evidence was called or given at the trial about the nature of the injuries he sustained or the treatment given in respect thereof or to prove the cause of his death. The evidence of Dr. Ezi referred to earlier in this judgment cannot be used in this case to convict the appellant in the joint trial where the appellant was convicted. The record is very clear on this. The learned trial judge did not find that the cause of death of the deceased was proved throughout his judgment. He merely

believed and accepted the evidence of P.W. 2 and P.W. 3 that it was the appellant who inflicted machete blows on the deceased on the 10th of March 1985. The Court of Appeal agreed with this finding of the learned trial judge when it held on page 143 of the record as follows:-

B *“Now, we have seen that the learned judge accepted the evidence of P.W. 2 and P.W. 3, the two eye witnesses to the incident, that they saw 1st appellant dealing machete blows on the deceased. Did the evidence before him support this stance?”*

C *I have carefully gone through the evidence of these two witnesses. They testified positively that they saw the 1st appellant dealing machete blow after machete blow on the deceased, even after the latter had fallen to the ground and was evidently out of the fight... The appellants themselves agreed that the 1st appellant used his*
D *machete on the deceased. I see no reason to disagree with the learned judge on his findings of facts here...”*

I also agree with the Court of Appeal on the findings that P.W. 2 and P.W. 3 saw the appellant (who was 1st accused at the trial and 1st appellant in the Court of Appeal) inflicting
E ***machete blows on the deceased according to the evidence. But this evidence is not evidence of proof of what caused the death of the deceased, since his death took place four days thereafter, and the Court of Appeal did not, like the learned***
F ***trial judge, advert its mind to the cause of death of the deceased. It seems to me that they both assumed that the fact that the deceased received machete blows by the appellant until he fell down, he (deceased) must have died as a result of the machete blows despite the fact that there was no medical***
G ***report to that effect. This is certainly a wrong assumption in law and conviction based upon it cannot stand. This was also conceded by the learned counsel for the appellant. I therefore find that the cause of death, an important ingredient of the offence of murder, has not been proved in this case. I answer***
H ***issue three in the negative.***

This is not the end of the matter. I have earlier said that I agree with the trial court and the Court of Appeal that there is overwhelming evidence of P.W. 2, P.W. 3, and the confession of the appellant himself to the effect that the (appellant) in-

fllicted machete blows on the deceased until he fell down before he was carried to the hospital for treatment. By this act the appellant must have committed an unlawful assault on the deceased. This is a criminal offence for which the appellant can be convicted of, even though he was not specifically charged with it. See Ibrahim v. State (1991) 4 NWLR (pt. 186) 397; Kada v. State (1991) 8 NWLR (pt. 208) 134; Onogwu v. State (1995) 6 NWLR (pt. 401) 276, and **Section 179 of the Criminal Code. It is a lesser offence from the murder charge with which the appellant was originally charged. It is an offence punishable under section 355 of the Criminal Code and carries a maximum sentence of three years.**

From all what I have said above, I allow this appeal, and set aside the conviction and sentence passed on the appellant for the offence of murder contrary to section 319 (1) of the Criminal Code. I however hereby find him guilty and convict him of the lesser offence of unlawful assault contrary to section 355 of the Criminal Code and sentence him to a term of two years imprisonment with hard labour with effect from the date of his conviction by the trial court.

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Kalgo, J.S.C., in the judgment just read. I have had a preview of the judgment in draft before now.

There is overwhelming evidence from the fact of this case that the appellant inflicted machete blows on the deceased, Mark Ukeagu, on the 10th of March, 1985. Mr. Ukeagu sustained serious injuries and was taken to Dr. Ukelonu's hospital Umuahia. On the following day the deceased was transferred to the Queen Elizabeth Specialist Hospital, Umuahia. On the 14th of March 1985 he died. There is no medical evidence adduced by the prosecution showing the condition of the deceased when he was taken to hospital and the medication given to him before he died. There is no record of his treatment at any of the hospitals. If the deceased had died on the spot after the attack medical evidence could be dispensed with since the court could infer the cause of death from circumstantial evidence before it – see Kato Dan Adamu v. Kano Native Authority (1956) 1 FSC 25 and

Homman v. The State (1967) NMLR 23.

In the present case it is impossible to infer the cause of death from the testimonies of the witnesses who gave evidence for the prosecution. It is the duty of the prosecution in a criminal trial to prove the charge beyond reasonable doubt. The only evidence which linked the appellant with the condition which led Mr. Ukeagu to be taken and admitted in hospital was when he said in evidence that used a machete to strike the deceased. But there is no evidence showing which part of the body was struck or the type of injury inflicted on the deceased by the appellant. Such evidence would help the court to infer the cause of death. In the circumstances, it is unsafe to say that the act of the appellant was the cause of the deceased death. The conviction of the appellant for the murder of Mr. Ukeagu cannot therefore stand. It is very clear that the guilt of the appellant was not established beyond reasonable doubt before he was convicted for the murder of Mr. Ukeagu.

I agree with my learned brother in the lead judgment that the offence disclosed by the evidence of witnesses and the confession of the appellant that he inflicted machete blows on the deceased is unlawful assault. On the facts and evidence the appellant is guilty of the offence of unlawful assault contrary to S. 355 of the Criminal Code and I convict him accordingly. I abide by the order of sentence made in the lead judgment.

F

UWAIFO JSC

I have had the opportunity to read in advance the judgment of my learned brother Kalgo JSC. I agree with it that the cause of death of the deceased was not proved. I also agreed with the alternative lesser offence for which the appellant has now been convicted.

Although there is oral evidence that the appellant dealt machete blows on the deceased, there is no evidence of the type and severity of the injuries arising therefrom. The sort of evidence needed is such that ought to be supported medically which will indicate that the deceased died from injuries following the said machete blows. It is unfortunate that the learned trial judge received and relied on the evidence of a witness – the doctor who performed the autopsy – recorded in the earlier aborted proceeding without complying with

section 34(1) of the Evidence Act, the relevant aspect of which is that such evidence is relevant “*when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable.*” The provisions of section 34(1) apply to both civil and criminal cases: see *Nahman v. Odutola* (1953) 14 WACA 381; *Alade v. Aborishade* (1960) SCNLR 398; *Adeleke v. Adewusi* (1961) 1 SCNLR 58.

The deceased was treated in two hospitals following his encounter with the appellant and died four days after. There was therefore an *actus novus interveniens* which must be accounted for by the prosecution. To be able to do this, there must be evidence of the type of attention and treatment given by each hospital. In the absence of that, there is likely to be a break in the chain of causation. In the present case, the link between the appellant’s act and the cause of death was broken with dire consequences, particularly as there is no autopsy report. It is therefore impossible to conclude with certainty what the deceased died from, in which case the appellant must be acquitted of the offence of murder with which he is charged: see *R. v. Abengowe* (1936) 5 WACA 85. The burden on the prosecution is to prove not only that the act of the appellant could have caused the death of the deceased but that it certainly did: see *Omogodo v. The State* (1981) 5 SC 5. If there is the possibility that the deceased died from other causes than the act of the appellant, the prosecution has not established the case against the appellant: see *R. v. Oledima* (1940) 6 WACA 202; *R. v. Nwokocha* (1949) 12 WACA 453; *R. v. Owe* (1961) 2 SCNLR 354.

Accordingly the appeal against the conviction and sentence of the appellant is allowed. The said conviction and sentence are set aside. I abide by the conviction and sentence substituted by my learned brother Kalgo JSC in his leading judgment for the reasons he has given.

H

EJIWUNMI JSC

I was privileged to have read before now the draft of the judgment just delivered by my learned brother Kalgo JSC.

It is manifest from a careful reading of the said judgment and the record of appeal that the salient facts in this appeal have been carefully set down. I am also satisfied that the issues of law raised in respect of the appeal have also been satisfactorily considered and applied. In my respectful view what is of paramount importance in this appeal was whether it was proved beyond doubt that the deceased died as a result of the machete cuts inflicted upon him by the appellant. It is unfortunate that evidence, which was available and should have been called to establish that fact, was not called. The effect of that omission is that the prosecution failed to establish an important ingredient which would go to establish the guilt of the appellant beyond reasonable doubt for the offence of murder for which he was charged. See *R. v. Samuel Abengowe* 3 W.A.C.A 85; *Ononuju v. The State* (1976) 5 S.C. 1; *Omogodo v. The State* (1981) 5 S.C. 5; *R v. Williams Oledima* 6 W.A.C.A 202; *Onyenankeye v State* (1964) 1 All N.L.R. 151.

Having failed to call that evidence, I agree with my brother Kalgo, JSC, that the appellant could in the circumstances be found guilty of the offence of unlawful assault contrary to section 355 of the Criminal Code. In the result, the conviction of murder contrary to section 319 (1) of the Criminal Code is hereby quashed by me. His appeal succeeds to that extent. But he is hereby convicted of the offence of unlawful assault and sentenced to a term of 2 years in hard labour with effect from the date of his conviction.

AYOOLA JSC

Having had the privilege of reading in advance the judgment just delivered by my learned brother, Kalgo, JSC, and being of the view that he has exhaustively dealt with the issues arising in the appeal, I have nothing to add to the reasons he gives for allowing the appeal of the appellant from his conviction of the offence of murder. I am satisfied for the reason he gives that a lesser offence of unlawful assault contrary to section 355 of the Criminal Code had been established. In the result I too find the appellant guilty of the lesser offence and convict him accordingly. I sentence him as pronounced by my learned brother, Kalgo, JSC.