

SUPREME COURT OF NIGERIA
FRIDAY 28TH JUNE, 2002. SC. 328/2001
CORAM:- M. L. UWAIJ C.J.N, I. L. KUTIGI,
M. E. OGUNDARE, U. MOHAMMED,
A. I. KATSINA-ALU, U. A. KALGO,
A. O. EJIWUNMI, JJSC

GODWIN ANYANWU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Confession - Language used - Exhibits C&D were rightly made in English language - Since appellant proffered no evidence to controvert same (H1)

CRIMINAL PROCEDURE - Interpreter - Necessity of - Use of interpreter becomes mandatory - Where a person charged with criminal offence - Does not understand the language used at trial (H2)

CRIMINAL PROCEDURE - Interpreter - Failure to record - Though it is desirable for trial judge to record use of interpreter - But failure to so record does not vitiate trial (H3)

CRIMINAL PROCEDURE - Fair hearing - Interpreter - 1979 Constitution s. 33(6)(a)(e) - Failure to provide interpreter where needed - Is breach of the section which is fatal to a criminal trial (H4)

FACTS

There was a struggle between the deceased and three others for the possession of a bicycle. At that point in time, appellant ran inside his house and soon emerged with a machete with which he inflicted injuries on the deceased. The deceased slumped and died as a result of injuries he sustained. Thereafter, PW1 who was with the deceased at the material time reported the matter to the police. Subsequently, appellant was arraigned before the High Court of Imo State for murder of the deceased which offence is punishable under section 319(1) of the Criminal Code, Cap 30, Vol. 2, Laws of Eastern Nigeria 1963 (then applicable to Imo State).

At the trial, appellant raised the defence of provocation. In his judgment, the learned trial judge rejected the defence, convicted and sentenced appellant to death by hanging. Being dissatisfied, appellant filed appeal at the Court of Appeal, Port Harcourt. The court dismissed the appeal and affirmed the judgment of trial court. Further dissatisfied, appellant appealed to Supreme Court, where he sought leave to raise point of law not argued in the Court of Appeal. The point borders on the compliance or otherwise of section 33(6)(e) and (7) of the Constitution of the Federal Republic of Nigeria 1979.

ISSUES FOR DETERMINATION

“1. Can it be safely concluded that exhibits C and D were indeed the confessional statements personally made by the appellant to the police?”

2. Whether the provisions of section 33 subsection (6)(e) of the constitution of the Federal Republic of Nigeria, 1979, as amended, which were designed to guarantee fair hearing to every person who is charged with a criminal offence (such as the appellant in this case) were fully complied with in the instant case and, if not, did such non-compliance not nullify the entire proceedings and judgment of the trial court?

3. Whether the provisions of section 33(7) of the constitution of the Federal Republic of Nigeria, 1979, as amended, were fully complied with in this case and, if not, did such non-compliance not render the trial unfair.

4. Was the court below right in holding that the appellant was not entitled to the defence of provocation to mitigate his criminal culpability from murder to manslaughter?”

HELD (Unanimously dismissing the appeal per

OGUNDARE JSC)

Confession - Language used

1. There is clear evidence on exhibits C and D that PW4 recorded exhibit D while Inspector Udeagha recorded exhibit C. It may be that it was wrong to have tendered exhibit C through PW4, but no objection was taken to its admissibility. Nor was PW4 ever challenged in cross-examination that the

statement (exhibit D) made to him was made in English language. There is no ground of appeal challenging the admissibility of either statement.

He not only admitted making exhibits C and D to the police he affirmed that their contents were correct. Appellant was at all time relevant to this case a civil servant (a driver) in the Federal Ministry of Information. PW4 testified that appellant made his statement to him in English language; he was never challenged on this piece of evidence nor was evidence proffered by the appellant to controvert it. I cannot in the light of the facts available, hold that appellant did not make exhibits C and D in English language. I see no substance in the submissions for the appellant. I, therefore, resolve issue 1 against him. (pp. 1748 D/1749 A)

CRIMINAL PROCEDURE - Interpreter - Necessity of

2. The use of an interpreter only becomes mandatory where a person charged with a criminal offence does not understand the language used at the trial. In the instant case, the trial of the appellant was conducted in English language. From all indications available at the trial and as demonstrated by exhibits C and D, the appellant understood that language. The fact that the learned trial Judge caused the charge to be explained to the defendants in Ibo language before their plea was taken is not sufficient to conclude that the appellant did not understand the English language; he probably did so *ex abundanti cautela*, having regard to section 33(6)(a) of the 1979 constitution (now section 36(6)(a) of the 1999 constitution). I, therefore, agree with the learned Attorney-General of Imo State, for the respondent, that the factual basis for the invocation of section 33(6)(e) was not present in this case. The consequences of a breach of section 33(6)(e) becomes academic. And as this court will not indulge in such academic exercise, I decline the invitation to consider, in this case, whether or not it is appropriate to overrule our previous decisions in the cases cited to us. (p. 1750 B)

CRIMINAL PROCEDURE - Interpreter - Failure to record

- 3. In my respectful view, where an interpreter is provided at the commencement of the trial and a record of this is made, it is desirable, and indeed a constitutional duty of the trial Judge to record this fact also on the subsequent days of the trial when use is made of the interpreter. Where, however, the Judge fails to make a record of the use of the interpreter in subsequent days the trial is not, per se, there vitiated. In effect what I am saying is that a breach of Sec. 33(7) of the 1979 Constitution per se, will not necessarily vitiate a trial.** (p. 1752 D/F)

Fair hearing - Interpreter

- 4. Where it is shown that an interpreter was not provided where it should have been provided as where the accused person does not understand the language in which the proceedings are being conducted, different considerations will arise as this raises the question whether such an accused ever had a fair hearing. Breach of section 33(6)(a) & (e), is, however fatal to a criminal trial as it raises the question whether an accused person so affected ever had a fair hearing.** (p. 1752 E/G)

REPRESENTATION

- B. E. I. Nwofor, Esq, for the Appellant
J. T. U. Nnodum, Esq., A-G of Imo State with C. N. Akowundu, Esq., (Senior State Counsel), for the Respondent

CASES REFERRED TO

- Eguabor v. The Queen (No.1) (1962) 1 SCNLR 409
Locknan v. The State (1972) ANLR 498
The State v. Gwonro (1983) 1 SCNLR 142
Ogba v. The State (1992) 2 NWLR (Pt. 222) 164
Madu v. The State (1997) 1 NWLR (Pt. 482) 386
Fawehinmi Construction Co. Ltd. v. Obafemi Awolowo University (1998) 6 NWLR (Pt. 53) 171
Josiah v. The State (1985) 1 NWLR (Pt. 1) 125
Edun v. I.G.P (1966) 1 All NLR 17

Udeh v. The State (1999) 7 NWLR (Pt. 609) 1

Akpan v. The State (1992) 6 NWLR (Pt. 248) 439

Akeredolu v. Akinremi (No.3) (1989) 3 NWLR (Pt. 108) 164

Kale v. Coker (1982) 12 SC 252

STATUTES REFERRED TO

Criminal Code Cap 30 Vol. 2 Laws of Eastern Nigeria 1963, s. 319(1)

Constitution of the Federal Republic of Nigeria 1979, s. 33(6)(e)(7)

Constitution of the Federal Republic of Nigeria 1999, s. 36(6)(e)(7)

LEAD JUDGMENT BY OGUNDARE JSC

The appellant was charged along with 2 others at the High Court of Imo State for the murder of one Thomas Aliri in that on 17th October, 1982, they unlawfully killed the deceased and thereby committed an offence punishable under section 319(1) of the Criminal Code, Cap 30, Vol. 2, Laws of Eastern Nigeria, 1963 applicable at the time in Imo State. They each pleaded not guilty after the charge had been read and explained to them in Ibo language. At the trial that followed, the respondent called 5 witnesses and closed its case. Each defendant gave evidence in his or her defence and closed the defence. After addresses by learned counsel for the parties, the learned trial Judge in a considered judgment, found the appellant guilty of the murder of Thomas Aliri, the deceased; he convicted him accordingly and sentenced him to the mandatory punishment of death by hanging. The 2nd and 3rd defendants were, however, found not guilty of the offence and were each discharged and acquitted. Being aggrieved with the said judgment as it affected him, the appellant unsuccessfully appealed to the Court of Appeal. He has now further appealed to this court.

With leave of this court, the appellant filed a notice of appeal containing five grounds of appeal. He also obtained leave to raise and argue points of law not canvassed in the court below. The points of law relate to subsections (6)(e) and (7) of section 33 of the constitution of the Federal Republic of Nigeria, 1979, then in force at the time the offence was committed and the appellant was tried. It is now section 36(6)(e) & (7) of the 1999 constitution. The grounds of appeal, without their particulars, read:

"1. The learned Justices of the Court of Appeal erred in law in

failing to hold that the entire proceedings at the trial of the appellant including the judgment delivered by the trial court on 21/1/85 are null and void.

2. *The learned Justices of the Court of Appeal erred in law in failing to hold that the appellant's fundamental right under section 33(7) of the constitution of the Federal Republic of Nigeria, 1979 was violated.*

3. *The learned Justices of the Court of Appeal erred in law by failing to hold that the appellant was entitled to defence of provocation to mitigate his criminal culpability from murder to manslaughter.*

4. *The learned Justices of the Court of Appeal erred in law by upholding the trial court's findings of fact that there was no fight between the deceased and any of the accused persons and that the deceased did not tell the 1st accused that he was responsible for the death of the wife of the 1st accused (now appellant) and would be responsible for 1st accused eventual death and thereby erroneously rejected appellant's defence of provocation.*

5. *The learned Justices of the Court of Appeal erred in law in failing to hold that it is clearly unsafe to conclude that exhibits C and D were indeed the confessional statements personally made by the appellant."*

The parties filed and exchanged their respective briefs of argument. In the appellant's brief the following 4 issues are raised as calling for determination in this appeal:

"1. *Can it be safely concluded that exhibits C and D were indeed the confessional statements personally made by the appellant to the police?*

2. *Whether the provisions of section 33 subsection (6)(e) of the constitution of the Federal Republic of Nigeria, 1979, as amended, which were designed to guarantee fair hearing to every person who is charged with a criminal offence (such as the appellant in this case) were fully complied with in the instant case and, if not, did such non-compliance not nullify the entire proceedings and judgment of the trial court?*

3. *Whether the provisions of section 33(7) of the constitution of the Federal Republic of Nigeria, 1979, as amended, were fully complied with in this case and, if not, did such non-compliance not render the trial unfair.*

4. *Was the court below right in holding that the appellant was not entitled to the defence of provocation to mitigate his criminal culpability from murder to manslaughter?"*

The respondent adopted these issues in its brief.

In determining this appeal I shall first consider issue 1 and thereafter take issues 2 and 3 together. Issue 4 will be considered last. B

Issue 1:

In the course of police investigation into this case PW 4, police Sgt. Cosmos Amaechi obtained two statements from the appellant. The two statements were recorded in the English language and tendered at the trial without objection from the appellant and marked exhibits C and D. PW 4 testified at the trial as follows: C

"Investigated this case. I know all the accused persons. Sometime in October 1982, a case of murder was reported and referred to Owerri urban police and transferred to State C.I.D. for investigation. During the course of my investigation, I arrested second and third accused persons. Before this, Owerri urban had already charged first accused to court. I visited the scene of crime at Umuogi, Ngor Okpala in Owerri Local Government. I also visited the prison yard where I obtained the statement of first accused in writing. I also obtained the statement of second and third accused persons. They were formerly charged to court with murder. A postmortem examination of the corpse of the deceased was performed by a doctor. This is the first statement made by first accused on 18/10/82. Counsel seeks to tender it. No objection. Statement admitted as exhibit 'C'. This is the second statement made by first accused on 23/12/82. Counsel seeks to tender it. No objection. Statement admitted as exhibit 'D'... Before each accused person made his statement or statements, he was cautioned and charged and he volunteered the statement without stress or inducement. The statements were obtained in English language and recorded in English language and read over to each accused persons and he said, it was correct before he signed it and I countersigned it. Exhibits C and D are repeatedly read in court by witness. No objection after the reading as to the voluntarily (sic) of each statement." E F G H

The question has arisen in this appeal as to whether or not exhibits C and D were made by the appellant. Learned counsel argued that the evidence of PW4 gave the impression that exhibits C

and D were either written down by the appellant in English language or that he dictated them to PW4 in English language who then wrote them down and that, in any event, appellant signed each statement. Comparing exhibits C and D, learned counsel submitted that they could not have been made by the same person as the hand writings on them were different and, therefore, could not have been written by the appellant. It is counsel's view that by the same argument, both statements could not have been written by PW4. It is further argued by learned counsel that as the signatures of the maker of the two statements were different, they could not both have been made by the appellant. Learned counsel then finally urged us to hold that *"this is not a case where it can safely be said that the appellant made statements or any statement to the police in English language."*

I agree with the respondent when, in its brief, it described the arguments for the appellant as making *"a mountain out of nothing"* and *"very fanciful but unfortunately bordered more on semantics and mere technicality."*

There is clear evidence on exhibits C and D that PW4 recorded exhibit D while Inspector Udeagha recorded exhibit C. It may be that it was wrong to have tendered exhibit C through PW4, but no objection was taken to its admissibility. Nor was PW4 ever challenged in cross-examination that the statement (exhibit D) made to him was made in English language. There is no ground of appeal challenging the admissibility of either statement. Rather importantly, the appellant in his evidence at the trial testified as follows:

"My name is Godwin Aliri or Godwin Anyanwu. I am a civil servant. I am employed as a driver by Federal Military Government in the Federal Ministry of Information. I live at 54B Okparanozie Street, Owerri. I am also a farmer. I know Thomas Aliri the deceased. He was my brother. I know second and third accused persons who are also my brothers. I was married. My wife died on 9th August, 1982. She died during the childbirth of twin babies. My mother takes care of the children, four of them in number. I was sad after the death which caused me a lot of suffering. I was in court when my statements to the police was (sic) read out. I adopt them as part of my defence. They are exhibits C and D which exhibits witness identified in court as his voluntary statements. The facts in the statements are

correct.”

He not only admitted making exhibits C and D to the police he affirmed that their contents were correct. Appellant was at all time relevant to this case a civil servant (a driver) in the Federal Ministry of Information. PW4 testified that appellant made his statement to him in English language; he was never challenged on this piece of evidence nor was evidence proffered by the appellant to controvert it. I cannot in the light of the facts available, hold that appellant did not make exhibits C and D in English language. I see no substance in the submissions for the appellant. I, therefore, resolve issue 1 against him.

Issues 2 and 3:

The pith of the arguments on issues 2 and 3 is that appellant understands only the Ibo language and not the English language. To buttress this assertion, reference was made to the court proceedings of 4th June, 1984 when the appellant along with the other defendants were arraigned in court. Before their plea was taken, the charge was read over and explained to them in Ibo language. It is submitted that from this fact it must be that the appellant understood only the Ibo language. Our attention was next drawn to the rest of the trial up to judgment which was conducted in English language without any intimation on record that an interpreter was provided who interpreted all the proceedings, including judgment, to the appellant from English to Ibo and vice versa. It is submitted that there was infraction of the appellant's fundamental right to fair hearing under section 33(6)(e) of the 1979 constitution (now section 36(6)(e) of the 1999 constitution). It is submitted that in the circumstance, the trial of the appellant is a nullity notwithstanding that he was represented at that trial by counsel. We are further invited to overrule the previous decisions of this court that held to the contrary in *Imadebhor Eguabor v. The Queen* (No.1) (1962) 1 SCNLR 409; *Peter Locknan & Anor v. The State* (1972) ANLR 498; (1972) 1 All NLR (Pt. 2) 62; (1972) 5 SC 40; *The State v. Salihu Mohammed Gwonro & 4 Ors.* (1983) 1 SCNLR 142; *Edwin Ogba v. The State* (1992) 2 NWLR (Pt. 222) 164; and *Mallam Madu v. The State* (1997) 1 NWLR (Pt. 482) 386.

Subsections (6)(a) & (e) and (7) of section 33 of the 1979 constitution provided:

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

(a) be informed promptly in the language that he understands and in detail of the nature of the offence;

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

33(7) “When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedings...”

The use of an interpreter only becomes mandatory where a person charged with a criminal offence does not understand the language used at the trial. In the instant case, the trial of the appellant was conducted in English language. From all indications available at the trial and as demonstrated by exhibits C and D, the appellant understood that language. The fact that the learned trial Judge caused the charge to be explained to the defendants in Ibo language before their plea was taken is not sufficient to conclude that the appellant did not understand the English language; he probably did so ex abundanti cautela, having regard to section 33(6)(a) of the 1979 constitution (now section 36(6)(a) of the 1999 constitution). I, therefore, agree with the learned Attorney-General of Imo State, for the respondent, that the factual basis for the invocation of section 33(6)(e) was not present in this case. The consequences of a breach of section 33(6)(e) becomes academic. And as this court will not indulge in such academic exercise, I decline the invitation to consider, in this case, whether or not it is appropriate to overrule our previous decisions in the cases cited to us.

It is the further complaint of the appellant that the trial Judge breached section 33(7) of the 1979 constitution in that he failed to record that an interpreter was provided to interpret the evidence of PW1, PW2, PW3 and the defendants given in Ibo language into the English language in which the learned Judge recorded the proceedings. I think there is a point here. The record before us shows that these prosecution witnesses and the defendants gave their testimony in Ibo language. The evidence itself was recorded in English language. But there is nothing on the record to indicate an interpreter was employed on the dates these witnesses testified to interpret Ibo into

English language and who the interpreter was. What then is the effect of the failure of the learned trial Judge to make a record of this fact? It is the submission of learned counsel for the appellant that a breach of section 33(7) rendered the proceedings and judgment of the trial court unconstitutional, null and void. He cited authorities that show the necessity for a court, particularly a trial court, to make a complete record of the proceedings before it. B

Counsel for the respondent, in his brief, drew the court's attention to a previous decision of this court on the point and this is Peter Locknan & Anor. v. The State (1972) ANLR 498 where this court appears to have resolved the issue arising in this case. In a situation not too dissimilar to what happened in this case, Lewis, J.S.C. delivering the judgment of this court said at page 501 of the report: C

"Now whilst we must of course agree with Mr. Brown Peterside that the record does not specifically show that the interpreter in English into Hausa and vice versa was present on the four days in question when the 5th, 6th, 8th and 9th prosecution witnesses gave evidence, we do not think that, once the learned trial Judge had recorded the interpreter as being affirmed on the first day of the trial, it was absolutely necessary for him to show on the record that the interpreter was present on every subsequent day. The presumption of regularity must apply and though, if he had noted his presence on each subsequent day, it would have put objections such as this completely out of the scope of counsel's argument, we do not think there was an absolute requirement for him to do so." E

And on page 502 he added:

"However, if the 1st accused could affirmatively show that an interpreter was absent then we would certainly be prepared to agree that the objection had force but that was not the case here. Mr. Brown Peterside did not seek to adduce evidence before us to show that the interpreter was not there on the days in question but he relied solely on the absence on the record of any definite statement that he was present"... F

In the case on hand, an interpreter was provided in court on 4/6/84 when the defendants were arraigned and their pleas taken - see page 29 of the record. This much the appellant conceded. It must be presumed, in the absence of evidence to the contrary, that the interpreter who was, in this case, the clerk of court was present H

throughout the trial of the defendants and did in fact interpret Ibo language into English language and vice versa as occasion required. I think the reasoning of this court in Locknan's case is sound and logical; I have no reason to depart from it. The two cases of Fawehinmi Construction Co. Ltd. v. Obafemi Awolowo University (1998) 6 NWLR B (Pt.53) 171 and Godwin Josiah v. The State (1985) 1 NWLR (Pt.1) 125 cited to us by learned counsel for the appellant in his brief do not go as far as learned counsel would want us to go in this case, that is, that failure by the learned trial Judge to make a full record of proceedings in a criminal trial per se vitiates the entire trial and judgment. Both cases, as well as Locknan, emphasize the desirability of a trial Judge making a full record of the proceedings before it in a criminal case. I, too, subscribe to the views expressed in those cases. The constitution requires it and trial Judges must comply with the provisions of the constitution.

In my respectful view, where an interpreter is provided at the commencement of the trial and a record of this is made, it is desirable, and indeed a constitutional duty of the trial Judge to record this fact also on the subsequent days of the trial when use is made of the interpreter. Where, however, the Judge fails to make a record of the use of the interpreter in subsequent days the trial is not, per se, there vitiated. Where it is shown that an interpreter was not provided where it should have been provided as where the accused person does not understand the language in which the proceedings are being conducted, different considerations will arise as this raises the question whether such an accused ever had a fair hearing. In effect what I am saying is that a breach of Sec 33(7) of the 1979 Constitution per se, will not necessarily vitiate a trial.

A breach of section 33(6)(a) & (e), is, however fatal to a criminal trial as it raises the question whether an accused person so affected ever had a fair hearing. From all I have said above, I resolve issues 2 and 3 against the appellant.

H Issue 4:

I think it is pertinent at this stage to give the facts of this case, how be it briefly: On 17/10/82, PW1 who was the village councilor of the area where the deceased and the 3 defendants resided, received a report from the deceased that the 2nd defendant had gone to the

police station to make a report of him (the deceased) with respect to a dispute between him (the deceased) and the 2nd defendant over the ownership of a bicycle carriage. Soon after the report, the appellant the 2nd defendant came to PW1 's house accompanied by a policeman who arrested the deceased and took him away to the police station. Later in the day PW1 went to the police station at Umuneke to take the deceased out on bail. On his way back from the police station with the deceased, they passed the appellant and 2nd defendant on the way; both were going in the opposite direction. The deceased was holding a bicycle. The 2 defendants turned back. 2nd defendant held on to the deceased's bicycle. PW1 rebuked the 2nd defendant who thereafter released the bicycle and followed PW1 and the deceased. The appellant had meanwhile left for his house. When the 3 men reached the gateway, the appellant emerged from his house and questioned the deceased how he came about the bicycle. PW1 rebuked the appellant for his conduct. At this juncture 3rd defendant came out of the house with a spanner and threatened to loose the bicycle carriage from the bicycle the deceased was still holding on to. There was a struggle between the deceased on the one hand and the 3 defendants on the other for possession of the bicycle. At that point in time, the appellant ran inside the house and soon emerged with a machete with which he inflicted injuries on the deceased on the neck, leg and hand. The deceased slumped and died. PW1 shouted for help but the people around ran away. PW1 and one Nkwocha left for the police station to make a report of the incident. On arriving at the police station the Police Inspector on duty informed them that the appellant had reported to the police that he the appellant had killed someone. Police accompanied PW1 to the scene where photographs were taken and the corpse of the deceased was removed to the hospital mortuary. An autopsy was conducted on the corpse of the deceased. The deceased and the 3 defendants were relations. Other than the struggle for possession of the bicycle, there was no fight between the deceased on the one part and the 3 defendants before the appellant inflicted machete cuts on the former. Neither did they abuse each other.

The appellant testified in his defence at the trial. He said:

"On 17/10/82, I first went to Umuoha to see my sister and to report to her about my ill-health. This was about 7 a.m. on the day.

When I returned about 9 a.m., I enquired about the whereabouts of second accused. The wife of second accused told me that second accused and the deceased disputed the ownership of a bicycle carriage. Shortly afterwards, as I stared at the frontage of my house I saw the second accused with a policeman. I accompanied second
B *accused and the policeman to the house of the deceased. The police arrested the deceased and took him and the second accused to Umuneke police station. I went back to my house. After a while I went to the police station to find out if the police would allow bail for the deceased. At the police station, I waited for PW1 to arrive and*
C *take the deceased on bail. As he did not arrive, I left to return home because I did not feel well. On the way I met PW1 and advised him to go and take the deceased on bail. At about 5 p.m. same 17/10/82, I heard from my house the voices of second accused and the de-*
D *ceased. On reaching the place where they were, I saw the deceased and second accused struggling for a bicycle carriage. I told them it was shameful for them to quarrel or struggle over a bicycle carriage which value was only N3 (three naira). Thomas asked me why I should say what I said. He said I should remember that he told me that my*
E *wife would die during a childbirth and that I would myself die before two months from the date of incident. And he said that he was responsible for my wife's death. As he said this to me he moved his fingers to my face. I was annoyed. I beat him with my hand. He held me and beat me. Fight ensued between him and me. As he was*
F *stronger than I was, I ran away. He chased me. As I was running, I saw an object which I used to fling on him. It cut his hand. As he continued the chase, I fly the object again and it cut his neck. I did not know the object was a machete. It was later on after the act I*
G *found the object was a machete. After the incident I ran away and the deceased also ran away. I went to the police and reported that I had a quarrel or fight with my brother and that I wounded him during the fight. I did not notice if the deceased bled because I ran away after the incident. I was sad when I heard of his death. PW1 was*
H *present but he went away with his bicycle at the stage when a fight ensued between me and the deceased. The distance between my house and the place where we fought is 3.6 metres (12 feet). The deceased chased me towards my house from the place we fought. Second accused was present when the object cut the deceased. Third*

accused was in his house.”

Cross-examined, he testified - *“My wife died at home in the village. Before she died I had no quarrel with the deceased. Before 17/10/82 the deceased never said he killed my wife and he never threatened he would kill me. My wife did not deliver either in the hospital or in a maternity. She delivered in the house. She died on the spot after the delivery. I did not suspect any foul play or anyone as responsible for her death. I do not know if the deceased was at home when my wife died. He did not come to sympathize with me. But his wife and children came and sympathized with me. The deceased said he was responsible for the death of my wife and he also said he would kill me.”*

To further questions, he answered - *“I killed the deceased because we fought. The second accused was separating me and the deceased as we fought. We did not take part in the fight. The cut on the hand and on the neck took place on the same spot. The cut took place near my house. I picked up the machete from my house. He lay outside my house. After inflicting the cuts I ran inside the bush.”*

The appellant raised the defence of provocation which the learned trial Judge considered and found-

“On the facts of the present case the only evidence which touches and concerns provocation is to bicycle carriage claimed by second accused and the alleged statement by the deceased that he would kill first accused as he had in the past killed the wife. On the issue of the bicycle carriage second accused and the deceased claimed ownership of it which they believed was bona fide.

Whether the claim on either side was made in good or bad faith is not in issue which can properly be determined in these proceedings. Suffice it to say that with that bona fide claim of right which the contestants was justified to kill the other either on ground of provocation or self defence or in defence of property. As I do not believe the evidence that the deceased said he would kill first accused as he did of the wife, the defence of provocation by such utterance is not available to the accused persons.”

The learned trial Judge rejected this defence and other possible defences he took into consideration and convicted the appellant for murder as charged. He found:

Having given due consideration to the facts and circumstances of this case, and found that:

“(a) There was no fight between the deceased or any of the accused persons, but there was a struggle between them over the bicycle carriage.

B *(b) The deceased did not tell first accused he was responsible for the death of his wife and would be responsible for his eventual death.*

C *(c) The dispute of ownership of the bicycle carriage between second accused and the deceased did not offer any justifiable cause for the killing of the deceased. I hold, therefore, that the defences of provocation and self defence are not available to the first accused. I find that the killing was unlawful contrary to section 319(1) of the criminal code law under which first accused is charged.”*

D The defence was again raised in the Court of Appeal, Akpiroroh, J.C.A. who read the lead judgment of that court, with which Ogebe and Pats-Acholonu, J.C.A. agreed, had this to say:

“I must say straight away that the defence of provocation is not available to the appellant on the facts of this case”.

E He considered the findings of the learned trial Judge and added:

“The above findings is (sic) amply supported by the evidence led before the court and the learned trial Judge was quite right in holding that the defence of provocation and self defence are not available to the appellant on the fact of this case.”

F The appellant has in this court, advanced the same arguments in support of his claim to the defence of provocation. I have given consideration to the arguments advanced but I regret I am not impressed by them. The findings of fact made by the learned trial Judge
G are amply supported by the credible evidence before him and were rightly affirmed by the Court of Appeal. I do not find them perverse as submitted before us. As no special circumstances have been shown why I should disturb those findings, I too affirm them. And upon those findings there can be no room for the success of the defence of
H provocation. On the facts of this case I have no hesitation in rejecting that defence. I, therefore, resolve issue 4 against the appellant. All the issues canvassed in this case having been resolved against the appellant, his appeal fails and it is hereby dismissed. I affirm the judgment of the Court of Appeal which, in turn, affirmed the conviction

for murder and the sentence of death passed on the appellant by the trial High Court.

UWAIS CJN

I have had the opportunity of reading in advance the judgment read by my learned brother Ogundare, JSC. For the reasons contained in the said judgment I too will dismiss the appeal. Accordingly, the appeal fails and it is hereby dismissed. I affirm the decision of the trial court which was confirmed by the Court of Appeal.

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Ogundare, JSC. I agree with his reasoning and conclusions. He has carefully considered all the issues raised before us that I do not need to repeat them. There is clearly no merit in the appeal. It is hereby dismissed. The decisions of the lower courts are accordingly affirmed.

MOHAMMED JSC

I agree with the opinion of my Lord Ogundare, JSC. in the judgment just read. My Lord has permitted me to read the draft of the judgment before now. I will also dismiss the appeal and affirm the judgments of the Court of Appeal and the trial court. The main argument of Mr. Nwofor learned counsel for the appellant is that the appellant being unable to speak English language which was the language of the court, was entitled to have, without payment, the assistance of an interpreter throughout the entire proceedings at his trial. Mr. Nwofor submitted further that on the day the appellant and his co-accused persons were arraigned before the trial court there was an interpreter who just read out the offence on the information in English language and thereafter interpreted same in Ibo language to the appellant and the co-accused persons. However, on all other subsequent dates of the trial proceedings at the High Court there was absolutely nothing on record to show that the same or any interpreter was present in court to render assistance to the appellant and

the court in the interpretation of the proceedings.

I will now go back to the arraignment when the charge in the information was read to the appellant and his co-accused persons. Part of the proceedings on that day read:

B *"The offence on the information is read out first in English and explained in Ibo language, separately to each accused person, using the sworn interpreter trusted presently in this court as the clerk of court."*

C From then on the proceedings continued without mentioning the interpreter. Is it necessary that the court must record that an interpreter is present during the rest of the proceedings? I think not. The interpreter was the court clerk and the presumption of regularity must apply. The court clerk would be presumed to be in court interpreting Ibo into English and vice versa during the proceedings. The D appellant and the co-accused were represented by a counsel throughout the trial. If the appellants and the co-accused were not being told in Ibo language what was going on the counsel would have raised an alarm. If he failed to do so he cannot complain afterwards. In the case of *The Queen v. Eguabor* (1962) 1 All NLR 287 this court observed as follows:

F *"In our experience the practice usually adopted in the High Courts and Magistrates' Courts where a witness is giving evidence in a language not understood by the accused, and where no interpretation into a language understood by the accused is being made for the benefit of the court, is for an interpreter to stand near the accused and tell him what the witness is saying. We consider that this should be the invariable practice where an accused person is not represented by counsel (as we believe it already is), and that it should be followed also where the accused is represented by counsel, unless the accused personally expresses a wish to dispense with the translation and the presiding Judge or magistrate considers that the interests of justice will not be prejudiced by such a course; he should not permit it unless he is of the opinion that the accused substantially understands the case he has to meet. If the trial takes any unexpected or unusual turn (e.g. if a witness alters or adds to his story) the Judge or magistrate should ensure that the accused understands what has been said."*

H *These views are in conformity with those expressed by the Court of Criminal Appeal in England in R. v. Lee Kun (1916) 1 K.B. 337,*

except that in Nigeria we consider that the waiver of a translation should be made by the accused himself. However, in R. v. Lee Kun the Court of Criminal Appeal treated the matter as one of practice, so that it would always be a question for the appeal court whether any substantial miscarriage of justice had resulted from a failure to follow the correct practice. We consider that this is the position in Nigeria also in a case where an accused has not expressly asked for the assistance of an interpreter, and that an appellant who was represented by counsel at the trial cannot invoke the right conferred by s. 21(5)(e) of the constitution (1960) as a ground for setting aside a conviction unless he claimed the right at the proper time and was denied it. “

In the case of *The State v. Salihu Mohammed Gwonto and Ors.* (1983) 1 SCNLR 142 Nnamani, JSC, supported the above opinion when he held:

“I think, with all respect, that the point which was missed here is that the importance of the issue of representation lies in the fact that if an accused person is represented by counsel such counsel ought to demand his client’s right to interpretation or object to any irregularity such as lack of interpretation. If neither he nor the accused object, the right is lost for all time and certainly cannot be invoked in a Court of Appeal. “

The argument of learned counsel for the appellant on the confessional statements made by the appellant and admitted as exhibits C & D is flawed by the admission of the appellant that the facts in the statements are correct. This is clear when the appellant testified in court and said as follows:

“I was in court when my statements to the police was (sic) read out. I adopt them as part of my defence. They are exhibits C and D. The facts in the statements are correct. ”

After accepting that the statements were made by the appellant and that the facts stated therein were correct can the learned counsel sincerely submit that it was unsafe to conclude that exhibits C and D are confessional statements made by the appellant?

For these reasons and the fuller reasons in the judgment of my learned brother Ogundare JSC, this appeal is without any merit and it is dismissed. The judgment of Court of Appeal is hereby affirmed.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Ogundare, JSC just delivered. I agree with it.

Subsection (6)(a) and (e) of section 33 of the 1979 constitution provided:

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

(a) to be informed promptly in the language that he understands and in detail of the nature of the offence;

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

The intention of the legislature was to ensure a fair trial of the accused person, that the accused person understands the charge or information against him, that he understands and is able to follow the trial to his conviction and acquittal as the case may be. In the present case the record shows that the interpreter in English into Ibo and vice versa was affirmed on the first day of the trial. This would presuppose that the appellant did not understand the English language. Thereafter the record is silent on the presence of the interpreter on the subsequent days of the trial. Was there an interpreter on the subsequent days or not? The answer would depend on first whether the accused could affirmatively show that an interpreter was absent and that led to his inability to follow the proceedings. Secondly if it is evident on the record that the accused person followed the proceedings to the end, then the presumption of regularity must apply. I do not understand the law as saying that the court must record the presence of the interpreter on every subsequent day of the trial. See *Peter Locknan & Anor. v. The State* (1972) All NLR G 498.

In the instant case, as I have already stated, an interpreter was provided in court on 4/6/84 when the accused persons were arraigned and their pleas taken. This is not in dispute. It must therefore be presumed in the absence of evidence to the contrary, that the interpreter was present throughout the trial. This explains why it is evident that the appellant understood the proceedings. Let me explain. The appellant in his evidence at the trial testified as follows:

“I was in court when my statements to the police was (sic) read out. I adopt them as part of my defence. They are exhibits C and D.

The facts in the statements are correct.”

This piece of evidence testifies to the fact that the appellant understood the proceedings. It cannot therefore be rightly said that section 33(6)(a) & (e) was breached. In the circumstance, I also must decline the invitation to consider whether or not it is appropriate to overrule our previous decisions in the cases cited to us. B

As I have already stated, I agree with the judgment of my learned brother Ogundare, JSC in this appeal. For the reasons he gives, I also dismiss the appeal and affirm the judgment of the Court of Appeal. C

KALGO JSC

I have had the advantage of a preview of the judgment just delivered by my learned brother Ogundare, JSC in this appeal. I agree with his reasoning and conclusions to the effect that this appeal be dismissed. I however wish to add a few words of my own. D

The challenge to the voluntariness of the appellant's cautioned statements exhibits C and D cannot succeed merely because they were in different handwriting. PW.4 who tendered these statements in court testified that he recorded exhibit C, but exhibit D was recorded by another policeman who was not available at the trial. They were both read out in court by PW.4 and the appellant owned them both, and that he made them voluntarily. Also when the appellant gave evidence in his own defence, he categorically said that he made both statements and did not suggest that he was in any way forced to make any of them. And from the body of the proceedings and the circumstances surrounding the making of the statements (exhibits C and D) and the appellant's oral evidence in court, it is not in any doubt that the appellant understood the English language. It appears to me therefore that there is full compliance with the provisions of section 33(6)(a) of the 1979 constitution applicable to this case, and this makes the exercise of considering to overrule the previous decisions of this court in the 5 cases listed by the appellant in his brief, unnecessary. I so hold. E F G H

On the issue of the absence or otherwise of an interpreter to interpret the proceedings to an accused person in court, a clear distinction must be made

(i) where the court recorded the appearance or presence of the interpreter on the first day of his appearance but failed to do so on subsequent days and

(ii) where no record of such interpreter was made at all.

In the first situation, there is the presumption of regularity that the interpreter was present on subsequent day or days even though not so recorded unless proved otherwise. In this case, failure to record the presence of the interpreter is not fatal to the proceedings. See *Edun v. I.G.P* (1966) 1 All NLR 17; *Udeh v. The State* (1999) 7 NWLR (pt.609) 1; *Locknan v. The State* (1972) All NLR 498. But in the second situation, there is clear non-compliance with the constitutional provisions as to fair hearing under section 36(6)(a) and (e) of 1979 constitution and the result of this is to vitiate the whole proceedings.

In the instant appeal, the appellant's complaint is exactly on the first situation mentioned above and it is my respectful view that the proceedings of the trial court, as affirmed by the Court of Appeal are properly conducted and valid and no breach or contravention of section 33(6)(a) and (e) or (7) of the 1979 constitution is occasioned.

I so find.

Finally, I also find that having regard to the facts of this case and the admissible evidence adduced at the trial as shown on the record, the defence of provocation in law, is not available to the appellant. The findings of the learned trial Judge which were upheld by the Court of Appeal, are in my view, amply supported by evidence at the trial. There is therefore the concurrent findings in this case of the trial court and the Court of Appeal which I normally cannot interfere with except where some special circumstances are shown and there are none shown here. See *Akpan v. The State* (1992) 6 NWLR (Pt. 248) 439; *Akeredolu v. Akinremi* (No.3) (1989) 3 NWLR (Pt. 108) 164; *Kale v. Coker* (1982) 12 SC 252.

Therefore for the above and more detailed reasons given by my learned brother Ogundare, JSC in the leading judgment, I find that there is no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal confirming conviction and the sentence passed on the appellant by the trial court.

EJIWUNMI JSC

I was privileged to have read in advance the judgment just delivered by my learned brother, Ogundare, JSC. In that judgment, he has carefully reviewed the peculiar facts of this case and considered also, the issues raised thereon in order to consider whether the appeal is meritorious. I agree entirely with his reasoning and conclusion that the appeal lacks merit, and must be dismissed. B

Among the issues raised in this appeal is the question as to whether this court should not overrule the previous decisions in *Eguabor v. The Queen* (No. 1) (1962) 1 SCNLR 409; *Peter Locknan & Anor v. The State* (1972) ANLR 498; (1972) 1 All NLR (Pt. 2) 62; (1972) 5 SC. 22; *The State v. Salihu Mohammed Gwonto & 4 Ors* (1983) 1 SCNLR 142; *Edwin Ogbu v. The State* (1992) 2 NWLR (Pt. 222) 164; and *Mallam Madu v. The State* (1997) 1 NWLR (Pt. 482) 386. The reason for questioning the continuing validity of the decisions of this court in those cases is the view of learned counsel for the appellant that an accused cannot be said to have had a fair hearing constituting a denial of his fundamental rights, where the proceedings were conducted in the language not understood by the accused, although he was also represented by counsel throughout his trial. E The above decisions of this court have been to the contrary.

Briefly, in the instant case, the contention made for the appellant is that he understands only the Ibo language and not the English language. To lend support to this contention, reference was made to the court proceedings of 4th June, 1984 when the appellant along with other accused persons were arraigned in court. Before their plea was taken, the charge was read over and explained to them in Ibo language. It is therefore submitted for the appellant that that was done because the appellant understood only the Ibo language. Our attention was next drawn to the rest of the trial up to judgment, which was conducted in English language. Throughout the proceedings, nothing was on the record apart from the day of arraignment to show that an interpreter was provided who interpreted the proceedings, including judgment to the appellant from English to Ibo and vice-versa. F G H

On those facts, as I have earlier observed, learned counsel for the appellant has invited this court to overrule the decisions of this court noted above, as they are in breach of the provisions of subsec-

tions 6(a) and (e) and 7 of section 33 of the 1979 constitution which read:

Subsections 6(a) and (e)

“Every person who is charged with a criminal offence shall be entitled to

B *(a) be informed promptly in the language that he understands and in detail*

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

C 33(7) *“When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedings.....*

It is obvious from a perusal of the provisions quoted above that an interpreter only becomes necessary where a person charged with a criminal offence does not understand the language used at the trial. In the case under consideration, the trial of the appellant was conducted in the English language. There is really nothing to suggest that the appellant did not understand the English language. It must be borne in mind that an interpreter was provided in court on 4/6/84 when the accused persons were arraigned and their plea taken. The appellant conceded that much. In my humble view, the fact that the learned trial Judge caused the charge to be explained to the defendants in Ibo language before their plea was taken is not sufficient to reach the conclusion that the appellant did not understand the English language. I take it that in the circumstances, the court wanted to satisfy itself that it evidently complied with the provisions of section 33(6)(a) of the 1979 constitution (now section 36(6)(a) of the 1999 constitution).

In his reply to the contention made for the appellant, the learned Attorney-General of Imo State, for the respondent, submitted that in the instant appeal the factual basis for the invocation of section 33(6)(a) of the constitution was not present in the case. I agree with him. I am also convinced to pursue that invitation upon the facts disclosed would amount to an academic exercise, which is not proper for this court to undertake. I will decline the invitation to overrule our previous decisions in the cases cited to us.

On the aspect of the complaint of the appellant that the court failed to make a full recording of what transpired during the proceedings by recording that an interpreter was present in court to in-

terpret the proceedings, there is no doubt that the complaint is valid in that regard. The provisions of section 33(7) of the constitution requires that a court trying any criminal offence shall keep a record of proceedings. It is therefore absolutely important for courts involved in the trial of such offences to scrupulously keep the records of the proceedings in accordance with the demands of the constitution. Failure so to do may vitiate the trial as a nullity. But in the instant case while the failure to record that an interpreter was in court interpreting the proceedings, that lapse in the circumstances is not sufficient to persuade me to depart from the decision of this court in *Peter Locknan & Anor v. The State* (1972) ANLR 498. In the result, I will also dismiss this appeal for the few reasons given above, and the fuller reasons given in the judgment of my learned brother Ogundare, JSC.

I will therefore uphold the judgment of the court below and accordingly affirm the conviction for murder and the sentence of death passed on the appellant by the trial court. Appeal dismissed.

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