

**SUPREME COURT OF NIGERIA**  
FRIDAY 11TH APRIL, 2003. SC. 258/2001  
**CORAM:- I. L. KUTIGI, M. E. OGUNDARE,**  
**U. MOHAMMED, N. TOBI, D. O. EDOZIE, JJSC**

IFEANYICHUKWU EJEKA ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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APPEALS - Court - Wrong attribution of issue - The error of attributing respondent's issue to appellant - Does not amount to violation of appellant's right to fair hearing (H1)

EVIDENCE - Contradiction - Effect - It is not every contradiction that results in upsetting trial court's judgment - As contradiction must be material - To warrant interference with judgment (H2)

MURDER - Conviction - Correctness of - Since evidence abound that appellant stabbed deceased to death - The conviction of murder cannot be reduced to manslaughter (H3)

***FACTS***

The deceased (in company of other children) while trekking down to a stream, met accused/appellant on their way. A minor argument erupted between the deceased and appellant. The argument led to appellant slapping and eventually stabbing the deceased. The deceased subsequently died on the same day at a hospital. Thereafter, appellant was arrested by the police.

He was thus arraigned before the High Court of Imo State Owerri, for the offence of murder contrary to section 319 of the Criminal Code Cap 30 LFN. At the conclusion of the trial, the learned trial Judge convicted appellant and sentenced him to death. His appeal to the Court of Appeal Port Harcourt was dismissed. Hence, appellant filed the present appeal at Supreme Court.

***ISSUES FOR DETERMINATION***

*"1. Whether the Court of Appeal can be said to have afforded the appellant a fair hearing of his appeal when that court failed to consider the arguments presented by the appellant in his*

*brief filed in support of his grounds of appeal?*

2. *Whether, in view of the material contradictions in the evidence of the witnesses for the prosecution, especially the PW1, PW2 and PW3, was the Court of Appeal correct in affirming the Judgment of the learned trial Judge?*

3. *Having regard to the facts established before the learned trial Judge, was the Court of Appeal correct in law, in refusing to invoke the provisions of section 179(2) of the Criminal Procedure Law of Eastern Nigeria?"*

**HELD** (Unanimously dismissing the appeal per  
**MOHAMMED JSC**)

*Courts - Wrong attribution of issue*

**1. I have also observed from the judgment of the learned Justice of the Court of Appeal that he considered the evidence of all the witnesses who testified during the trial for the appellant before he dismissed the appeal. It is also clear from the judgment of the court below that it considered all the defences put up by the appellant during the trial and found them not convincing enough to warrant disturbance of the decision of the learned trial Judge. The argument of the learned counsel, in the appellant's brief, that the Court of Appeal did not consider the submissions made on behalf of the appellant during the hearing of his appeal could not therefore be correct. The error committed by Ogebe, JCA in attributing the issues formulated by the respondent to the appellant does not amount to violation of the appellant's constitutional right to fair hearing. I therefore resolve the first issue against the appellant.**  
(p. 920 E)

*EVIDENCE - Contradiction - Effect*

**2. The essence of the testimony of PW1, PW2 and PW3 was to show that the appellant had stabbed the deceased and that the injury was the cause of his death. Even if the word "fight" was not used during the trial in describing how the incident occurred that does not amount to a material contradiction**

***between the testimony of the witnesses and the statements they made to the police. It is well settled that not every contradiction will result in upsetting trial court's judgment. For a contradiction to upset a judgment, it must be of such magnitude as to warrant interference with the conclusion reached by the learned trial Judge. (p. 921 F)***

*Conviction - Correctness of*

***3. It has been confirmed by the medical officer who performed the post-mortem examination on the body of the deceased that there was a wound caused by a sharp object. The sharp object went into the right ventricle of the heart. Such injury can be caused by a knife. This confirms the evidence of eye-witnesses that the appellant stabbed the deceased with knife. The deceased died on the same day. All these facts have established overwhelming evidence against the appellant. The issue of alternative verdict was not part of the case of the appellant before the trial court and I see no extenuating circumstances to reduce the offence of murder for which the appellant has been convicted to manslaughter. (p. 923 A)***

## NOTABLE POINT OF INTEREST

### **TOBI JSC**

#### ***1. Denial of fair hearing must be specifically proved***

The principle of fair hearing is breached where parties are not given equal opportunity to be heard in the case before the court. Where the case presented by one party is not adequately considered, the party can complain that he was denied fair hearing. Fair hearing is not an abstract term that a party can dangle in the judicial process but one which is real and which must be considered in the light of the and circumstances of the case. A party who alleges that he was denied fair hearing must prove specific act or acts of such denial and not a mere agglomeration of conducts which are merely cosmetic and vain. (p. 924 A)

### **REPRESENTATION**

A. Adedipe, Esq., for the Appellant

J. T. U. Nnodum (A-G Imo State) with L. C. Azuama (Assistant Director of Public Prosecutions), for the Respondent

**CASES REFERRED TO**

- Queen v. Izobo Owe (1961) ANLR 710
- B Onogwu v. The State (1995) 6 NWLR (Pt. 410) 271
- Iyanda v. The Queen (1960) SCNLR 595
- Ikemson v. The State (1989) 3 NWLR (Pt. 110) 455
- Onubogu v. The State (1974) ANLR 561
- C Adele v. The State (1995) 2 NWLR (Pt. 377) 269
- Abogede v. The State (1995) 1 NWLR (Pt.372) 473
- Gaji v. The State (1975) 1 All NLR 266
- Garba v. University of Maiduguri (1986) 1 NWLR (Pt.18) 550
- Tumobi v. Opawole (2000) FWLR (Pt. 2) 341
- D Queen v. Izobo Owe (1961) ANLR 710
- Onogwu v. The State (1995) 6 NWLR (Pt. 410) 271

**STATUTES REFERRED TO**

- Criminal Code Cap 30 Laws of Eastern Nigeria, s. 319
- E Criminal Procedure Laws of Eastern Nigeria, s. 179(2)

**LEAD JUDGMENT BY MOHAMMED JSC**

- The appellant was arraigned before Nwogu, J. of Imo State High Court, sitting at Owerri, for the offence of murder, contrary to section 319 of the Criminal Code, Cap. 30, Laws of Eastern Nigeria, applicable to Imo State. At the conclusion of the trial the learned trial Judge convicted the appellant and sentenced him to death. The facts of the case are in the following brief narrative: On 28th April, 1984 at about 9.00 p.m. four students, Christopher Ejiogu, Emmanuel Obiyor, Simon Ejiogu and Emmanuel Nnodi all of Federal Government College, Owerri were going to the stream to take bath. On their way they saw the appellant. He was going in the same direction. Christopher Ejiogu greeted him. The appellant did not respond. He continued on his way. A moment later he came back and rebuked the four students for not giving him his due respect by calling him “Nda” - Simon Ejiogu, who hereinafter shall be referred to as the deceased, pleaded with the appellant to go. The appellant turned to the deceased and asked *“If it were his (deceased’s) brother, Patrick,*

would he show such disrespect to him?" The deceased told the appellant not to mention the name of his senior brother. The appellant slapped the deceased. The deceased held the appellant. The two were holding each other when the deceased shouted that the appellant had stabbed him. The other boys came and held the appellant. The appellant wriggled free and escaped. He was later arrested by the police. The deceased was rushed to the hospital and he died on the same day. B

The appellant was tried for murder before Nwogu, J. of Imo State High Court. As I mentioned at the opening of this judgment, the learned trial Judge convicted the appellant of the offence of murder and sentenced him to death. He appealed to the Court of Appeal but the appeal was dismissed. Hence his final appeal to this court. The following issues have been identified by the appellant's counsel for the determination of this appeal; C D

*"1. Whether the Court of Appeal can be said to have afforded the appellant a fair hearing of his appeal when that court failed to consider the arguments presented by the appellant in his brief filed in support of his grounds of appeal?"*

*2. Whether, in view of the material contradictions in the evidence of the witnesses for the prosecution, especially the PW1, PW2 and PW3, was the Court of Appeal correct in affirming the Judgment of the learned trial Judge?"* E

*3. Having regard to the facts established before the learned trial Judge, was the Court of Appeal correct in law, in refusing to invoke the provisions of section 179(2) of the Criminal Procedure Law of Eastern Nigeria?"* F

The issues formulated by the learned counsel for the respondent are the same as the appellant's issues except issue 1 in which the respondent's counsel questioned whether the mistaken reference (by the court below) of the issues formulated by the learned counsel for the respondent, as issues formulated by the appellant, imply that the court below did not consider arguments presented by the appellant in his brief? H

Learned counsel for the appellant, in support of issue 1, submitted that the appellant was not afforded fair hearing by the Court of Appeal. He referred to a number of authorities on fair hearing including Gaji v. The State (1975) 1 All NLR 266; Garba v. University

of Maiduguri (1986) 1 NWLR (Pt.18) 550; and Alhaji Lawal Tumobi v. Israel Opawole (2000) FWLR (Pt. 2) 341; (2000) 2 NWLR (Pt. 644) 275.

Learned counsel Mr. I.A. Adedipe pointed out an error which the Court of Appeal committed when learned Justice Ogebe, JCA referred to the issues identified by the respondent and said that it was learned counsel for the appellant who formulated them. I have looked at the issues which Ogebe, JCA said, in his judgment that the appellant's counsel formulated for the determination of the appeal before the Court of Appeal. I agree that the learned Justice was in error to say that those issues were formulated by the counsel for the appellant. But is the error material for the learned counsel to submit that the appellant was not afforded fair hearing of his appeal? I think not. If one compares the issues formulated by the appellant and the respondent it will show that the respective issues, although couched in different terminologies, were basically the same. Each set of issues raised the question of self-defence, the question of proof of the prosecution's case based on the evidence adduced and the question whether the facts of this case warranted the invocation of section 179 (2) of the Criminal Procedure Law. The first issue questioned the evaluation of the evidence by the learned trial Judge. It is quite clear that Ogebe, JCA reevaluated the evidence before the trial court. ***I have also observed from the judgment of the learned Justice of the Court of Appeal that he considered the evidence of all the witnesses who testified during the trial for the appellant before he dismissed the appeal. It is also clear from the judgment of the court below that it considered all the defences put up by the appellant during the trial and found them not convincing enough to warrant disturbance of the decision of the learned trial Judge. The argument of the learned counsel, in the appellant's brief, that the Court of Appeal did not consider the submissions made on behalf of the appellant during the hearing of his appeal could not therefore be correct. The error committed by Ogebe, JCA in attributing the issues formulated by the respondent to the appellant does not amount to violation of the appellant's constitutional right to fair hearing. I therefore resolve the first issue against the appellant.***

On issue II, learned counsel for the appellant submitted that

where a witness had made a statement before trial which was inconsistent with the evidence he gave in court and gave no cogent reasons for the inconsistency the trial court should regard his evidence as unreliable. He referred to *Christopher Onubogu v. The State* (1974) ANLR 561 at 570; (1974) 9 SC 1; *Adele v. The State* (1995) 2 NWLR (Pt. 377) 269; and *Abogede v. The State* (1995) 1 NWLR (Pt.372) 473. The inconsistency which learned counsel made heavy weather of is where PW1, PW2 and PW3 made statement to the police and said that there was a “fight” between the deceased and the appellant. But when they came to give evidence they said that there was no fighting between them.

The court below considered the issue about the allegation of a fight between the deceased and the appellant and it concluded that what happened was not a fight but a scuffle. The court observed, quite rightly, that the evidence from the prosecution witnesses shows that the appellant was the first to slap the deceased. I have looked into the statements made by the PW1, PW2 and PW3 and the testimony of each of them in court and I do not see any inconsistency between their evidence and the statements they made before the police. The evidence given by PW1, PW2 and PW3 of the incident at the scene of the crime was convincing enough to affirm that there was no fight between the deceased and the appellant. The appellant was in fact the aggressor during the encounter. After all, the appellant had admitted injuring the deceased with a fork although he said it was not intentional. He said that he wounded the deceased with a fork when the deceased hit him with palm fronts. ***The essence of the testimony of PW1, PW2 and PW3 was to show that the appellant had stabbed the deceased and that the injury was the cause of his death. Even if the word “fight” was not used during the trial in describing how the incident occurred that does not amount to a material contradiction between the testimony of the witnesses and the statements they made to the police. It is well settled that not every contradiction will result in upsetting trial court’s judgment. For a contradiction to upset a judgment, it must be of such magnitude as to warrant interference with the conclusion reached by the learned trial Judge.*** *Gidado Iyanda v. The Queen* (1960) SCNLR 595; (1960) 5 FSC 263 and *Ikemson v. The State* (1989) 3 NWLR (Pt. 110) 455 at

466. Appellant has again failed to have this issue resolved in his favour.

On the third issue learned counsel for the appellant submitted that where the evidence adduced by the prosecution fails to support a conviction for the offence charged but would be sufficient to support a conviction of an attempt to commit the offence the appellate court or any court seized of the facts of the case has jurisdiction to convict for a lesser offence. He referred to a number of cases in support of this submission. I will mention two of them: *The Queen v. Izobo Owe* (1961) ANLR 710; *Onogwu v. The State* (1995) 6 NWLR (Pt. 410) 271. Learned counsel argued that although the deceased, PW1, PW2 and PW3 had an encounter during which the deceased died as a result of the wound he received, the forensic science report concluded that the stains on the appellant's knife and handkerchief were not human blood. Counsel also argued that the appellant was a 17 year old student when the incident occurred. For these reasons the learned Justices of the Court of Appeal ought to agree that the learned trial Judge was in error in failing to reduce the offence charged to manslaughter.

The respondent's counsel submitted that the appellant used a jack knife in stabbing the deceased. The deceased died a few hours after he had been stabbed. A jack knife is always in a sheath and the blade is not exposed until when one intends to make use of it. The case of the prosecution had been proved beyond reasonable doubt and the statement and evidence adduced by the appellant help the court in drawing inference to his guilt.

I agree that the appellant's trial left no room to doubt his conviction. The appellant gave his age as 21 years when he made a statement to the police. When he gave his evidence in court and during cross-examination he said it was his mother that gave his age as 21 years. If there was any dispute about his age he would have called his mother to testify and deny what the police have recorded that she told the police that he was 21 years old. It is crystal clear that the appellant's act of stabbing the deceased with a jack knife at a fragile part of the body such as heart explains clearly that the appellant's intention was to cause grievous injury to the deceased. He himself admitted in his testimony as follows:

*"At the time of fighting, I held exhibit (knife) in my hand. I do not think it is possible for fork or knife to wound anyone if in check*



*and folded up in my hand.”*

***It has been confirmed by the medical officer who performed the post-mortem examination on the body of the deceased that there was a wound caused by a sharp object. The sharp object went into the right ventricle of the heart. Such injury can be caused by a knife. This confirms the evidence of eye-witnesses that the appellant stabbed the deceased with knife. The deceased died on the same day. All these facts have established overwhelming evidence against the appellant. The issue of alternative verdict was not part of the case of the appellant before the trial court and I see no extenuating circumstances to reduce the offence of murder for which the appellant has been convicted to manslaughter.***

In conclusion, this appeal has failed and it is dismissed. The judgment of the Court of Appeal in which it confirmed the conviction and sentence passed by the trial High court is hereby affirmed.

### **KUTIGI JSC**

I read before now the judgment just delivered by my learned brother, Mohammed, JSC, I agree with the conclusion that this appeal has no merit. The evidence against the appellant is overwhelming. The appellant has not shown why we should interfere with the concurrent findings of the lower courts. The appeal is accordingly dismissed. Conviction and sentence are hereby confirmed.

### **OGUNDARE JSC**

I have read in advance the judgment of my learned brother, Mohammed, JSC, just delivered. I agree entirely with him that this appeal be dismissed. I adopt as mine his reasoning leading to this conclusion. I see no merit whatsoever in this appeal which is hereby dismissed by me too.

H

### **TOBI JSC**

I have read in draft the judgment of my learned brother, Mohammed, JSC and I agree that this appeal should be dismissed.

Learned counsel for the appellant submitted that the Court of Appeal did not afford the appellant a fair hearing because the court failed to consider the arguments presented by the appellant in his brief. He cited quite a number of cases on fair hearing.

The principle of fair hearing is breached where parties are not given equal opportunity to be heard in the case before the court. Where the case presented by one party is not adequately considered, the party can complain that he was denied fair hearing. Fair hearing is not an abstract term that a party can dangle in the judicial process but one which is real and which must be considered in the light of the and circumstances of the case. A party who alleges that he was denied fair hearing must prove specific act or acts of such denial and not a mere agglomeration of conducts which are merely cosmetic and vain.

One complaint of learned counsel is that the Court of Appeal considered only three issues for determination instead of four. The fourth issue which would appear not to have been put down as an issue for determination at page 115 of the record is as follows: *“Did the learned trial Judge correctly evaluate all the evidence produced before him.”*

Although the Court of Appeal did not put down the above issue for determination, Ogebe, JCA, dealt adequately with the issue in his judgment. I should allow myself to quote him in extenso at pages 115 and 116 of the record:

*“It is clear from the evidence before the trial court that there was a scuffle between the appellant and the deceased. Even if the appellant’s version is believed that the deceased used palm fronds to beat him there was nothing to show that the appellant was in apprehension of death or grievous harm. In any event it was clear from the evidence of the prosecution witnesses that the appellant was the first to slap the deceased. In other words, he started the fight. For the appellant to turn round and stab the deceased with a jack knife in his chest which resulted in his death that very night, cannot be said to be reasonably necessary to make effectual defence against whatever assault that was meted out to him. At one breath he said that he wounded the deceased with a fork. In another breath he said it was with a knife. Again, he said he did not even know how it all happened. He ran away after the incident and when the police arrested*

*him, they found no injury on his body. It is clear therefore that he could not have been acting in self-defence when he stabbed the deceased."*

The above is, in my humble view, an adequate evaluation of the evidence before the trial court. It is rather too technical and abstract to argue that because the Court of Appeal failed to put down the issue in its judgment, this court should allow the appeal. I do not think I can allow the appeal on that ground. B

The next complaint is that the Court of Appeal credited to the appellant issues formulated by the respondent. This is an error on the part of the Court of Appeal. The question is whether the error has caused a miscarriage of justice. And the answer to that question can be found in the body of the judgment. I have examined the judgment carefully and I see a balanced evaluation of the evidence of the appellant. As a matter of fact, the judgment materially evaluated the evidence of the appellant. I do not therefore accept the submission of learned counsel that the brief of the appellant was not considered. The issues which were raised in the brief by the appellant in the Court of Appeal were: (1) self-defence; (2) material contradictions; (3) correct evaluation of evidence at the trial court; and (4) whether section 179(2) of the Criminal Procedure Law could not have been invoked? C  
D  
E

Of the four issues, the Court of Appeal adequately dealt with three. It was only the fourth issue that the court did not deal with. I shall deal with the issue in this judgment. That takes me to the alleged contradictions in the evidence of the prosecution witnesses. On the issue of contradictions, Ogebe, JCA stated at page 116 of the record: F

The learned trial Judge believed the evidence of the witnesses who testified that the appellant stabbed the deceased with a jack knife, an act which the appellant himself admitted. Assuming that there was material contradiction in the evidence of the witnesses which is not conceded, the learned trial Judge did not see any evidence of proportionality of the act of stabbing arising from a possible fight which in essence was really a scuffle. The learned trial Judge dealt exhaustively with self-defence. He said at pages 43 and 44 of the record: G  
H

*"I find as a fact that at no time did the deceased and or the 1st, 2nd and 3rd prosecution witnesses put the life of the accused in danger to warrant his taking measures to defend himself. In the circum-*

*stances, I hold that on the evidence before me the defence of provocation cannot avail the accused ... As I said earlier in this judgment, for the defence of self-defence to be available and to exclude criminal responsibility, the accused must face imminent apprehension of death or grievous harm from his victim. I do not find from the evidence in this case that the accused was faced with such a situation."*

Let me now take section 179(2) of Criminal Procedure Law of Eastern Nigeria. By the subsection, a trial court can, in appropriate cases, reduce the charge of murder to manslaughter. Manslaughter is an unintentional killing of a human being. Such a killing is not pre-meditated but accidental, in the sense that it was not intentional.

What was the evidence before the trial court? The appellant killed the deceased with a jack knife, Exhibit G. A jack knife is not like any other ordinary knife. A jack knife is protected in a shield and is removed only when the person intends to use it. That is not all. A jack knife can only cause injury if the user draws out the blade from its shield. Appellant said in his evidence under cross-examination:

*"At the time of fighting I held exhibit G in my hand. I do not think it is possible for the fork or knife to wound anyone if in check and folded up in my hand."*

The jack knife was not folded in the hand of the appellant. The truth is that he unfolded the knife and stabbed the deceased with it. The learned trial Judge said at page 42 of the record:

*"It is common ground that the accused stabbed the deceased with a jack knife and inflicted injuries on the deceased from which he died. From the totality of the evidence before me, it is my finding of fact that the deceased had no weapon on him that evening and none of them posed any threat to the accused. The story that the deceased and the witnesses hit the accused with palm fronts and wounded him on the hand and that his hand was bleeding is an afterthought and made up by the accused in order to defend himself. The evidence of PW5 was that he observed no injuries on the accused."*

I entirely agree with the above finding of the trial Judge, a finding which is clearly borne out from the evidence before him. And so I ask: where is the place of section 179(2) of the Criminal Procedure Law of Eastern Nigeria to reduce the charge of murder to manslaughter? I see none and there is none. Judges are human beings and therefore are liable to make mistakes and I concede that we can

make mistakes. Mistake made by a Judge in a criminal trial can vitiate the proceedings and result in acquittal of the accused if the mistake is so fundamental to the trial to the extent that it has caused injustice to the accused. Where a mistake does not affect the merits of the trial, a conviction cannot be set aside on appeal. The mistakes of the Court of Appeal did not affect the merits of the matter and therefore cannot be basis for allowing the appeal. B

I do not see my way clear in tampering with the concurrent findings of the two lower courts. I accordingly dismiss the appeal. The judgment of the Court of Appeal is affirmed. C

### **EDOZIE JSC**

I have read in advance a copy of the lead judgment of my learned brother, Mohammed, JSC and I am in full agreement that the appeal be dismissed. It is manifest from the lead judgment of the Court of Appeal, per Ogebe, JCA that the case presented by the appellant was exhaustively considered. The issues formulated by both sides in the court below were identical in content. The mere fact that the court below inadvertently described the issues formulated by the respondent as those of the appellant cannot sustain a complaint of denial of fair hearing. It is not every mistake or error in a judgment that results in the appeal being allowed. It is only when the error is so substantial that it has occasioned a miscarriage of justice that the appeal court is bound to interfere: See *Onajobi v. Olanipekun* (1985) 4 SC (Pt.2) 156 at 163; (1985) 4 NWLR (Pt. 2) 156; *Oje v. Babalola* (1991) 4 NWLR (Pt.185) 267 at 282; *Anyanwu v. Mbara* (1992) 5 NWLR (Pt.242) 386 at 409; *Odukwe v. Ogunbiyi* (1998) 8 NWLR (Pt.561) 339 at 350. There is no material placed before the trial court upon which a defence of provocation could avail the appellant to warrant the reduction of conviction for murder to that of manslaughter pursuant to section 179(2) of the Criminal Procedure Law of Eastern Nigeria. E F G

For these and the more detailed reasons discussed in the lead judgment, I, too, dismiss the appeal and affirm the judgment of the Court of Appeal. Appeal dismissed. H