

SUPREME COURT OF NIGERIA
FRIDAY 11TH JULY, 2003. SC. 16/2002
CORAM:- M. L. UWAIS CJN, U. MOHAMMED, A. I. IGUH,
A. I. KATSINA-ALU, D. MUSDAPHER, JJSC

THE STATE APPELLANT
V.
MOSHOOO OLADIMEJI RESPONDENT

COURTS - Issues - Suo motu raising of - Court should confine itself to issues raised by parties - But where it raises issue suo motu - Parties must be given opportunity - To address court on the point (H1)

CRIMINAL LAW - Murder - Conspiracy - Where two persons form common intention to prosecute unlawful act - Which resulted in commission of an offence - Each of the persons is deemed to have committed the offence (H2)

FACTS

Accused/respondent and four others were arraigned before the High Court of Oyo State, Ibadan on a one count charge of murder of one Agboola Aina contrary to section 319(1) of Criminal Code Law Cap. 30, Vol. II Laws of Oyo State, 1977. It was in evidence that following a protracted land dispute between the deceased's family and respondent's family, the latter held a meeting at which it was agreed that the deceased should be eliminated so that respondent's family would take control of deceased's family land. In pursuance of this agreement, respondent and other members of his family way laid the deceased and his sister (PW3). They attacked the deceased and his sister with dangerous weapons. The deceased suffered multiple injuries which eventually resulted in his death.

After trial, the learned trial judge found respondent guilty of lesser offence of manslaughter. The other accused persons were discharged and acquitted. Aggrieved, respondent appealed to Court of Appeal, Ibadan. The court allowed the appeal on the ground that the arraignment of respondent was bad in law. The issue of arraignment was however raised suo motu by the court and relied on without hearing the parties thereon. Moreover, the court held that it was

not proved that it was the act of respondent that caused the death of the deceased. Dissatisfied, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether it is right for the Court of Appeal to raise the issue of plea and arraignment under Section 215 of the Criminal Code, Cap. 30 Vol. II, Laws of Oyo State of Nigeria, 1978 suo motu without hearing argument from the two parties upon which it relied heavily to quash the respondent’s conviction.

2. Whether having regard to the circumstances of this case the prosecution must prove that the act of the respondent alone must cause the death of the deceased before the respondent’s conviction could be affirmed.”

HELD (Unanimously allowing the appeal per **KATSINA**

ALU JSC)

COURTS - Issues - Suo motu raising

1. It is now trite law that in the determination of disputes between parties, the court should confine itself to the issues raised by the parties. The court is not competent to suo motu, make a case for either or both of the parties and then proceed to give judgment in the case so formulated contrary to the case of the parties before it. Where, however, the court raises an issue suo motu and the issue goes to the root of the case, the parties must be given an opportunity to address the court on the point.

When an issue is not properly placed before the court, the court has no business whatsoever to deal with it.

I have earlier on in this judgment shown that the arraignment of the respondent was not an issue before the Court of Appeal. Learned counsel for the respondent did not make his arraignment in the court of trial an issue. The Court of Appeal in the course of its judgment raised the issue suo motu. It considered the issue it raised suo motu and based its judgment on it without giving the parties an opportunity to address the court on the point. Clearly the court below was in grave error. On the authorities of this court, a few of which were referred

to herein, the court below had no business whatsoever to deal with an issue which was not placed before it for adjudication. But if it considered the point important enough to raise it, then it should have called on the parties to address the court on the issue so raised. That was not done. That judgment therefore must not be allowed to stand. It must be set aside. I answer Issue No. 1 therefore in the negative. (p. 2262 H)

Murder - Conspiracy

2. The evidence before the trial court shows clearly that there was a common intention to cause death or at least to do grievous harm to the deceased Agboola Aina. The doctor's opinion was that he died from multiple injury.

The main question here is whose acts caused the death of Agboola Aina? The court below was of the view that for the conviction of the respondent to stand, it must be shown that it was his acts that caused the death of the deceased. The court below in my view was in error.

This court held that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. (p. 2264 H)

REPRESENTATION

No appearance for the Appellant

Chief A. A. Aribisala, for the Respondent

CASES REFERRED TO

Odiase v. Agho (1972) 1 All NLR (Pt. 1) 170

Adeniyi v. Adeniyi (1972) 1 All NLR (Pt.1) 278

Oje v. Babalola (1991) 4 NWLR (Pt. 185) 267

Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410

Saude v. Abdullahi (1989) 7 S.C. (Pt. II) 116

Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 NWLR (Pt. 39) 1

Alli v. Alesinloye (2000) 4 S.C. (Pt. I) 111

Ugo v. Obiekwe (1989) 2 S.C. (Pt. II) 41

Alarape v. The State (2001) 2 S.C. 114

Atanda v. Lakanmi (1974) 3 S.C. 109

STATUTES REFERRED TO

- B Criminal Code Cap. 30 Vol. II Laws of Oyo State 1978, s. 319
Criminal Procedure Law of Oyo State, s. 215

LEAD JUDGMENT BY KATSINA-ALU JSC

- C The respondent, Moshood Oladimeji and four others were arraigned before the Ibadan High Court, Oyo State on a one count charge of murder of Agboola Aina contrary to Section 319(1) of the Criminal Code, Cap 30 Volume II, Laws of Oyo State, 1978.

At the trial, the prosecution called nine (9) witnesses. The accused persons also gave evidence in their defence. On 13th October, 1998, the respondent was found guilty and convicted of the lesser offence of manslaughter. The other accused persons were acquitted and discharged.

- The respondent's appeal to the Court of Appeal was allowed.
E The present appeal to this court is by the State.

The facts of the case are these. There had been a protracted land dispute at Dada Village near Idi-Ayunre in Ibadan between the deceased's family (Dada family) and respondent's family (Lakun family). Because of this feud over land, the respondent's family held a meeting at which it was agreed that the deceased Agboola Aina should be eliminated so that the Lakun family would take control of the Dada family land. In pursuance of this agreement, on the morning of the day in question i.e. 2nd February, 1996 the respondent and others of the Lakun family waylaid the deceased and his sister (P.W.3), who were on their way to Ibadan. The respondent first accosted the deceased. In a little while the others came out of hiding. The deceased raised alarm which attracted his sons to the scene. In the fight which ensued, the deceased, his sister and his sons were assaulted with cudgels, cutlasses and sticks. The deceased was struck several blows with these weapons thereby causing him multiple injuries from which he died in hospital on 4th February, 1996.

- H The State in its brief of argument formulated two issues for determination. They read as follows:

“1. Whether it is right for the Court of Appeal to raise the issue of plea and arraignment under Section 215 of the Criminal Code, Cap. 30 Vol. II, Laws of Oyo State of Nigeria, 1978 suo motu without hearing argument from the two parties upon which it relied heavily to quash the respondent’s conviction.

2. Whether having regard to the circumstances of this case the prosecution must prove that the act of the respondent alone must cause the death of the deceased before the respondent’s conviction could be affirmed.” B

For his part the respondent also raised two issues which are similar to those formulated by the State. C

ISSUE No. 1

“Whether it is right for the Court of Appeal to raise the issue of plea and arraignment under Section 215 of the Criminal Code, Cap. 30 Vol. II, Laws of Oyo State of Nigeria, 1978 suo motu without hearing argument from the two parties upon which it relied heavily to quash the respondent’s conviction.” D

As I have already indicated, the respondent was found guilty of manslaughter. His appeal to the Court of Appeal was allowed. The issue submitted on behalf of the respondent who was the appellant in that court, for determination were as follows: E

“(1) Whether from the totality of the evidence adduced at the trial and the manner the same was summed up by the trial Judge, can it be reasonably said that there was proper evaluation of the evidence by the court and proper findings made on the essential ingredients of the offence to sustain the conviction of the appellant.” F

(2) Whether having regard to the evidence led by the prosecution, the learned trial Judge has not misdirected himself in his deduction in his judgment that it was the accidental acts of the appellant that caused the death of the deceased. G

(3) Whether having regard to the evidence of the appellant which remains uncontradicted, the appellant was not entitled to the defence of self defence and accident which the court ought to consider.” H

The arraignment of the accused (respondent herein) was not an issue in the proceedings in the Court of Appeal. The accused did not make it an issue.

The Court of Appeal, in the course of its judgment, raised the

issue of the arraignment of the respondent suo motu. This is clearly borne out from the following excerpt from the judgment of the Court of Appeal:

B “Before I consider the issues for determination - I am duty bound to look into a crucial aspect of criminal trials - which is the arraignment of the accused person, including the appellant before the trial court.”

After due consideration of the issue, the court below held:

C “Though I do not need to delve into any of the issues for determination in this appeal as the entire trial, conviction and sentence before the lower court is now a nullity by operation of Section 215 of the Criminal Procedure Act of Oyo State, I shall like to comment briefly on certain aspects of the evaluation of evidence of the learned trial Judge.”

D It is to be noted that the court below did not call upon the parties to address it on the issue. The first issue is therefore against the failure by the court below to give the parties an opportunity to be heard on the point so raised suo motu by it.

E It was submitted on behalf of the appellant that a court should confine itself to issues raised by the parties. Where, however, the court raises an issue suo motu, the parties must be given an opportunity to address the court on the point. Learned counsel for the appellant relied on the following authorities – *IBWA Ltd. v. Pavex International Co. (Nig.) Ltd.* (2000) 4 S.C. (Pt. II) 196; (2000) 7 NWLR (Pt.663) 105; *Alli v. Alesinloye* (2000) 4 S.C. (Pt. I) 111, (2000)6 NWLR (Pt. 600) 177; *PNS v. Adekanye* (No.2) 2000 FWLR (Pt. 120)1659. It was said that the court below was in grave error to have raised the issue suo motu and resolved it in favour of the respondent without hearing the parties on the issue so raised.

G For the respondent, it was submitted that failure of the parties to address the court on the issue of plea did not amount to a breach of the right of fair hearing and also did not occasion a miscarriage of justice.

H The law in this regard is now settled. ***It is now trite law that in the determination of disputes between parties, the court should confine itself to the issues raised by the parties. The court is not competent to suo motu, make a case for either or both of the parties and then proceed to give judgment in the***

case so formulated contrary to the case of the parties before it. Where, however, the court raises an issue suo motu and the issue goes to the root of the case, the parties must be given an opportunity to address the court on the point. See Adeniyi v. Adeniyi (1972) 1 All NLR (Pt.1) 278; Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410; Atanda v. Lakanmi (1974) 3 S.C. 109; Odiase v. Agho (1972) 1 All NLR (Pt. 1) 170. **When an issue is not properly placed before the court, the court has no business whatsoever to deal with it** - see Ebba v. Ogodo (1984) 4 S.C. 84 at 112.

I have earlier on in this judgment shown that the arraignment of the respondent was not an issue before the Court of Appeal. Learned counsel for the respondent did not make his arraignment in the court of trial an issue. The Court of Appeal in the course of its judgment raised the issue suo motu. It considered the issue it raised suo motu and based its judgment on it without giving the parties an opportunity to address the court on the point. Clearly the court below was in grave error. On the authorities of this court, a few of which were referred to herein, the court below had no business whatsoever to deal with an issue which was not placed before it for adjudication. But if it considered the point important enough to raise it, then it should have called on the parties to address the court on the issue so raised. That was not done. That judgment therefore must not be allowed to stand. It must be set aside. I answer Issue No. 1 therefore in the negative.

ISSUE No.2.

“Whether having regard to the circumstances of this case the prosecution must prove that the act of the respondent alone must cause the death of the deceased before the respondent’s conviction could be affirmed.”

In the course of its judgment, the Court of Appeal per Adekeye, JCA., said:

“In the case I have already drawn attention to the inconsistency (sic) finding of facts on the acts of the appellant and the failure of the learned trial Judge to properly elucidate on the accidental acts of the appellant and relate same as being the cause of death of the deceased.”

It was said on behalf of the appellant that the court below was in grave error to hold as it did in the above quoted passage. It was submitted that where a number of persons joined in an unlawful assault, it is not mandatory for the prosecution that the act of a particular accused alone caused the death of the deceased and it is a question of fact in every case whether the death of the person assaulted is a probable consequence. For this submission learned counsel for the appellant relied on *Musa Sokoto v. R.* (1976) 2 S.C 133; *Muonwen v. Queen* (1963) 1 All NLR 95. We were urged to allow the appeal.

For the respondent it was submitted that it was not proved with certainty that it was the act of the respondent that caused the death of the deceased. It was further submitted that in murder cases, the burden is not discharged unless the prosecution established not only the cause of death, but also that the act of the appellant caused the death of the deceased. Counsel relied on the decision of this court in the case of *Akinfe v. State* (1988) 7 S.C. (Pt. II) 131, (1988) 3 NWLR (Pt.89) 729 at 744. It was urged on us to dismiss the appeal.

There is evidence that the deceased's family and the respondent's family had a protracted land dispute. Because of this feud the respondent's family held a meeting at which it was agreed that the deceased, Agboola Aina should be eliminated. In pursuance of this agreement, on the morning of the day in question, the respondent and some members of his family ambushed the deceased and his sister (P.W.3) who were on their way to Ibadan. They beat the deceased severely with cudgels, cutlasses, sticks and with their hands. He received multiple injuries from which he died two days later in hospital.

I think it is important to remind ourselves that the respondent himself admitted under cross-examination that he took part in the fight. His words:

"I sustained injury when I was fighting Saka and his father ..."

The evidence before the trial court shows clearly that there was a common intention to cause death or at least to do grievous harm to the deceased Agboola Aina. The doctor's opinion was that he died from multiple injury.

The main question here is whose acts caused the death

of Agboola Aina? The court below was of the view that for the conviction of the respondent to stand, it must be shown that it was his acts that caused the death of the deceased. The court below in my view was in error.

This court held that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence; see Muonwen v. The Queen (1963)1 All NLR 95. See also Ofor v. The Queen (1955) 15 WACA 4.

In the English case of Rex v. Grant and Gilbert 38 Cr. App. R. 107 it was held that if several persons embark on an enterprise to commit a felony and have also the preconceived common intention to use violence of any degree, if necessary, for the purpose of overcoming resistance, and death results from such violence, all are guilty of murder.

In Rex v. Betts and Ridley 22 Cr. App. R. 148 it was held that in the case of a common design to commit robbery with violence if one prisoner causes death while another is present aiding and abetting the felony, as a principal in the second degree, both are guilty of murder.

I answer Issue No.2 also in the negative.

It is the law that where two or more persons form a common intention to assault a person and one of them causes his death while the others are present aiding and abetting the felony, all are guilty of murder. The court below was therefore clearly in error when it faulted the judgment of the trial court on the ground that it failed to “properly elucidate on the accidental acts of the appellant and relate same as being the cause of death.”

In the result this appeal succeeds and I allow it. I set aside the judgment of the Court of Appeal which reversed the judgment of the trial court. The judgment of the trial court is hereby restored.

UWAIS CJN

I have had the privilege of reading in draft the judgment read

by my learned brother, Katsina-Alu, JSC. I agree that the appeal has merit and that it should be allowed.

Accordingly, the appeal is hereby allowed and I adopt the order contained in the said judgment.

B

MOHAMMED JSC

I agree that this appeal has merit and ought to be allowed. Issue of arraignment is fundamental in a criminal trial because if not properly conducted it may vitiate the proceedings. An appeal court may raise points suo motu and where such points are so taken the parties must be given opportunity to address the court before a decision on the point is made by the appeal court. *Florence Olusanya v. Olufemi Olusanya* (1983) NSCC 97. The Court of Appeal was in error in the case in hand to raise such an issue of arraignment suo motu and decide on it without giving the other side an opportunity to address on it.

I have had the advantage of reading the judgment of my learned brother, Katsina-Alu, JSC., and for the reasons given in that judgment, I allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court.

IGUH JSC

F I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kastina-Alu, JSC., and I agree entirely that there is merit in this appeal and that the same should be allowed.

G The respondent, along with four others, were arraigned before the High Court of Justice, Oyo State, holden at Ibadan, charged with the offence of the murder of one Agboola Aina punishable under Section 319(1) of the Criminal Code, Cap. 30, Volume II, Laws of Oyo State of Nigeria, 1978. At the conclusion of hearing, the respondent was on the 13th day of October, 1998 found guilty but convicted of the lesser offence of manslaughter. He was sentenced to imprisonment for a term of 4¹/₂ years. The rest of the accused persons were acquitted and discharged.

The conviction of the respondent was on appeal quashed by

the Court of Appeal, Ibadan Division. This was on the questions of the plea and arraignment of the respondent which was raised suo motu by the Court of Appeal without giving any opportunity to the parties to address the court on those points. It is against this decision of the Court of Appeal that the State, herein the appellant, has appealed to this court. B

The case for the prosecution against the accused persons is that on or about the 1st day of February, 1996 at Dada village near Idi-Ayunre, Ibadan, the respondent with several other members of his family, who had been engaged in a protracted land dispute with the family of the deceased, ambushed the said deceased and beat him up with cudgels and sticks. The deceased was rushed to the hospital where he died two days after this attack as a result of the multiple injuries he sustained. C

Two issues were formulated by the appellant for the determination of this appeal. These are as follows:- D

“1. Whether it is right for the Court of Appeal to raise the issue of plea and arraignment under Section 215 of the Criminal Code, Cap. 30 Vol. II, Laws of Oyo State of Nigeria, 1978 suo motu without hearing argument from the two parties upon which it relied heavily to quash the respondent’s conviction.” E

2. Whether, having regard to the circumstances of this case the prosecution must prove that the act of the respondent alone must have caused the death of the deceased before the respondent’s conviction could be affirmed.” F

Turning now to issue 1, it is evident from the record of proceedings that the Court of Appeal, with respect, raked up suo motu what it described as defects in the plea and arraignment of the respondent without giving the parties an opportunity to be heard on those points. It then proceeded to rely on the alleged defects as unilaterally detected by it to declare the trial a nullity and to quash the conviction of the said respondent. G

In deciding to consider the issues of plea and arraignment suo motu, the court stated thus- H

“Before I consider the issues for determination, I am duty bound to look into a crucial aspect of criminal trials which is the arraignment of the accused persons including the appellant before the trial court ...” (Underlining supplied for emphasis)

Having come to the conclusion at the end of its exercise that the plea and arraignment of the respondent before the trial court were defective, the Court of Appeal rounded up as follows:

B “The proceedings before the trial court amounts to a nullity because the plea of all the accused persons had been defectively taken in violation of Section 215 of the Criminal Procedure Act of Oyo State and this nullifies not only the trial but also the conviction and sentence”.

It then added -

C “Though I do not need to delve into any of the issues for determination in this appeal as the entire trial, conviction and sentence before the lower court is now a nullity by operation of Section 215 of the Criminal Procedure Act of Oyo State, I shall like to comment briefly on certain aspects of the evaluation of evidence of the learned trial Judge.”

D While it is conceded that the issue of plea and arraignment under Section 215 of the Criminal Procedure Act is fundamental to criminal proceedings and capable in appropriate cases of rendering a trial a nullity, the point must be stressed that courts of law should guard against the abandonment of their traditional and constitutional role of being an umpire between parties to a dispute and appearing to be partisan in disputes before them. I think the point must also be made that another equally fundamental principle of law in the determination of disputes between parties is that judgment must be confined to the issues raised by the parties. In this regard the law is well established that it is not competent for the court suo motu to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before it. See Commissioner for Works, Benue State & Anor. v. Devcon Development Consultants Ltd. & Anor. (1988) 7 S.C. (Pt. I) 29; (1988) 3 NWLR (Pt. 83) 407, Nigerian Housing Development Society Ltd. & Anor. v. Mumuni (1977) 2 S.C. 57, Adeniji & Ors. v. Adeniji & Ors. (1977) 1 All NLR (Pt.1) 278, A.C.B. Ltd. v. Attorney-General, Northern Nigeria (1969) NMLR 231 etc. There can be no doubt that courts of law have the power to raise suo motu relevant issue or issues which are not before the court for the determination of the case. In exercising this power, however, the court must adhere strictly to the principles of natural justice and, in particular, to the audi

alteram partem rule.

Accordingly the law is well settled that on no account should a court raise a point *suo motu*, no matter how clear it may appear to be, and then proceed to resolve it one way or the other without inviting the parties to address it on such a point. If it does so, it will be in flagrant breach of the parties' right to fair hearing. See *Ugo v. Obiekwe* (1989) 2 S.C. (Pt. II) 41, (1989) 1 NWLR (Pt.99) 566 at 581, *Oje v. Babalola* (1991) 4 NWLR (Pt. 185) 267 at 280 etc. In other words, when a court for any compelling reasons finds it necessary and in the interest of justice to raise a point in a case *suo motu*, the parties must be given an opportunity to be heard on such point, particularly the party that may suffer some prejudice as a result of the point raised *suo motu*. See *Ejowhomu v. Edok-Eter Mandilas Ltd.* (1986) 5 NWLR (Pt. 39) 1, *Adegoke v. Adibi* (1992) 5 NWLR (Pt. 242) 410 at 420, *Atanda v. Lakanmi* (1974) 3 S.C. 109, *Odiase v. Agho* (1972) 1 All NLR (Pt. 1) 170 etc. When, therefore, an issue is not placed before a court, such court has no business whatsoever to deal with it as decisions of a court of law must not be founded on any ground in respect of which it has neither received argument from or on behalf of the parties before it nor, even raised by or for the parties or either of them. See *Shitta-Bey v. Federal Public Service Commission* (1981) 1 S.C. 40, *Chief Ebba v. Chief Ogodo & Anor.* (1984) 4 S.C. 84 at 112, *Saude v. Abdullahi* (1989) 7 S.C. (Pt. II) 116, (1989) 7 SCNJ 216 etc.

In the present case, the respondent, as appellant before the Court of Appeal, did not raise the issue of plea or arraignment either in his amended notice and grounds of appeal or in any of the three issues he raised for the determination of his appeal. Although the Court of Appeal had ample opportunity to raise the two issues and to call for further addresses on them at any stage before it concluded the delivery of judgment in the appeal, this it never did. I think, with respect, that the Court of Appeal was quite in error to have raised the issue of plea and arraignment of the respondent before the trial court *suo motu* without giving an opportunity to the parties to be heard on the points. See too *Alli v. Aleshinloye* (2000) 4 S.C. (Pt. I) 111, (2000) 6 NWLR (Pt. 600) 177. Issue 1 is accordingly resolved in favour of the appellant.

Issue 2 raises the question whether having regard to all the

circumstances of this case, the prosecution to succeed in its case against the respondent must establish that it was the singular act of the said respondent that caused the death of the deceased. In the first place, the case for the prosecution which was accepted by the trial court is that as a result of a protracted land dispute between the families of the respondent and the deceased respectively, members of the Lakun family of the respondent waylaid the deceased and his sister on the road at the material time, date and place. The respondent on accosting the deceased and his sister told them that he was from Lakun family and that his family held a meeting wherein it was decided that the deceased should be killed so that Lakun family would take control of the Dada land in dispute between both families. At this stage other members of the respondent's Lakun family emerged from their hiding and attacked the respondent with cudgels and sticks. The respondent did not deny the fact that he was present at the scene of crime and that he participated in the attack that caused the death of the deceased.

The law is firmly settled that where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose, an offence of such nature that its commission is a probable consequence of the prosecution of such purpose is committed, each of them is deemed to have committed the offence. In such circumstances it would not matter on such facts which of the accused persons that did what for the simple reason that a fatal blow, though given by one of the accused persons involved is deemed in the eyes of the law to have been given by the rest of his co-accused persons. The person actually delivering the blow is no more than the hand by which the others all strike. See *Ogu Ofor & Anor. v. The Queen* (1955) 15 WACA 4 at 5, *Igyegh Atanyi v. The Queen* (1955) 15 WACA 34, *Asimiyu Alarape & Ors. v. The State* (2001) 2 S.C. 114; (2001) 5 NWLR (Pt. 705) 79.

Similarly, where a number of persons acting in concert joined in an unlawful assault which resulted in the death of their victim, it is not mandatory for the prosecution to establish the precise act of a particular accused person that directly caused the death of the deceased. It is a question of fact in every case whether the death of the person assaulted is a probable consequence of the particular unlawful assault against his person by his attackers. So long as the prosecu-

tion is able to establish that the accused persons were acting in concert and that there was a common intention to kill the deceased or at least, to do grievous harm to him and that the killing of the deceased in circumstances amounting to murder was pursuant to or in consequence of the prosecution of that intention, all such persons may be convicted of the offence of murder. See *Muonwen & Ors. v. The Queen* (1963) All NLR 95 etc. I think the Court of Appeal on the facts of the present case was in error when it insisted that the evidence led by the prosecution must establish that it was the particular act of the respondent that led to the death of the deceased before the respondent could rightly be convicted of the offence of the murder of the deceased, Agboola Aina. Issue 2 must be resolved in favour of the appellant.

It is for the above and the more detailed reasons contained in the leading judgment that I too, allow this appeal. The judgment of the Court of Appeal is hereby set aside and that of the trial court is affirmed. In the result, the conviction and sentence passed on the respondent is hereby affirmed.

E

MUSDAPHER JSC

I was privileged to have read before now the judgment of my Lord, Katsina-Alu, JSC., just delivered. I respectfully agree with the reasoning and the conclusion arrived at. For the same reasons, which I adopt as mine, I too, allow the appeal. I set aside the decision of the court below and restore the decision of the trial court.

G

H