

SUPREME COURT OF NIGERIA
28TH MAY, 2004. SC.235/2002
CORAM:- M. L. UWAIS CJN, U. MOHAMMED,
S.U. ONU, S.O. UWAIFO, JJSC

PETER ORISAKWE	APPELLANT
V.		
THE STATE	RESPONDENT

CRIMINAL LAW - Murder - Criminal responsibility - Criminal Code ss. 30 & 319 - Age of accused - Controversy over allegedly forged birth certificate is of no relevance in this case (H1)

CRIMINAL PROCEDURE - Additional evidence - After close of defence - Proper procedure under s. 200 CPL - Was not followed by trial court (H2)

COURTS - Criminal procedure - Witnesses - Additional taking of evidence - At the close of defence - Though wrong - Did not cause a miscarriage of justice (H3)

MURDER - Appeals - Concurrent findings - That convicted appellant - Will not be disturbed (H4)

MURDER - Witnesses - Tainted evidence - PW1'S evidence - Is not tainted - Merely because he comes from deceased person's village (H5)

FACTS

Before the Imo State High Court, appellant was charged with the offence of murder contrary to S. 319 of the Criminal Code. In September 1993, appellant's people and deceased person's people were playing masquerade at the place a ceremony to mark the end of a mourning period was going on. A misunderstanding arose between appellant and the deceased, and he threatened to deal with the deceased. When the deceased

was going home in the company of his masquerade dance group, appellant came to them riding a bicycle. He held deceased by the dress. As exchange of words was going on, he stabbed the deceased with a dagger he was holding and ran away. Some people pursued appellant to no avail while PW1 was watching over that bicycle. Appellant later reported to the police who arrested him and he made statement under caution. He made about 3 statements in all at various Stages.

When the case came up at the trial court, the trial judge received a letter in chambers alleging that appellant's birth certificate, tendered by his father that sought to show he was 14 at the time cause of action occurred was forged. This was after defence has closed its case. The trial court suo motu called for evidence, conducted a trial within trial, and came the conclusion that the said birth certificate was forged. He later gave judgment against the accused and sentenced him to death by hanging. Appellant's appeal to the Court of Appeal was dismissed, and he has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the learned Justices of the Court of Appeal were right in affirming that the procedure adopted by the trial court in calling an additional witness recalling two other witnesses and in conducting a mini-trial within the main trial for the determination of the age of the Appellant, after both the prosecution and the defence had closed their case, did not lead to a denial of fair hearing to the appellant.

(ii) Whether the Court of Appeal was right in affirming the conviction and sentence of the Appellant by the trial court.”

HELD (Unanimously dismissing the appeal per **UWAIS CJN**)

Murder - Criminal responsibility

1. Now the accused in making statements to the police (“Prosecution Exhibits 1, 2 and 3”) gave his age as 14 years. His father D.W.2 produced a birth certificate which gave the accused's date of birth as 18th December, 1979; in order words, suggesting that the accused was under the age of 14 by 20th September, 1993 when the deceased was attacked and killed by the accused according to the case for the prosecution. It is

clear that the defence under Section 30 of the Criminal Code, Cap. 30 could not avail the accused.

By the 8th July, 1997 when the judgment of the trial court was delivered and the accused was convicted and sentenced to death, the accused, as per his case, was over 17 years but under 18 years. It will be seen again that the accused could not have availed himself of the provisions of Section 319 of the Criminal Code. So that the issue of age in the circumstances of this case has no relevance whatsoever.

Therefore the forged certificate of birth of the accused (Defence Exhibit No. 1) is of no significance, since it could not have benefited the accused. So that all the splitting of hair by learned counsel for the Appellant is, with respect, no more than a storm in a tea cup. (p. 1559 C)

CRIMINAL PROCEDURE - Additional evidence

2. As has been seen already, the learned Chief Judge on the receipt of the letter by Mr. John Agbarakwe (Miscellaneous Exhibit A) he decided to take additional evidence suo motu after the case for the defence had been closed. The question is: was it proper for the trial Chief Judge to pay attention to the letter and call additional evidence in order to ascertain the allegation in the letter that "Defence Exhibit No. 1" was a forgery? The manner in which the trial Chief Judge treated the letter is strange. The information in the letter that impugned the testimony of D.W.2 on the certificate of birth should have been passed to the prosecution (D.D.P.P.) which would have decided what step to take. In that case the prosecution could have applied under Section 200 of the Criminal Procedure law Cap. 31 to either recall D.W. 2 for further cross-examination, or call additional witnesses to prove the falsity of the certificate of birth which was tendered by D.W.2. This would have been a proper procedure under the Criminal procedure Law. (p. 1560 C)

COURTS - Criminal procedure - Witnesses

3. In the case on hand what was curious and irregular was the acceptance of a letter in chambers by the learned Chief Judge during the pendency of the case before him and the calling of witnesses to determine

whether Defence Exhibit No. 1 was genuine. In my view, the trial Chief Judge should not have allowed the content of the letter to influence his subsequent action. It is dangerous for a trial judge to allow himself to be influenced by an extraneous event which takes place outside his court, because such could lead to a miscarriage of justice. The saving factor in this case is that the age of the accused was immaterial whether with regard to criminal responsibility or sentence. I, therefore, hold that the calling of additional witnesses suo motu by the learned Chief Judge though irregular, did not occasion miscarriage of justice and the Appellant's right to fair hearing was not infringed since his counsel, who consented to the irregularity, had the opportunity to cross-examine the additional witnesses and no desire had been expressed or denied, for the accused to call any witness to rebut the additional evidence called by the trial Chief Judge. (p. 1561 H)

MURDER - Appeals - Concurrent findings

4. It follows that there has been concurrent findings by the courts below on the points raised to attack the findings of and the conclusion reached by the trial Chief Judge. No basis has been established by the Appellant for us to disturb the findings by the trial court. (p. 1566 G)

Witnesses - Tainted evidence

5. I too see no reason to accept that the evidence of P.W.1 was tainted by the reason only of his coming from the same village as the deceased. There is no iota of evidence to suggest that he had an interest of his own to serve. Suppose I were to hold that he was such a witness, his evidence was corroborated by the evidence of Dr. Njemanze, P.W.5 and to some extent by the evidence of the accused who did not dispute that he attacked the deceased- see Mbenu v. The State (Supra).

On the whole, I see no merit in this appeal. I accordingly dismiss it and affirm the decision of the Court of Appeal, which in turn confirmed the decision of the trial court. (p. 1567 D)

NOTABLE POINT OF INTEREST

UWAIS CJN

1. Trial court's calling of a witness after the close of defence

It follows that it is irregular for a trial Judge to recall an accused or call a witness after the close of defence. However, this dictum appears to me to contradict the specific provisions of Section 200 of the Criminal Procedure Law, Cap, 31 which allows a trial court at any stage of the trial to call any person as a witness or recall any witness including the accused if his evidence appears to the court to be essential to the just decision of the case.

In the same case (supra) on p. 36 D-E, Oputa, JSC., made the following observation:-

"This Section – 200 CPL - has been subject of very many judicial interference and also setting the limits thereof as follows:

"After the close of the case for the defence, the trial Judge can call a witness proprio motu or suo motu if, and only if, the defence has set up a case ex improviso, which no human ingenuity can foresee. But even here it should be made quite clear that the "evidence is not such as is only calculated to do an injustice to the accused but one essential to a just decision of the case". R v. Dora Harris, (1928) 20 Cr. App. R 86 at p. 89; 28 Cox C.C. 432 at pp. 435-436".(p. 1561 D)

REPRESENTATION

CHIEF C.A.B. AKPARANTA, (WITH HIM, ROBINSON. M. EMEM, ESQ.,) FOR THE APPELLANT.

L.C. AZUAMA, ESQ., ASSISTANT DIRECTOR OF PUBLIC PROSECUTION, IMO STATE, FOR THE RESPONDENT.

CASES REFERRED TO

Okpulor v. The State, (1990) 7 NWLR (Pt. 164) 581 at p. 590C

UBA Ltd. v. Achoru (1990) 6 NWLR (Pt. 156) 254 at p. 270F-G

Onuoha v. The State, (1989) 2 S.C. (Pt. II) 115 (1989) 2 NWLR (Pt. H 101) 23 at p. 44 D-F

Mbenu v. State, (1988) 3 NWLR (Pt.84) 615 at p. 626 H

Queen v. Moses Onoro (1961) 1 AII NLR (Pt. 1) 33

Ejelikwu v. The State, (1993) 7 NWLR (Pt.1) 33 (Pt. 307) 554

Rasaki Ariori & Ors. v. Muraino B. Elemo & Ors. (1983) 1 S.C. 13

E. Okpulo v. The State (1990) 7 NWLR (Pt. 164) 581 at page 590C

Okeke v. A. Obidife & Ors. (1965) 1 AII NLR 50)

B

STATUTES REFERRED TO

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

Criminal Procedure Law Cap.31 Laws of Eastern Nigeria 1963 Vol.2

ss.208, 200

C

LEAD JUDGMENT BY UWAIS CJN

The Appellant was charged in the High Court of Imo state (Ojiako, CJ.) with the murder of one Sylvanus Agbarakwe contrary to Section
D 319 subsection (1) of the Criminal Code, Cap. 30 of the Laws of eastern Nigeria, 1963 applicable to Imo State and sentenced to death.

The prosecution case is briefly as follows. On the 20th day of September, 1993, there was a ceremony in Umunoha town to mark the
E end of a mourning period which was referred to as “*mourning clothes removal ceremony*”. The masquerade dancing group of Umuokpara, Ejimadu people was invited to Umunoha to participate in the ceremony. The group arrived there at about 2.00p.m and took part in dancing. At
F about 4.00 p.m., the deceased, Sylvanus Agbarakwe, who was a very good singer, came from Aba and joined the masquerade group and took over the singing. After the performance by the masquerade group they bade farewell to the head of the masquerade of Umunoha town.

As they were on their way leaving for Umuokpara Ejimadu the
G accused and his cohorts began to disturb them. The deceased had to warn the accused to keep his distance but the latter challenged the deceased and threatened to deal with him (deceased). When on their way home, the masquerade group saw the accused riding a bicycle on a main
H road followed by the masquerade group armed with a dagger in his hand. The accused accosted the deceased at a spot along the road near the accused’s home. The accused held the shirt worn by the deceased. The deceased asked the accused to leave him alone as he was rather young

for the accused, who was older, to fight with. After the deceased said so, the accused stabbed him with the knife on the chest and ran away, leaving behind the bicycle he rode. Those present chased the accused in vain. While Kingsley Onwuka (P.W.1) held the bicycle, the deceased was conveyed to a private hospital at Eziamia Obiato, by one Philip Agbaraka, B where he died. P.W.1 went home and reported to one of the elders – Ukaobasi Mbaonu and left the bicycle with the latter, with whom it was until the police came to him and took it with them to Nwaorieubi police station. The accused person reported himself on the instruction of his father, (D.W.2) to the police at Eziamia Police Station. He was arrested there and taken to Nwaorieubi where he was charged with murder. He was cautioned and he made a voluntary statement which was admitted at the trial as “Prosecution Exhibit No. 1” The case was transferred to Imo State Central Investigation Department (C.I.D) where it was assigned to Police Inspector Alex Okedu (P.W.3) on 23rd September, 1993 to investigate. The accused was again arrested, charged with murder, was cautioned and he volunteered a statement which was admitted at the trial as “Prosecution Exhibit No. 2” A search under a warrant was conducted at accused’s father’s home (D.W.2) but nothing incriminating was found. The accused volunteered another statement, which was taken under caution and was admitted in evidence as “Prosecution Exhibit No. 3.” The body of the deceased was transferred from the private hospital to the mortuary of the General Hospital at Owerri. Autopsy was carried out by a Dr. Innocent Njemanze (P.W.5) after the body of the deceased was identified as that of the deceased by his brother John Agbarakwe (P.W.4)

The accused person testified in his defence as D.W.1. He gave his age as 14 years in 1993 and that he was a student in Senior Secondary Class 1 at Secondary Technical School, Ogbor Hill, Aba. That on 20th day of September, 1993, he was at Umuokpa, where he attended the ceremony for “removing the mourning apparel of a dead person.” He joined the village masquerade for the ceremony. As their masquerade emerged the beating of masquerade drums was asked to be stopped. The deceased refused to do so and continued drumming despite the plea by other persons for him to stop. Consequently, two youths by names Chinedu

and Aturuchuwuoda challenged the deceased to stop but he would not. A quarrel ensued between the youth and the deceased. As the accused went to them to intervene, he was pushed by the deceased who slapped him on his left cheek. People present asked the deceased to leave the accused alone but despite this the deceased continued to hit the accused with his fist and he eventually knocked accused on the ground. As the deceased was about to hit the accused with a stick, the latter picked up a stone and hit the deceased on the stomach with it. The deceased fell on the ground and the accused ran away but the deceased got up and chased him. The accused escaped by running to his family compound where he remained. The next day the accused's father (D.W.2) took the accused to the police post of Eziam, from whence the accused was taken to Nwarorieubi police station. It was while he was there that he heard that the deceased had died and he made a statement to the police. Under examination-in-chief the accused denied that he stabbed the deceased with a dagger but said that he "stabbed" the deceased with a stone and he did not waylay the deceased on the road. He admitted making three statements to the police, which he said he adopted as part of his defence. He said under cross-examination that his birth was registered at Port Harcourt and that the certificate of birth was in his father's (D.W.2) possession. He said that at the time of the incident that led to the death of the deceased, he was not 18 years old.

In his testimony, D.W.2, John Orisakwe, said he was a retired Inspector of Police and that the accused was his son and he was born on 7th October, 1979 at Port Harcourt General Hospital. He confirmed that deceased's birth was registered and he tendered the birth certificate in his possession, which was admitted in evidence as "Defence Exhibit No. 1."

On 7th May, 1996, the defence closed its case immediately after the evidence of D.W.2 and the trial was adjourned to 8th July, 1996 for the trial court to be addressed. On the 8th July, 1996, the accused was not brought to court from prison custody and so the case was further adjourned to 7th October, 1996 "for continuation." On this date, the learned trial Chief Judge minuted as follows:-

"COURT: On 7/5/96 counsel for the accused person, Mr.

Azuatalam tendered a Birth Certificate No. 12399 dated 18th December, 1979 to the effect that the accused person, Peter Orisakwe was born at the General Hospital Port Harcourt on 7th October, 1979. The said Certificate which was tendered and recorded as Defence Exhibit No. 1 was procured by the father of the accused person, Mr. J.N. Orisakwe on 12/6/96, the elder brother of the deceased, one Mr. John Agbarakwe wrote to the court to say that the said defence Exhibit 1 was a forgery. This morning the Deputy Director of Public Prosecutions has shown the court a letter dated 13/9/96 signed by Dr. G. J. Orgwu that the said Defence Exhibit 1 was a real forgery. John Agbarakwe's letter dated 12/6/96 is hereby tendered as Miscellaneous Exhibit 'A'. Dr. G.J. Orgwu's letter dated 13/9/96 is tendered as Miscellaneous Exhibit 'B'.

At this stage the two opposing counsel have agreed that since fraud is alleged the matter should be investigated. I therefore order that the person who issued the said certificate i.e. Dr. F. Chavez and the person who wrote denying the authenticity of the certificate, Dr. G.J. Orgwu should be subpoenaed by the parties in the matter for them to be examined and cross-examined on Oath. Each should come with all relevant documents pertaining to the alleged forged birth certificate of the accused – Orisakwe.

This case is therefore adjourned to 11/12/96 for the above issue to be sorted out."

It is to be observed that Mr. John Agbarakwe, the elder brother to the deceased, was P.W.4 His letter (Miscellaneous Exhibit A) mentioned above reads-

"MR. JOHN AGBARAKWE

NO. 18 MANN STREET,

OWERRI-IMO STATE.

12TH JUNE, 1996.

The Honourable Chief Judge,

The Judiciary,

Owerri – Imo State.

Sir,

PETITION AGAINST REGISTRATION OF BIRTH CERTIFI-

CATE PRESENTED BY EX-INSPECTOR JOHN ORISAKWE

With honour and respect, I submit this my humble petition against the birth certificate tendered before your Honourable Justice on 7th May, 1996 by Ex-Inspector John Orisakwe.

B *The Certificate with registration No. 4321/79 with card No. 12399, dated 18/12/79, purported to have been issued by City Health Office Port Harcourt, River State is forged. I have been to the City Health Office Port Harcourt where the document is proved to be false and forged.*

C *John Orisakwe did this in order to mislead your Honourable Justice and thereby pervating (sic) the course (sic) of Justice. I pray your Honourable Justice to scrutinize the document and bring the culprit to book so that it will serve as a deterrent to others.*

D *The Doctor in charge of the City Health Office is ready to prove the falcity (sic) of the document.*

May the Almighty God continue to give you the wisdom to dispense justice.

Thanks in advance.

E *I am,
Yours Obediently
Sgd: JOHN AGBARAKWE”*

The letter by Dr. G.J. Orgwu (Miscellaneous Exhibit B) mentioned above reads-

F *“GOVERNMENT OF RIVERS STATE OF NIGERIA
Ministry of Health and
Social Welfare
P.M.B. 5101
City Health Office
Port Harcourt.
13th September, 1996*

G
H *Ref: MH/PH/389/187
The Director of Public
Prosecution,
Public Prosecutions Dept.,
Ministry of Justice,*

Owerri.

Attention: J.C. DURU(ESQ.)

RE: REGISTRATION OF BIRTH OF PETER ORISAKWE

With reference to your DPP/18/Vol.4/123 of 3rd July, 1996 on the above subject, I am directed to inform as follows:-

1. That the Birth Certificate No. 4321/79 with the name Peter Orisakwe was not issued from the Birth and Death Registry Section of the City Health Office Port Harcourt.

2. That there is no information about the said birth certificate found in our records.

3. That the No. 4321/79 in our records belongs to a female child registered on the 2nd of August, 1979 and not 18th Dec., 1979 as contained in the photocopied birth certificate sent to us for verification.

4. From the foregoing, therefore, the birth certificate is not authentic and not genuine.

Sgd: DR. G.J. ORGWU

Senior Medical Officer i/c

City Health Office.

For: Hon. Commissioner for Health

And Social Welfare, Port Harcourt."

On 11th December, 1996, the learned Chief Judge's record reads in part thus-

"Accused person present. J.C. Duru Deputy Director of Public Prosecution (sic)

for the State.

R.C. Azuatalam for the accused person.

COURT: On 7/10/96 this court asked the two opposing counsel in the case to subpoena the two Doctors who gave contradictory documents regarding the birth date of the accused. This morning the Deputy Director of Public Prosecution (sic) says the Doctor he subpoenaed Dr. G.J. Orgwu is in court, but Azuatalam counsel for the accused says he is going to rely on what Dr. G.J. Orgwu says in Evidence after cross examination and so did not produce the other Doctor to testify.

Dr. G.J. Orgwu testified as the court's witness as both opposing

counsel agreed”.

Dr. Gift Jethro Orgwu then testified. He said that as at that date he was the Principal Medical Officer and Assistant Director in charge of the City Health Office, a unit of the Ministry of Health, Rivers State. He assumed this duty on the 7th March, 1996. He mentioned the names of five doctors who were his predecessors in office, including Dr. (Mrs.) F. Chavez, a Philipino, who was the Registrar from 1977 to 1981. Before 1992, the City Health Office was known as Port Health Office. He stated that 23 births were registered on 18th December, 1979 at Port Health Office, Rivers State and he tendered the Births Register for the period October to December, 1979 without objection and it was admitted as “Court Exhibit No. 1” containing the 23 births registered on 18th December, 1979. He could not find from the registered births the name of Peter Orisakwe. He said that registration No. 4321 of 26th July, 1979 bore the name Ngeribokoa G. Omoniye – Benibo and not Peter Orisakwe. The register was tendered without objection and was admitted in evidence as “Court Exhibit No.2”.

Defence Exhibit 1 was shown to Dr. Orgwu and he said that he could not find it mentioned in the records with him. He said that he knew the signature of Dr. (Mrs.) Chavez, who had since returned to the Phillipines, and that if shown to him he could recognize it. He tendered a file containing document written and signed by Dr. Chavez. Defence counsel raised objection but was overruled by the trial court and it was admitted in evidence as “Court Exhibit3”. At the end of his evidence-in-chief, Dr. Orgwu was cross-examined by the defence counsel – R.C. Azuatalam, Esq., and was re-examined by the Deputy Director of Public prosecutions J.C. Duru, Esq. The case was then adjourned to the 29th January, 1997 for the trial court to rule on the issue. On the adjourned date the following ruling was delivered by the learned Chief Judge-

“RULING

Following the mini trial conducted on 11/12/96, I ruled as follows:-

The conflicting dates of birth of the accused person as revealed by the prosecution in asking that the Birth Certificate, Defence Exhibit No.

I be expunged gave rise to this trial within trial. It was for the defence to establish the authenticity of the said Defence Exhibit No. 1 which gave the date of birth of the accused as 7th October, 1979. The defence and the prosecution were on 7/10/96 asked to produce witnesses for the mini trial.

The mini trial is as recorded above. R.C. Azuatalam, Esq., counsel for the accused person did not produce any Doctor or person to substantiate the date of birth, 7th October, 1979, as recorded in the Certificate of Birth he tendered in evidence as Defence Exhibit No. 1. Rather he said he was going to rely on what Dr. Orgwu would say in evidence after cross-examining him. Dr. Orgwu was subpoenaed by the prosecution to establish that the accused was not born on the date (7/10/79) reflected in the said Birth Certificate. His evidence to that effect was very obvious and overwhelming that the said Birth Certificate purporting the birth day of the accused person to be 7/10/79 which was procured by John Orisakwe, the father of the accused person is a forgery. I rule that the birth Certificate, Defence Exhibit No. 1 should and is hereby expunged from the evidence already given, and should be marked as expunged.

The procurement of the said Birth Certificate should be referred to the police for thorough investigation and prosecution of whosoever was responsible for producing such a forged document in a serious matter of this nature before me."

Immediately after the ruling the following minute follows-

"COURT: The trial continues. Defence counsel says he has completed the defence of the accused and is ready to address the court. The D.D.P.P. is in agreement."

The defence counsel addressed the trial court at length, at the end of which the case was adjourned to 18th March, 1997 for the prosecution counsel's address, which he did on that date. The case was then adjourned for judgment on the 22nd May, 1997 but on this date the learned Chief Judge minuted thus:-

"COURT: This case was on 18/3/97 adjourned to this date for judgment. But in the course of my evaluation of the case on a whole it occurred to me that even though in the mini trial the court found the age of 14 years claimed by the accused, as his age at the date of the alleged

commission of the offence to be false there was the necessity for the court to make due inquiry as to the age of the accused person. With this persuasion hearing notices were given to the prosecution and the defence and subpoena given to Dr. Njemanze for him to testify today from his expert knowledge as to the age of the accused at the date of the alleged commission of the offence”.

Soon after the ruling, Dr. Innocent Njemanze, Principal Medical Officer, Grade 1 (who was P.W.5) was called as “Court’s Witness No. 2”. He said that he had seen the accused person and had examined him physically and he stated that by physically looking at him “his chronological age will be between 22 and 25 years old”. He was examined by D.D.P.P. and the case was adjourned to the 26th May, 1997 on which day the doctor said he “could not complete the x-ray test on the accused due to power fluctuation. We are likely to complete the test today”. The case was then adjourned to 10th June, 1997 on which day it was further adjourned to the 27th June, 1997 because the accused was not produced from prison custody.

It is significant to observe that the last time the defence counsel, R. C. Azuatalam, Esq., appeared for the accused person was the 18th March, 1997, thereafter it was C.N. Metu Esq. Who appeared for the accused up to the end of the trial. The minutes of the trial Chief Judge does not indicate that he was holding brief for Azuatalam, Esq., nor whether the latter had withdrawn his appearance for the accused.

Be that as it may, on the 27th June, 1997, Dr. Njemanze continued with his testimony. He stated that x-ray of the important bones of the accused were taken as to determine his age. That from x-ray films all the bones were normal. He further re-affirmed that in his opinion the age of the accused was “between 22 and 25 years at the time of the x-ray, that is on 22/5/97 and 26/5/97. He was then cross-examined by the defence counsel and at the end of the cross-examinations the case was adjourned to the 8th July, 1997 for judgment. In the judgment the learned Chief Judge observed as follows:-

“Before the resumption of the case on 7/10/96 the elder brother of the deceased called John Agbarakwe who testified as P.W.4 wrote the

court on 12/6/96 saying that the Birth Certificate Defence Exhibit 1 tendered by the father of the accused was a forgery. On 9/10/96, the prosecution showed the court a letter dated 13/9/96 signed by one Dr. G.J. Orgwu that the said Defence Exhibit 1 was a real forgery. The said John Agbarakwe's letter dated 12/6/96 was tendered as Miscellaneous Exhibit 'A' while Dr. G.J. Orgwu's letter dated 13/9/96 was tendered as Miscellaneous Exhibit 'B'. The two opposing counsel at the stage agreed with the court that since fraud was alleged, and the age was disputed the letter should be investigated as enjoined by Section 208 of the Criminal Procedure Law (Cap. 31) Laws of Eastern Nigeria 1963 Vol. 2. The Court therefore ordered that the person who issued the alleged forged certificate, i.e. Dr. F. Chavez, and the person who wrote denying the authenticity of the certificate, that is Dr. G.J. Orgwu, should respectively be subpoenaed by each party in the matter for them to come to court on the next date of adjournment to be examined and cross examined on Oath. Each doctor was to come with all relevant documents pertaining to the alleged forged birth certificate of the accused, Peter Orisakwe. C D

When the hearing resumed on 11/12/96, Dr. G.J. Orgwu who was subpoenaed by the prosecution was in court. But R.C. Azuatalam, defence counsel, said he was going to rely on what Dr. G.J. Orgwu said in evidence after cross examination and so did not produce the other Doctor to testify. E

The trial within trial was conducted after which I was convinced beyond any reasonable doubt that the Birth Certificate No. 12399 dated 18th December, 1979 and tendered as Defence Exhibit No. 1 by the father of the accused was a real forgery. After giving a ruling on the issue the said forged birth certificate was expunged from the evidence already given and marked as such after which the main trial continued by way of address as the defence had also closed its case. F G

As I was about to evaluate the evidence of witnesses as well as the submissions of the two opposing counsel, it occurred to me that even though in the mini trial the court found that age of 14 years claimed by the accused, as his age at the date of the commission of the alleged offence, to be false, there was the necessity for the court to make due H

inquiry as to the age of the accused. This arose from the fact that the accused might silently be saying to himself.

“If the court has discredited my age as 14 years and I have not admitted that of the prosecution of 18 years, then it is for the court to say what my age is.”

With this persuasion, I had to recall the Medical Doctor who performed the autopsy to examine the accused person as to his age and testify. Dr. Innocent Njemanze did examine the accused person and gave evidence to the effect that the age of the accused person as at 20th September, 1993 was over 18 years.”

The learned Chief Judge went on to reject as an afterthought the testimony of the accused that he hit the deceased with a stone and not stabbed him with a dagger. He believed that the accused used a dagger. He believed the testimony of P.W.1, whom he said was not of the same family as the deceased but that they came from the same village. He saw no reason why he should not believe him. However, this notwithstanding, the learned Chief Judge said that he warned himself before accepting his evidence, in case the witness could be regarded as an interested party in the case. He considered the defences of provocation and self – defence, which were put up by the accused counsel in his address, and rejected them as afterthought as there was no evidence to support any of the defences. He concluded by holding “that the prosecution proved its case beyond reasonable doubt. I accordingly, find the accused person Peter Orisakwe guilty of the murder of Sylvanus Agbarakwe on 20th day of September, 1993”. He sentenced him to death by hanging.

Aggrieved by the decision, the accused person appealed to the Court of appeal on a notice of appeal prepared on his behalf by C.N. Metu, Esq. On the 7th October 1999, a motion on notice inter alia praying for leave to file and argue 2 additional grounds of appeal was filed in the Court of Appeal on behalf of the accused by Chief C.A.B. Akparanta. At the hearing of the appeal by the court below, Chief Akparanta abandoned all the six grounds of appeal originally filed by C.N. Metu, Esq., and argued questions for determination based on the additional grounds of appeal.

In considering the contention of the accused, that the trial court erred in law when it expunged “Defence Exhibited No. 1” from its record; received and admitted suo motu exhibits outside the court and acted on private letters without being tendered during the trial; conducted mini-trial after the prosecution and defence had closed their cases, and recalled P.W.5 at the stage it did to inquire into the age of the accused. Finally, the accused contended that the prosecution did not prove its case beyond reasonable doubt as required by Section 138 subsection (1) of the Evidence Act.

The Court of Appeal in a considered judgment dismissed the appeal in its entirety. The accused, therefore, appealed further to this court and raised in his brief of argument the following questions for us to determine, viz:-

“(i) Whether the learned Justices of the Court of Appeal were right in affirming that the procedure adopted by the trial court in calling an additional witness recalling two other witnesses and in conducting a mini-trial within the main trial for the determination of the age of the Appellant, after both the prosecution and the defence had closed their case, did not lead to a denial of fair hearing to the appellant.

“(ii) Whether the Court of Appeal was right in affirming the conviction and sentence of the Appellant by the trial court.”

The prosecution, similarly formulated two questions for our determination. They read-

“(i) Whether the procedure adopted by the learned trial judge (sic) at the trial, as approved by the court below, was unfair to the Appellant.

“(ii) Whether the lower court’s confirmation of the conviction of the Appellant by the trial court was supported by the evidence at the trial”.

In my opinion the issues raised in the Appellant’s brief of argument are more akin to the grounds of appeal filed by the accused than the issues formulated in the Respondent’s brief. For this reason, I adopt the former issues for the purpose of determining this appeal.

Issue No. (i)

The accused contends that the procedure followed by the trial court led to a denial of fair hearing to the Appellant. He refers to the receipt of the two letters by the learned Chief Judge from sources outside the High Court and their being admitted in evidence as exhibits after the prosecution and defence had closed their cases and the case had been adjourned for addresses; and contends that every court has a duty to do substantial justice to both parties. That in the circumstances of this case the trial court was making a case for the prosecution. The cases of Okpulo v. The State, (1990) 7 NWLR (Pt. 164) 581 at p. 590C per Belgore, JSC and UBA Ltd. v. Achoru (1990) 6 NWLR (Pt. 156) 254 at p. 270F-G per Karibi-Whyte, JSC., were cited in support.

The accused argued further that in conducting mini-trial and recalling or calling witnesses after the cases for the prosecution and the defence had been closed, was to strengthen the case for the prosecution by filling gaps in the prosecution's case and contradicting the defence. It is canvassed that this is so because at the close of the cases for the prosecution and defence, it was obvious that the former had not succeeded in proving that the Appellant's birth certificate was a forgery. The only reference about the Appellant's date of birth in the prosecution case was a passing remark under cross-examination of P.W.6. Reliance has been placed on the case of Onuoha v. The State, (1989) 2 S.C. (Pt. II) 115 (1989) 2 NWLR (Pt.101) 23 at p. 44 D-F where it was stated that-

"..... it would be contrary to natural justice and against the spirit of the law for a trial court to re-call an accused person (or call a witness for that matter) after the close of defence and addresses in order to clear up its doubts. For that would in effect be depriving the accused of the benefit of the doubt".

The accused concluded that the procedural irregularity committed by the trial Chief Judge not only occasioned miscarriage of justice but also denied him fair hearing.

In reply, the prosecution argues, in the Respondent's brief, that it was within the personal knowledge of the accused as to what was his correct age. The issue of age of the accused was raised after the prosecution had closed its case. This was done in order to spring a surprise at

the prosecution. It was for this reason that the prosecution cross-examined the accused as to whether his birth was registered and what was his age. He was unable to answer this but said that his birth certificate was with his father (D.W.2). At the time D.W. 2 produced the certificate which showed that the Appellant was 14 years old, the prosecution was not given notice at the earliest opportunity to verify the claim. It is argued that the disclosure of the fraud by P.W.4 and the prosecution was legitimate and was done in the interest of justice as there is no rule of law which demands that the court should shut its eyes to an issue of fraud which has come to its knowledge as in the present case.

It is contended that nothing was in the proceedings being complained against which was done behind the defence's back. It is significant that learned counsel for the accused agreed to all the steps taken in the proceedings and cross-examined all the witnesses that testified, whether called by the prosecution or the court. Therefore, it is submitted, on the authority of Ilodibia v. NCC, 1997 SCNJ 77 at p. 79, that the Appellant cannot be heard to complain over the steps taken by the trial court, since they were taken with the consent of his counsel.

The Court of Appeal (Ogebe, Akpiroroh and Ikongbeng, JJCA) in dealing with this issue stated as follows, per Ikongbeh, JCA, who wrote the leading judgment, concurred with by other members of the coram-

"With all due respect to the learned counsel, in the peculiar circumstances of this case the issue raised here appears to be of academic relevance only. It has no practical effect in favour of the Appellant. The document in question was, as has been seen, the alleged birth certificate tendered by D.W.2, the appellant's father, in proof of the appellant's age. It shows on the face of it that Dr. F. Chavez had registered the birth of the appellant at the City Health Office (sic) on 18/12/79 as No. 4321/79. It shows also that the appellant was born on 07/10/79....."

The appellant's counsel cross-examined the witness. The learned Chief Judge, ruling on the point taken in the mini-trial, held that the document was indeed a forgery. He then ordered that it be expunged from the record.

In the circumstances just related, in what way has this order affected the decision of the court regarding the guilt or otherwise of the appellant? In other words, in what way has it occasioned any miscarriage of justice to the appellant? Whether the document was left on the record of the court or expunged there was no way the court could have used it in the determination of the appellant's age. From the evidence before the learned Chief Judge, he was absolutely right in holding the document to be a forgery..... I do not see the order for expungation as giving any cause for complaint against the ultimate decision of the court convicting and sentencing the appellant.....

On the third issue Chief Akparanta submitted that the learned trial Chief Judge should not have acted on the letter from P.W.2 and Dr. Orgwu as they had not been introduced into the evidence the normal way when a witness was testifying. Coming, as they did, after the parties had closed their cases. The court should have ignored them.

With all due respect, I see no merit in the complaint here. As was seen as I was relating the facts relevant to the second issue, the court brought the letters to the attention of counsel for both sides and called for evidence to thrash out the question of the genuineness or otherwise of the birth certificate, counsel for the parties consented to the holding of the mini-trial... What the Chief Judge could not have done was to have used the letters without further investigation or without involving the parties in the investigation. The Chief Judge could not, however, have closed his eyes to such a grave allegation as the one contained in the letters. I see no merit, in the circumstances of this case, in the complaint that the court made a case for the prosecution, nor in the complaint that the appellant had not been given a fair hearing."

Now, with utmost respect, I think the Court of Appeal fell into serious error in the manner it considered the appeal before it. The points to be considered are (1) What was the relevance of age to the case of the accused? (2) If age was relevant to his case, how was the additional evidence about it going to be adduced by the court? And (3) was the proper procedure followed in adducing and admitting the additional evidence?

Section 30 of the Criminal Code of Eastern Nigeria, Cap. 30, on criminal responsibility, provides as follows:-

“30. A person under the age of seven years is not criminally responsible for any act or omission.

A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

A male person under the age of twelve years is presumed to be incapable of having carnal knowledge”.

Now the accused in making statements to the police (“Prosecution Exhibits 1, 2 and 3”) gave his age as 14 years. His father D.W.2 produced a birth certificate which gave the accused’s date of birth as 18th December, 1979; in order words, suggesting that the accused was under the age of 14 by 20th September, 1993 when the deceased was attacked and killed by the accused according to the case for the prosecution. It is clear that the defence under Section 30 of the Criminal Code, Cap. 30 could not avail the accused.

Section 319 subsections (1) and (2) of the Criminal Code, Cap. 30 which deals with the punishment for murder reads:-

“319(1) Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death.

(2) Where an offender who in the opinion of the court has not attained the age of seventeen years has been found guilty of murder such offender shall not be sentenced to death but shall be ordered to be detained during the Governor’s pleasure and upon such an order being made the provisions of part XLIV of the Criminal Procedure law shall apply”.

By the 8th July, 1997 when the judgment of the trial court was delivered and the accused was convicted and sentenced to death, the accused, as per his case, was over 17 years but under 18 years. It will be seen again that the accused could not have availed himself of the provisions of Section 319 of the Criminal Code. So that the issue of age in the circumstances of this case has no relevance

whatsoever.

Therefore the forged certificate of birth of the accused (Defence Exhibit No. 1) is of no significance, since it could not have benefited the accused. So that all the splitting of hair by learned counsel for the Appellant is, with respect, no more than a storm in a tea cup.

Section 200 of the Criminal Procedure Law, Cap 31 of the Laws of Eastern Nigeria, 1963, applicable to Imo State, provides as follows:-

“200. *The court at any stage of any trial, inquiry or other proceedings under this Law may call any person as a witness or recall and re-examine any person already examined and the court shall examine or recall and examine any such person if his evidence appears to the court to be essential to the just decision of the case.*”

As has been seen already, the learned Chief Judge on the receipt of the letter by Mr. John agbarakwe (Miscellaneous Exhibit A) he decided to take additional evidence suo motu after the case for the defence had been closed. The question is: was it proper for the trial Chief Judge to pay attention to the letter and call additional evidence in order to ascertain the allegation in the letter that “Defence Exhibit No. 1” was a forgery? The manner in which the trial Chief Judge treated the letter is strange. The information in the letter that impugned the testimony of D.W.2 on the certificate of birth should have been passed to the prosecution (D.D.P.P.) which would have decided what step to take. In that case the prosecution could have applied under Section 200 of the Criminal Procedure law Cap. 31 to either recall D.W. 2 for further cross-examination, or call additional witnesses to prove the falsity of the certificate of birth which was tendered by D.W.2. This would have been a proper procedure under the Criminal procedure Law. In the case of Onuoha v. The State, (1989) 2 S.C. (Pt. II) 115 (1989) 2 NWLR (Pt. 101) 23 at p. 44 D-F this court observed as follows:-

“The other issue I would like to consider is the regularity or otherwise of the calling of two witnesses suo motu by the trial Judge after the close of the defence. In Police v. Horvat, (1952) 20 NLR 52, applying R v. Owen, (1952) 1 All E.R. 1040, it was held that it would be contrary to

natural law and against the spirit of the law for a trial court to recall an accused person (or call a witness for that matter) after the close of defence and addresses in order to clear up its doubts. For that would in effect be depriving the accused of the benefit of the doubt. In the instant case counsel had not addressed the court and the learned trial Judge did not say he was calling the witnesses to clear any doubt he had. One thing however, is certain, the additional witnesses called after the defence has closed its case was not called on any matter arising *ex improviso* from the defence. Another is that the additional evidence was used to strengthen the case for the prosecution and to weaken that for the defence. For these reasons I am satisfied that the calling of the additional witnesses after the case of the defence was a grave irregularity which has occasioned a miscarriage of justice. See *West v. Police*, (1952) 20 NLR 71 and *Ejukole v. Police*, WACA 161” per Agbaje, JSC.

It follows that it is irregular for a trial Judge to recall an accused or call a witness after the close of defence. However, this dictum appears to me to contradict the specific provisions of Section 200 of the Criminal Procedure Law, Cap, 31 which allows a trial court at any stage of the trial to call any person as a witness or recall any witness including the accused if his evidence appears to the court to be essential to the just decision of the case.

In the same case (*supra*) on p. 36 D-E, Oputa, JSC., made the following observation:-

“This Section – 200 CPL - has been subject of very many judicial interference and also setting the limits thereof as follows:

“After the close of the case for the defence, the trial Judge can call a witness proprio motu or suo motu if, and only if, the defence has set up a case *ex improviso*, which no human ingenuity can foresee. But even here it should be made quite clear that the “evidence is not such as is only calculated to do an injustice to the accused but one essential to a just decision of the case”. *R. v. Dora Harris*, (1928) 20 Cr. App. R 86 at p. 89; 28 Cox C.C. 432 at pp. 435-436”.

In the case on hand what was curious and irregular was the acceptance of a letter in chambers by the learned Chief Judge dur-

ing the pendency of the case before him and the calling of witnesses to determine whether Defence Exhibit No. 1 was genuine. In my view, the trial Chief Judge should not have allowed the content of the letter to influence his subsequent action. It is dangerous for
 B a trial judge to allow himself to be influenced by an extraneous event which takes place outside his court, because such could lead to a miscarriage of justice. The saving factor in this case is that the age of the accused was immaterial whether with regard to criminal
 C responsibility or sentence. I, therefore, hold that the calling of additional witnesses suo motu by the learned Chief Judge though irregular, did not occasion miscarriage of justice and the Appellant's right to fair hearing was not infringed since his counsel, who consented to the irregularity, had the opportunity to cross-examine
 D the additional witnesses and no desire had been expressed or denied, for the accused to call any witness to rebut the additional evidence called by the trial Chief Judge. Had it been that the additional evidence was called by the trial Chief Judge to enhance the case of the
 E prosecution with regard to the age of the accused, I would have relied on the decision in Onuoha's case (supra) to reject the additional evidence.

Issue No. (ii)

Learned counsel for the Appellant contends in the Appellant's brief
 F of argument that the Court of Appeal was wrong in confirming the conviction of the Appellant on the basis that the testimony of P.W.1, as an eye-witness, that he saw the accused stab the deceased in the chest with a dagger, was not unequivocal. He argued that the testimony was not free of inconsistencies. He cited P.W. 1 as stating as follows:

G "We were on the way when the accuse and his cohorts began to disturb us. It was the deceased who warned him. The accused then began to ask the deceased why he (deceased) was warning him and threatened to deal with him. After our courtesy visit to the head of the masquerade
 H of the place we performed, the accused with a dagger and his groups waylaid us on the road. As we were passing near the home of the accused on the main road, the accused held the deceased on the shirt. The rest of the villagers ran away as they said the accused had a dagger and was

going to stab the deceased. The deceased told the accused to leave him alone as the accused is too junior for him (deceased) to fight with. After the deceased has said this, the accused stoutly stabbed him (deceased) and ran away. He stabbed him on the chest. As he, accused ran away, people pursued him. The accused arrived at the scene where he stabbed the deceased on a bicycle and he was carrying a boy with injured leg on the bicycle”. B

Later on under cross-examination P.W.1 said-

“I did not do anything when the accused was holding the deceased on his shirt. I was afraid when people from the accused person village warned that he was with a dagger. None of us tried to intervene because of the warning that he was armed with a dagger. The deceased is from the same village with me.” C

Learned counsel argued that from the quotation it can easily be deduced that P.W. 1 did not see any dagger with the accused, and that any knowledge P.W.1 had about the dagger was derived from the warning allegedly given by the villagers that the accused had a dagger. If really P.W.1 saw the accused with a dagger, he further canvassed, did P.W.1 need any further warning from the villagers before keeping away from the accused? He referred to the evidence of P.W.1 that the accused was holding the deceased by the shirt before stabbing the latter and asked: where was the dagger at that time? He also asked that if the accused initially way laid P.W.1 and the masquerade troupe, how could P.W.1, at the same time, have seen the accused arriving at the scene of the incident on a bicycle with an injured boy on it? He asked, if it was true that the accused had a dagger with him, which scared the troupers and the villagers, then how could the same people, who were frightened pursue the accused and where was P.W.1 then to see the accused allegedly stab the deceased with a dagger? Learned counsel submitted that all these discrepancies in the testimony of P.W.1 show that the evidence of P.W.1 was not free from doubt contrary to the finding of the court of Appeal. H

Learned counsel pointed out, in addition, that P.W.1 came from the same village as the deceased and the (P.W.1) was also a co-masquer or trouper. He therefore contends that in the circumstances it became necessary for

the evidence of P.W.1 to be treated with great caution. He cited the case of Mbenu v. State, (1988) 3 NWLR (Pt.84) 615 at p. 626 H, where Nnamani, JSC., stated-

B “..... A tainted witness is a witness who not an accomplice is a witness who may have a purpose of his own or her own to serve..... The evidence of such witness should be treated with a toothcomb.... Trial courts have been advised to be wary in convicting on the evidence of such witnesses without some corroboration.”

C In reply, learned counsel for the respondent argues that the testimony of P.W.1 was clear and unequivocal. He said that the witness was specific in his evidence that the accused stabbed the deceased with a dagger which the witness saw with the accused before the incident took place. He contends that in both his statement to the police “Prosecution D Exhibit No. 3” and his testimony before the trial Chief Judge, the accused admitted attacking the deceased. The only difference with the testimony of P.W.1 is that while P.W.1 said that accused stabbed the deceased with a dagger, the accused gave evidence that he caused wound to the deceased in his stomach. Learned counsel drew attention to the contradiction E between “Prosecution Exhibit No.3” and the oral evidence given by the accused. In the former, accused stated that he caused the injury on the deceased with a “sharp flat block” but in his evidence on oath it was a stone that he used to hit the deceased. He never described the stone as F “sharp”. The opinion expressed by P.W.5 Dr. Innocent Njemanze, who performed autopsy on the deceased’s body, is that the wound suffered by the deceased on the chest, which caused his death, must have been caused by a sharp instrument. Learned counsel pointed out further contradiction G between “Prosecution Exhibit No. 3” and the oral evidence of the accused who in one breath stated that he hit the deceased in the stomach and in another breath that he hit him on the chest. He referred to the opinion expressed by P.W.5 on the instrument used to cause the fatal H wound on the deceased, to wit-

“Such edged object that could cause this type of wound could be a dagger, a knife with sharp edge. A sharpened stick with sharp point and sharp edges as well as any metallic object with pointed tips and sharp

edges, as well as a broken glass with sharp edges and pointed tip.”

Learned counsel submitted that the Court of Appeal was right in upholding the judgment of the lower court that the accused killed the deceased by stabbing him with a dagger. That the fact that the accused stabbed the deceased on the chest is a pointer that the accused had intended to kill the deceased. He cited in support the cases of Queen v. Moses Onoro, (1961) 1 AII NLR (Pt. 1) 33 and Ejelioku v. The State, (1993) 7 NWLR (Pt.1) 33 (Pt. 307) 554. B

As I stated earlier in this judgment the accused was represented at the trial court by two different counsel and learned counsel for the Appellant before us was not one of them. His brief started with the appeal to the court below. It appears to me all the points he made about the testimony of P.W.1 relate to questions that he could have asked the witness under cross-examination, had he appeared for the accused at the trial, in order to shake or discredit the testimony. But as this did not happen, the trial Chief Judge was entitled to examine the evidence without such cross-examination and come to a conclusion. This he did. For he held- C

“That there was the death of a human being, Sylvanus Agbarakwe, and that the death was caused by the accused are facts that are not in dispute. On the third issue, that is that the act was done by the accused with the intention of causing the death of the deceased is an issue that needs an expatiation. The nature of the wound inflicted on the deceased is a pointer in the determination of this issue. As submitted by the prosecution, the law is settled that an intent to kill can be inferred from the nature of the wound inflicted on the deceased. See Queen v. Moses Onoro (1961) 1 AII NLR (Pt. 1) 33, Ejelioku v. State (1993) 7 NWLR (Pt. 307) 554 S.C. F G

Dr. Innocent Njemanze, who performed the autopsy on the body of the deceased found amongst other things a deep and penetrating laceration wound, 10 cm long, with sharp edges which tranversed (sic) the diaphragm, the pericardium and the lateral surface of the lower half of the left ventricle of the heart. It was a very fatal wound that was not meant to give the deceased any chance to survive. I believe and hold that the accused person’s evidence that he picked up a stone and hit the de-

ceased on his stomach is another calculated afterthought. The evidence of the P.W.1, the eye-witness, was not in any way shaken. He was sure that what the accused used on the deceased was a dagger and I believe him..... From the evidence of P.W. 1 no stone was used by the accused but a dagger. The depth and length of the wound with 2.5 liters of blood recovered from the left hemothorax leaves me with no other inference than that the accused in striking the deadly and fatal blow had no other intention but to kill and the accused knew that the death of the deceased would be the probable consequence of his act". (Underlining mine).

In dealing with the argument by learned counsel for the Appellant before us, the Court of Appeal held, per Ikongbeh, JSC as follows:-

"With all due respect to learned counsel, I find little merit in this argument. P.W.1 was categorical in his evidence that he saw the appellant stab the deceased in the chest. The portion of his evidence highlighted by counsel cannot by any stretch of the imagination be interpreted to mean that the witness could not have seen what happened that day. What the witness said about the appellant's people saying the appellant was armed could not be hearsay. He did not say he did not see the dagger. He said he did. What he said was that because of the warning that the appellant was armed he did not go near him and the deceased.

I have little doubt in my mind that the Chief Judge was justified in drawing inference of intent to kill from the nature of the wound that the appellant inflicted the deceased nor have any doubt that he was justified in his preference for the evidence of P.W.1. there was nothing intrinsically incredible about it. It was the learned counsel for the appellant who took a wrong view of it. What the witness said showed clearly that he witnessed what he said he saw. The learned trial Chief Judge, who had seen and heard him and the appellant as they testified, had little other option then to accept it."

It follows that there has been concurrent findings by the courts below on the points raised to attack the findings of and the conclusion reached by the trial Chief Judge. No basis has been established by the Appellant for us to disturb the findings by the trial court.

On the issue that P.W.1, by virtue of his coming from the same village as the deceased, his evidence must be treated with caution before it was admitted, the trial Chief Judge held:-

“He (P.W.1) was not of the same family with the deceased but of the same village and had no cause to tell lies. I have however, warned myself before accepting his evidence in case by any stretch of the imagination he could be regarded as an interested person.”

The Court of Appeal remarked thus on the contention of learned counsel for the Appellant that P.W.1 was a tainted witness-

“With the greatest respect to earned counsel, rather than pursuing the substance of the matter he seems to have followed the shadow. For instance, he himself acknowledged that family relationship between a (sic the) witness and the deceased did not necessarily render the evidence of the former inadmissible.”

I too see no reason to accept that the evidence of P.W.1 was tainted by the reason only of his coming from the same village as the deceased. There is no iota of evidence to suggest that he had an interest of his own to serve. Suppose I were to hold that he was such a witness, his evidence was corroborated by the evidence of Dr. Njemanze, P.W.5 and to some extent by the evidence of the accused who did not dispute that he attacked the deceased- see Mbenu v. The State (Supra).

On the whole, I see no merit in this appeal. I accordingly dismiss it and affirm the decision of the Court of Appeal, which in turn confirmed the decision of the trial court.

MOHAMMED JSC

I agree that the appellant's appeal has failed. My learned brother, the Chief Justice of Nigeria, M.L. Uwais, has considered all the salient issues canvassed in this appeal and I have nothing more useful to add. The appeal is dismissed. The judgment of the Court of Appeal is hereby affirmed.

ONU JSC

The facts and the law in this appeal have been so exhaustively dealt with in the judgment of my learned brother, Uwais, Chief Justice of Nigeria and with which I am in entire agreement that I need in expiation thereof to consider only Issue No. (1) briefly hereunder as follows:

Issue No. (1) asks whether the learned Justices of the Court of Appeal (in the rest of this judgment referred to shortly as the court below) were right in affirming that the procedure adopted by the trial court in calling an additional witness, recalling two other witnesses and in conducting a mini-trial within the main trial for the determination of the age of the Appellant after both the prosecution and the defence had closed their case, did not lead to a denial of fair hearing to the Appellant. This issue covers Ground 1 of the Grounds of Appeal.

(i) RECEIPT OF TWO LETTERS EXTRA JUDICIALLY

It is the Appellant's submission that the learned trial Judge was wrong in receiving these letters directly from outside the court and admitting same as exhibits in the case after both the prosecution and the defence had closed their case and the case had been adjourned for counsel's address. Every court, it is contended has a duty to do substantial justice to both parties. If this is true in civil cases (for which see Okeke v. A. Obidife & Qrs. (1965) 1 AII NLR 50) it is even more so in criminal cases, particularly in murder cases where the accused is on trial for his life. The conclusion, it is argued, is therefore inescapable, in that in the circumstances of the case in hand, it would appear that the court was making a case for the prosecution. This court in the case of E. Okpolor v. The State (1990) 7 NWLR (Pt. 164) 581 at page 590C (per Belgore, JSC) had stated that "*it is not for the court to make case for the parties, the Court acts and finds only on the case the parties present before it.*" This principle, it is further argued, was stated in the cases of UBA Ltd. v. Mrs. N. Achoru (1990) 6 NWLR (Pt. 156) 254 at page 270 (F-G) (per Karibi-Whyte, JSC) and Theophilus v. The State (1996) 1 NWLR (Pt. 423) 139. One may ask, it is contended, was it not an afterthought by the prosecution to tender this piece of evidence at that stage by routing same through the trial Judge when the two letters (Exhibits A

and B) and the evidence of Dr. G.J. Orgwu were not in the original proof of the prosecution evidence? Was it not a case of taking the defence by surprise? It is for these posers that in the circumstances I do not agree with the Appellant that the trial court suo motu had sought to make a case or strengthen the case for the prosecution against him, thereby resulting B in “a situation of lack of fair hearing.”

(ii) Conducting a mini-trial or calling witnesses after the close of case for the prosecution and the defence in order to prove the age of the Appellant.

Undoubtedly and invariably, the purpose of conducting a mini-trial-within trial and in calling or recalling witnesses including P.W.5 was to strengthen the prosecution’s case, filling a gap in the prosecution’s case and contradicting the defence. This is so because, at the close of the case for both the prosecution and the defence, it was obvious that the prosecution had not succeeded in proving that the Appellant’s birth certificate (Defendant’s Exhibit 1) was a forgery. The effort made to elicit the Appellant’s date of birth and the attempt to tender its certificate being inconclusive coupled with its denial as being false by DW.2 (the Appellant’s E father), made the court to suo motu adduce extra judicial evidence in a complaint similar to the one in the case of Onuoha v. The State (1989) 2 S.C. (Pt.II) 115 (1989) 2 NWLR (Pt.101) 23 at page 44 where this court emphasized that “it would be contrary to natural justice and against the F spirit of the law for a trial court to recall an accused person (or call a witness for that matter) after the close of the defence and addresses in order to clear up its doubts. For that would in effect be depriving the accused of the benefit of the doubt.” Pursuant to Section 200 of the Criminal Procedure Law, Eastern Nigeria Cap. 31 the trial Judge is empowered to call a witness suo motu after the close of the case for the defence if, and only if, the defence has set up a case ex-improviso which G no human ingenuity can foresee and in doing so the trial Judge must ensure that the evidence to be given is not such as is only calculated to do H an injustice to the accused but one essential to the just decision of the case.” The said Criminal Procedure Law was at all material times to the instant case applicable to Imo State. The result of all I have been saying

is that not only must the procedural irregularities in the trial of the Appellant have occasioned a miscarriage of justice but has also led to a denial of fair hearing to him. Compare Isiyaku Mohammed v. Kano Native Authority (1968) 1 AII NLR 424 in which the Supreme Court per Ademola, B CJN at page 426 said;

“It has been suggested that a fair hearing does not mean a fair trial. We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. We therefore see no difference between the two. The true test of a fair hearing..... is the impression a reasonable person who was present at the trial whether from his observation, justice has been done in the case.”

See also Rasaki Ariori & Ors. v. Muraino B. Elemo & Ors. (1983) 1 S.C. 13 at 20, 26 and 59. In the case in hand, the impression a reasonable person would come away with is that justice, has all told, been done or seen to be done.

It is for all I have said herein before and for the many reasons proffered by my Lord, the Chief Justice of Nigeria in his leading judgment that I too answer Issue No. (1) in the affirmative.

In the result, I dismiss the appeal and subscribe to the consequential orders made by the Honourable Chief Justice of Nigeria therein.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Uwais, Chief Justice of Nigeria. I entirely agree with it and for the reasons he gives. I also dismiss the appeal. I also abide by the consequential orders made by him.

UWAIFO JSC

I had the opportunity to read in draft the judgment of my learned brother, Uwais, CJN. I fully agree with it for the reasons carefully stated. H I too dismiss the appeal and affirm the decision of the Court of Appeal.