

SUPREME COURT OF NIGERIA
27TH JANUARY. 2006. SC.14/2005
CORAM:- S. U. ONU, A. I. KATSINA-ALU, N. TOBI,
M. MOHAMMED, I. F. OGBUAGU, JJSC

SALE DAGAYYA APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Evidence of a child - Opinion - Meaning of
- Within the context of s.183(1), (2) & (3) Evidence Act - In respect of
court's handling - Of evidence of a child in criminal proceeding (H1)

EVIDENCE - Witnesses - Competence - Courts - Judicial precedents -
Obtaining the evidence of a child in criminal cases - Steps the court should
take under ss. 154 & 182 Evidence Act (H2)

COURTS - Evidence - Compliance - With ss. 154 & 182 Evidence Act
- In obtaining the evidence of a child - In criminal proceedings - Trial court
complied with that law (H3)

CRIMINAL PROCEDURE - Evidence of a child - Prior investigation by
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CRIMINAL PROCEDURE - Murder - Corroboration - Meaning of - It

does not mean using the exact words - Unsworn evidence of PW1 in this case - Is properly corroborated (H7)

CRIMINAL PROCEDURE - Alibi - Implication of the defence - Time element - Should be to the minutest detail (H8)

CRIMINAL PROCEDURE - Alibi - Defence of - Time element - Effect of failure to investigate the plea - Superior evidence crumbles the defence (H9)

MURDER - Proof - Alibi - Evidential burden on accused - Where prosecution discharged its burden of proof - The defence of alibi is a mere farce (H10)

FACTS

Before the High Court of Justice Jigawa State, the appellant was charged with the offence of culpable homicide punishable with death under s. 221(b) of the Penal Code. Appellant was alleged to have attacked the deceased, one Sabuwa Muhammed with a machete and stick, thereby inflicting injuries resulting in the death of the deceased. PW1, Gambo Muhammed, a 14 years old granddaughter of the deceased was the only eye witness available on the day of the incident. She said that she saw the appellant running towards them (herself, the deceased who was her grandmother and one Abba). Appellant told the deceased to stop and instructed her to go back to Gidan Gamji village, but she refused stating that she did not leave anything there to collect. Appellant then gave the deceased several cuts with a machete until she died. This was on the 10th day of December 1999. PW1 made efforts to lift the deceased but to no avail. She left for Ubba, their home, and lodged a report to other relations which led to the arrest of the appellant, investigation of the matter and his prosecution before the trial court.

Before receiving PW1's evidence, the trial Judge conducted a preliminary inquiry in accordance with ss. 154 and 183(1) & (2) of the Evidence Act as to the competence of a child to testify. He was of the

opinion that the 14 years old PW1 could give intelligent answer to questions, but as she did not understand the nature of an oath, her evidence was unsworn. Relying on the PW1's eye witness account and other corroborative evidence, the trial court found the appellant guilty as charged and sentenced him to death. His appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether their Lordships of the Court of Appeal were not in error in their evaluation of the evidence of PW1 against the appellant regard being had to the provisions of section 183(1) and (3) of the Evidence Act in confirming the conviction and sentence of the appellant by the High Court.

2. Whether in the light of the serious and material contradictions, doubts and inconsistencies in the case of the prosecution, the Court of Appeal was not in error to have affirmed the Judgment of the trial High Court bearing in mind that the prosecution had the duty to prove the guilt of the appellant beyond reasonable doubt.

3. Whether the decision of the trial High Court was properly sustained by the Court of Appeal having regard to its evaluation of the plea of alibi put forward by the appellant.”

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

Evidence of a child - Opinion - Meaning of

1. The expression, “*in the opinion of the Court*”, is used twice in subsection (1) while the expression, “if the Court is of opinion” is used once in subsection (2). The operative and telling word in both subsections is “*opinion*”. And it conveys the same meaning. An opinion is what a person thinks about something based on the person’s personal judgment, rather than actual facts. The expression also means what people in general think about something. It also conveys a professional judgment on the part of a professional. Subsections (1) and (2) vindicate that professional slant in the meaning because the court which, in this context, is the Judge, is a professional. A person, or relevantly a Judge, can form a professional opinion by resorting to his whims and caprices. In the process of forming

the opinion, the Judge is exposed to a subjective judgment, which is influenced by his personal feelings, punctuated with his instinctive behaviour and at times, habitual mannerisms. And these must flow from our rules of evidence. An opinion which is formed wrongly or outside the
B precincts of our procedural law will be subject to an appellate attack if the matter goes on appeal. But an opinion which is exercised within our procedural law will receive the approval of an appellate court. The position is as strict and tight as that. (p. 269 C)

C ***Witnesses - Competence - Courts***

2. As correctly pointed out by learned counsel for the respondent, this Court dealt with the matter in 1988 in the case of Okon v. State, supra. What did this Court say and what did the learned trial Judge do in the case
D on appeal? This Court held that (1) Once a witness is a child, by the combined effect of sections 154 and 182(1) and (2) of the Evidence Act, the first duty of the Court is to determine first of all whether the child is sufficiently intelligent to understand the questions he may be asked in the
E course of his testimony and to be able to answer rationally. This is tested by the court putting on him preliminary questions which may have nothing to do with the matter before the court. (2) If, as a result of these preliminary questions, the Court comes to the conclusion that the child is unable to
F understand the questions or to answer them intelligently, then the child is not competent witness within the meaning of section 154(1). But if the child passes this preliminary test then the Court must proceed to the next test as to whether, in the opinion of the Court, the child is able to understand the nature and implication of an oath. (3) If after passing the first test, he
G fails this second test, then being a competent witness, he will give evidence which is admissible under section 182(2), though not on oath. If, on the other hand, he passes the second test so that, in the opinion of the Court, he understands the nature of an oath, he will give evidence on oath.
H (p. 271 A)

Evidence - Compliance - With ss. 154 & 182 Evidence Act

3. In my view, the learned trial Judge clearly complied with the procedural

requirements as enumerated in the cases examined above. And so I ask, why the furore on the part of counsel for the appellant? The learned trial Judge's first question requesting for the name of the witness qualifies as "*preliminary question which has nothing to do with the matter before the court*", using the language of this Court in *Okon v. State, supra*. I say so because the question, "*what is your name?*" has nothing to do with the matter before the court, which is murder. The question was aimed at testing the intelligence of PW1. If a child of 14 years cannot give a correct answer to the question, then the trial Judge is entitled to hold that the child lacks intelligence. But she gave her name as Gambo Muhammed, which is correct.

I see some gap in the record and it is in respect of the answers that immediately followed after the name of PW1. Let me read the three sentences once again to make a point:

"I know God and I live at Ubba Village. But I do not know what God will do to me if I tell lies. I do not know what oath is."

I realize that the learned trial Judge did not record the questions which he asked that gave rise to the answers PW1 gave above in the three sentences. Does that destroy the case of the respondent? I think not. In *Mbele v. State, supra*, this Court held that the provisions of the Evidence Act will be satisfied "*even though the actual questions and answers in the course of the investigation are not recorded.*" I am of the view that the procedure vindicates the position of the law in *Mbele v. State*.

In sum, I hold that the learned trial Judge complied strictly with the provisions of section 183(1) and (2) of the Evidence Act.

(pp. 272 F & 274 A)

Evidence of a child - Prior investigation by trial court

4. I think I can still go further on the authority of *Mbele v. State*. *Mbele* shifts the burden on the party contending that the requisite investigation was not carried out to rebut this prima facie opinion by showing that either that there was no investigation at all or that what the trial Judge called investigation under sections 154 and 182 was a parody or travesty of the investigation envisaged. Did the appellant discharge that burden? The

answer is a big “No”. Learned counsel submitted that the trial Judge failed to carry out the preliminary tests or investigations required under section 183(1) and (3). With the greatest respect, he got the point wrong in the light of the case law. It is sad that learned counsel did not refer to the case law but merely gave an apparent magisterial submission based on the section. If he had read the case law, he should have refrained from the submission he made. (p. 273 D)

Principles guiding allegation of contradictions

5. The first is that if contradiction is material, it will tilt the appeal in favour of the party relying on the contradiction, which in this case, is the appellant. The second, and the opposite of the first, is that if the contradiction is immaterial (the opposite of material), it will not be of any assistance to the party raising it, again in this case, the appellant.

Where the ground of appeal relied upon was that of contradictions in the evidence of witnesses, as in this appeal, it is not enough to warrant a reversal of judgment merely for the appellant to show the existence of those contradictions, without showing further that the trial Judge did not advert to and consider the effect of those contradictions. For an appellant to succeed on the ground of contradictions in the evidence of witnesses for the prosecution, the contradictions must be shown to amount to substantial disparagement of the witnesses concerned, making it dangerous or likely to result in a miscarriage of justice to rely on the evidence of the witness or witnesses. (p. 274 B)

Contradictory statement - Meaning of

6. A contradictory statement is a statement which states the opposite of what is being contradicted. A contradictory statement is an affirmation of the contrary of what was earlier stated or spoken. For a statement to be contradictory, it should be a direct opposite of what was earlier stated or spoken.

With the greatest respect to learned counsel for the appellant, I do not agree with him that the evidence of PW2 contradicted that of PW1. This is because what PW2 said in evidence is not the opposite or an

affirmation of the contrary of what PW1 said. The evidence of PW2 could have been said to be contradictory if it was to the following or like effect:

“The accused Sale Dagayya did not kill or murder the deceased” or “It was XYZ that killed or murdered the deceased; not the accused Sale Dagayya.”

Such evidence is in direct contradiction or conflict with the evidence given by PW1. But that is not the situation here. The issue therefore fails. (p. 275 C)

Murder - Corroboration - Meaning of

7. Learned counsel also raised the issue of corroboration of the evidence of PW1. He argued that the unsworn evidence of PW1 was not adequately corroborated. He relied on section 183(3) of the Evidence Act.

Learned counsel for the respondent sees evidence of corroboration from the testimonies of PW3, PW5, DW1 and DW2. I think I largely agree with him.

The above evidence, again, corroborates the evidence of PW1. In her evidence, PW1 said that the deceased had cuts on the hands and the head and that the appellant did the cuts. In the circumstance, the submission of learned counsel for the appellant on corroboration fails, as the learned trial Judge complied with section 183(3) of the Evidence Act. After all, corroboration entails the act of supporting or strengthening a statement of a witness by fresh evidence of another witness. Corroboration does not mean that the witness corroborating must use the exact or very like words, unless the matter involves some arithmetics. That will reduce the straightforward adjectival matter to a pedantic level; and I do not think the procedure will be prepared to take or admit such pedantry.

Alibi - Implication of the defence

8. The defence of alibi is that at the time the crime or alleged crime was committed, the accused was somewhere else; not at the place the crime was committed or allegedly committed. In other words, it is the case of the accused that he was not at the scene of crime or locus criminis at the

material time when the crime was committed or alleged to have been committed. And so the accused says that he cannot by any stretch of imagination be said to have committed the crime, as it is humanly impossible for him to be in two places at the same time and moment.

B In view of the importance of the time element in the defence, months, days, hours, minutes and even in some cases seconds, count in the determination of the criminality of the accused person. After all in the determination of criminal responsibility, minutes count, if not seconds. It is a fact that an offence could be committed within a second of the clock.
C And so the court has to take into consideration the time element to the minutest detail in its search for criminal responsibility on the part of the accused. (p. 278 B)

D *Alibi - Defence of - Time element*

9. The defence of alibi crumbles the moment the prosecution gives superior evidence, that is a more believable evidence than that of the accused, by fixing permanently the accused person not only at the scene
E of crime but also in the commission of the crime, in a way that if a photograph was taken at the time, or point of the actus reus of the accused, it will clearly show or depict him in ‘romance’ with the crime he is charged with. The matter is as exact as that.

F It is however the law that failure of the prosecution to investigate the facts and circumstances given by an accused person of his whereabouts renders the alibi unrebutted and it may vitiate the proof beyond reasonable doubt against the accused raising the alibi. See *Okosi v. State* (1989) 1 NWLR (Pt. 100) 642. But the position will be different if the
G prosecution has more convincing or stronger evidence as to the guilt of the accused person as in this appeal. See *Onafowokan v. State*, supra.

Still on the defence of alibi, the appellant gave a specific time when he was in the mosque and in the house of Muhammed Kure and that was
H between 1.00 p.m. and 2.30 p.m. on the fateful day of 10th December, 1979. I ask: who gave the evidence that the appellant killed the deceased between 1.00 p.m. and 2.30 p.m. on that day? Certainly PW1 did not give such evidence and none of the witnesses did so. And so the alibi is to no

avail. The murder could have taken place before the time the appellant claimed he was in the mosque and the house of Muhammed Kure. The murder could also have taken place after the period. The exact time the murder took place was not given by any witness and so the appellant flew the wrong balloon. (pp. 278 F & 279 C)

B

Alibi - Evidential burden on accused

10. Although the proof of the guilt of the accused is on the prosecution and so too the investigation of the defence of alibi, the onus lies on the accused to discharge the evidential burden that he was in fact not at the scene of crime at the time the offence was committed and that he was somewhere else. From the state of our adjectival law, the evidential burden is not easy to discharge in the light of overwhelming and incriminating evidence from the prosecution such as the one in this appeal, as the evidence relates to PW1 which was corroborated by other witnesses.

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D

I come to the inevitable conclusion that the prosecution discharged the burden of proof in this case and that the defence of alibi was a mere farce. Accordingly, the appeal fails and it is dismissed. (p. 280 A)

E

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. Contradiction - Meaning of

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The word contradiction comes from two Latin words - contra, which means opposite, and dicere, which means to say. Therefore in ordinary conversation to contradict is to speak or affirm the contrary. Hence in the law of evidence, a piece of evidence is contradictory to another when it asserts or affirms the opposite of what the other asserts, and not necessarily when there are some minor discrepancies in, say, details between them. In other words, contradiction between two pieces of evidence goes rather to the essentiality of something being or not being at the same time. Whereas minor discrepancies depend rather on the person's astuteness and capacity for observing meticulous details. (p. 288 D)

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2. Nature of corroborative evidence

In respect of the corroboration of such evidence stated by me hereinabove, which undoubtedly, is mandatory and is not a mere matter of practice, it has to be borne in mind and this is also settled, that corroborative evidence, must be evidence which confirms in some material particular, not only that the crime has been or was committed, but also that it was the Appellant who committed it. The corroboration, need not be direct evidence that the accused person or Appellant, committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime.
(p. 293 C)

REPRESENTATIONS

D Abubakar Malami for the Appellant.
Suleh Umar Esq., for the Respondent.

CASES REFERRED TO

- E The Queen v. Ekpata (1957) 2 FSC.1
- Okafor v. Commission of Police (1964) 1 ANLR 303, 304
- Itauma v. Akpe-lme (2000) 7 SC (Pt. 2) 24
- Olohunde v. Adeyoju (2000) 6 SC (Pt.3) 118
- Atano v. AG Bendel State (1988) 2 NWLR (Pt. 75) 201
- F Kalu v. State (1988) 4 NWLR (Pt. 90) 503
- Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR (Pt. 7) 393
- Arehia v. The State (1982) 4 SC 78
- Muka v. The State (1975) 9-10 SC 305
- G Enahoro v. The Queen (1965) 1 All NLR 125
- The Queen v. Ekanem (1960) 5 FSC 14
- Omisade v. The Queen (1964) 1 All NLR 233
- Adio v. State (1986) 3 NWLR (Pt. 31) 714
- H State v. Aibangbee (1988) 3 NWLR (Pt. 84) 548
- Adekunle v. State (1989) 5 NWLR (Pt. 123) 505

STATUTES REFERRED TO

Evidence Act ss. 154(1), 155(1), 179, 180, 182 & 183

Criminal Procedure Code of Jigawa State s. 229(2)

Children & Young Persons Act of England, 1933 s.38(1)

LEAD JUDGMENT BY TOBIJSC

This is yet another murder appeal. Like most murder cases, the facts are pathetic, traumatic, and revealing not necessarily because human life was taken but because of the circumstances and the way it was taken.

Let me briefly tell the story as accepted by the learned trial Judge. Sabuwa Muhammed was the deceased. PW1, Gambo Muhammed, was the granddaughter of the deceased. She was 14 years old at the time of the incident. She gave evidence as an eyewitness. This is what she said in examination-in-chief.

She saw the appellant running towards her, her grandmother (the deceased) and one Abba. The appellant asked the deceased to stop and she stopped. He further instructed the deceased to go back to Gidan Gamji village but the deceased refused; telling the appellant that she did not leave anything there to collect and that she would not go back.

The appellant performed his mission. He cut the deceased on her hand with a machete. Not satisfied, he also macheted the deceased on both sides of her head as well as the middle of the head. The deceased then fell down. Even in that pathetic, traumatic and gruesome stage, the appellant did not stop cutting the deceased. He continued cutting her with the machete. PW1 made efforts to lift up the deceased but to no avail. She left for Ubba, their home, and lodged a report of what happened. And so Sabuwa Muhammed died gruesomely on that 10th day of December, 1999. Fourteen years old Gambo Muhammed was the only witness to the murder of the grandmother. She must have had so much trauma and pain.

The learned trial Judge heard the evidence of Gambo and others, including the appellant. He was not satisfied with the evidence of the appellant and his witnesses. He was satisfied with the evidence of the prosecution witnesses. He therefore convicted the appellant and sentenced him to death. He followed the procedural requirements of sentencing for

murder meticulously when he pronounced:

B *"I have listened with rapt attention to the plea of leniency very powerfully put by the Learned Defence Counsel on behalf of the convict. The sentence that I am about to pronounce is filed (sic) by law, i.e. it is mandatory to pronounce same once a court is convinced of such an offence. Having said that, the convict is sentenced to death by hanging. He is to be hanged by the neck till he is dead."*

C Dissatisfied with the judgment, the appellant lodged an appeal at the Court of Appeal Kaduna. After a careful examination of the appeal, the Court of Appeal dismissed the appeal and affirmed the conviction and sentence of the learned trial Judge. Ba'aba, JCA, in his judgment, said in the final paragraph:

D *"In the result, the appeal fails and is hereby dismissed. The judgment of the learned trial judge delivered on 31/7/2001 by the learned trial judge, Abdullahi, J is hereby affirmed by me."*

E By our rules of procedure in criminal proceedings, the appeal has come to us almost automatically, to enable the final court of appeal to look at the complaint of the appellant.

As usual, briefs were filed and duly exchanged. The appellant formulated three issues for determination as follows:

F *"1. Whether their Lordships of the Court of Appeal were not in error in their evaluation of the evidence of PW1 against the appellant regard being had to the provisions of section 183(1) and (3) of the Evidence Act in confirming the conviction and sentence of the appellant by the High Court.*

G *2. Whether in the light of the serious and material contradictions, doubts and inconsistencies in the case of the prosecution, the Court of Appeal was not in error to have affirmed the Judgment of the trial High Court bearing in mind that the prosecution had the duty to prove the guilt of the appellant beyond reasonable doubt.*

H *3. Whether the decision of the trial High Court was properly sustained by the Court of Appeal having regard to its evaluation of the plea of alibi put forward by the appellant."*

The respondent formulated the following two issues:

“2.01 Whether the Court of Appeal was right when it held that the trial court followed the procedure laid down in section 183(1) & (3) of the Evidence Act governing the reception and treatment of the evidence of a child.

2.02 Whether having regard to the totality of credible evidence before the trial court; the decision of the Court of Appeal affirming the decision of the said trial court was unwarranted or unreasonable.”

Arguing Issue No. 1, learned counsel for the appellant, Abubakar Malami, Esq. submitted that the learned trial Judge did not comply with section 183(1) and (3) of the Evidence Act in dealing with the evidence of PW1, a child of 14 years and that the Court of Appeal was wrong in holding that the provisions of the subsections were strictly complied with by the trial Judge.

Learned Counsel submitted that the learned trial Judge did not consider the two tests required in section 183(1) and (3). These are (1) the required level of understanding and the need to tell the truth and (2) to ensure that the witness understood the nature of oath. Counsel submitted that not any of those investigations was conducted on the witness and that the effect of such failure is to render the evidence of the witness a nullity.

Counsel picked extracts from the evidence of PW1 and submitted that the learned trial Judge did not comply with the provisions of section 183(1) and (3). He also roped in sections 154(1), 179 and 182(1) of the Evidence Act. Learned Counsel did not remember to cite a single case on the issue, and there are a plethora of cases.

On Issue No. 2, learned counsel submitted that in the light of the serious and material contradictions, doubts and inconsistencies in the case of the prosecution, the Court of Appeal was in error in affirming the decision of the trial Judge. Counsel submitted that the decision of the Court of Appeal was erroneous because the evidence led by the prosecution did not satisfy the standard of proof required. A lot of doubts were created in the testimony of the prosecution witnesses and the pieces of doubts taken singly or together would warrant a setting aside of the conviction and sentence passed on the appellant, learned counsel contended.

Learned counsel was not happy with the finding of the Court of

Appeal that the trial Judge was right in coming to the conclusion that the prosecution established its case beyond reasonable doubt. Counsel took time and pains in his brief to point out what he regarded as inconsistencies in the evidence of PW1 and PW2. He cited the following cases in support of his argument: *Ankwa v. State* (1969) 1 All NLR 113; *Fatoyinbo v. Attorney-General, Western Nigeria* (1966) WNLR 4; *Sambo v. The State* (1993) 7 SCNJ 142; *Okobichi v. The State* (1975) NSCC 124; *Olaleye v. State* (1970) All NLR 300; *Okabichi v. State* (1975) 3 SC 135; *Okafor v. COP* (1965) NMLR 89; *Queen v. Moses* (1960) 5 FSC 187; *Amen v. State* (1978) 6-7 SC 27; *Aneke v. The State* (1976) 10 SC 225 at 264; *Tepper v. Queen* (1952) AC 4 SC 480 at 489; *Ukorah v. The State* (1971) 167 at 174, 176-177; *Adio v. The State* (1980) 1-2 SC 116 at 122 and *Laki v. The State* (1980) 8-11 SC 81.

On Issue No. 3, learned counsel submitted that the findings of both the trial Judge and the Court of Appeal on the plea of alibi were wrong. Counsel argued that the prosecution has an obligation to investigate any defence whether stupid or spurious, put up by an accused irrespective of its worth. He cited the case of *Aigbadion v. The State* (2001) 2 ACLR 60. Counsel made another effort to dislodge the evidence of PW1, which the learned trial Judge believed. He submitted that without the evidence of PW1 fixing the appellant at the scene of the crime, the evidence of alibi put up by the appellant cannot be lightly disregarded as the Court of Appeal did in the case. He cited *Onafowokan v. The State* (1987) 3 NWLR (Pt. 61) 538 at 552; *Aremu v. State* (1991) 7 NWLR (Pt. 201) 24; *Adedeji v. The State* (1971) 1 All NLR 75; *Peter v. The State* (1997) 3 NWLR (Pt. 496) 625 and *Adio v. The State* (1980) 1-2 SC 116. He urged the Court to allow the appeal.

Learned counsel for the respondent, Suleh Umar, Esq., Senior State Counsel, Ministry of Justice, Dutse, Jigawa State, submitted on Issue No. 1 that there is nowhere in the bare wordings of section 183(1) of the Evidence Act which requires the court to conduct any inquiry or test to determine the competency of the child witness. What the section requires is for the Judge who see and hear the child witness to form an opinion on the competency of the said witness. He relied on the case of *Onyegbu v.*

State (1995) 4 NWLR (Pt. 391) 510 at 529 and Okoye v. State (1972) Vol. 7 NSCC 717.

Learned Counsel conceded that the issue of preliminary inquiry before receiving evidence of a child witness crept back into our law in the case of Okon v. State (1988) Vol. 19 NSCC 156, some sixteen years after it has been decisively rejected by the Supreme Court in 1972 in Okoye v. State, *supra*. He said that this Court relied heavily on the opinion of Akinola Aguda in his Book entitled Law Relating to Evidence in Nigeria and the cases of Okon v. The State, *supra*; Mbele v. State (1990) 4 NWLR (Pt. 145) 484; Sambo v. State (1993) 6 NWLR (Pt. 3000) 399 and Omosivbe v. COP (1959) WNLR 209. Counsel further traced the trend of the Nigerian case law to English decisions in the cases of R. v. Reynolds 34 Cr AR 63; R. v. Sorgendor 27 Cr. AR 175 and R. v. Dunna 21 Cr. AR 176, cases which were tried by juries. He distinguished the group of English cases from the present case by contending that it was tried by a judge alone without jury and so it was not mandatory for him to conduct a preliminary inquiry. Counsel relied once again on the case of Okoye v. State, *supra*. Counsel urged the Court to depart from the previous decisions which required preliminary investigation before the reception of evidence of a child witness. He cited Criminal Law Review Committee Report of England at pages 696 of Phipson on Evidence, 13th edition on the need to abolish preliminary inquiry in such matters in England. He came out with the conclusion that the Committee recommended that children over 14 years should always give evidence on oath and children under that age should always give unsworn evidence. Counsel argued that failure to conduct the preliminary inquiry was a mere irregularity which was not fatal to the proceedings. He cited section 151(1) of the Evidence Act.

Learned Counsel submitted that the evidence in corroboration is an independent testimony of evidence which affects the accused by connecting or contending to connect him with the crime. He relied on Iko v. State (2001) 14 NWLR (Pt. 732) 321 and Omisade v. The Queen (1964) Vol. H 3 NSCC 170 on the issue of corroboration and submitted that the evidence of PW1 satisfied the requirement of the law of corroborative evidence. He also relied on the evidence of PW3, PW5, DW1 and DW2.

On Issue No. 2, learned counsel submitted that there was no contradiction or inconsistency between the testimony of PW1 and PW2. Counsel found an excuse in the evidence of PW2 in respect of his tender age of 9 years as opposed to his older sister who was 14. To learned
B counsel, the evidence given by PW2 was not in contradiction to the evidence given by PW1; contending that two pieces of evidence can only be said to be contradictory where one affirms the contrary or opposite of what the other says. He cited Kwagshir v. State (1994) 2 NWLR (Pt. 328) 592 at 607. Counsel further submitted that PW2 may not have appreciated
C what transpired at the scene of the crime because of his tender age; a situation why he failed to state what actually happened at the scene of the crime.

On the issue of the defence of alibi, learned counsel submitted that
D where there is an eye-witness to the commission of the offence or a credible evidence that fixed the accused person at the scene of the crime, the defence cannot be sustained by the court. He relied on Balogun v. AG Ogun State (2002) 6 NWLR (Pt. 763) 512 at 536; Njovens v. State (1973)
E 8 NSCC 257. He also called in aid the evidence of PW1.

On the failure to produce the blood stained stick, learned counsel made reference to pages 6, 7, 8 and 9 of the Record and submitted that the closure of the case by the trial Judge on the ground that the State Counsel,
F who was prosecuting the case, was absent on that day to take the evidence of the police investigation officer, who recorded the confessional statement of the appellant, was the cause of not tendering the blood stained stick. He did not in the circumstances see the reason for the invocation of section 149(d) of the Evidence Act. He urged the Court to dismiss the
G appeal.

Let me first take the provision of section 183(1) (2) and (3) of the Evidence Act as the subsections relate to the evidence of Gambo Muhammed. The subsections read:

H “(1) In any proceedings for any offence the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understand the nature of an oath, may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient

intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) If the court is of opinion as stated in subsection (1) of this section, the deposition of a child may be taken though not on oath and shall be admissible in evidence in all proceedings where the deposition if made by an adult would be admissible. B

(3) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecutor is corroborated by some other material evidence in support thereof implicating the accused.” C

The expression, “in the opinion of the Court”, is used twice in subsection (1) while the expression, “if the Court is of opinion” is used once in subsection (2). The operative and telling word in both subsections is “*opinion*”. And it conveys the same meaning. An opinion is what a person thinks about something based on the person’s personal judgment, rather than actual facts. The expression also means what people in general think about something. It also conveys a professional judgment on the part of a professional. Subsections (1) and (2) vindicate that professional slant in the meaning because the court which, in this context, is the Judge, is a professional. A person, or relevantly a Judge, can form a professional opinion by resorting to his whims and caprices. In the process of forming the opinion, the Judge is exposed to a subjective judgment, which is influenced by his personal feelings, punctuated with his instinctive behaviour and at times, habitual mannerisms. And these must flow from our rules of evidence. An opinion which is formed wrongly or outside the precincts of our procedural law will be subject to an appellate attack if the matter goes on appeal. But an opinion which is exercised within our procedural law will receive the approval of an appellate court. The position is as strict and tight as that. D E F G H

In my humble view, a trial Judge has discretion to exercise in the opinion ‘*saga*’ but I do not think the discretion is unfettered since it is subject to scrutiny by an appellate court. And if I may go further, most

discretions are not unfettered as wrongly held, since they are subjected to review by an appellate court. And in this respect, the final bus stop is this Court which has the unfettered power to exercise its discretion. But that is not an issue here. I merely tried to complete the picture, and probably

B for no useful reason.

I should pause here to take the case law. As it is, the case law is in two apparently conflicting parts, so to say. Both counsel dealt with the cases which understandably emphasized the position which favour their clients. The division in the case law is between those which hold that in compliance with section 183, there is no need for a preliminary inquiry on the part of the trial Judge and those which hold that such a preliminary inquiry is a desideratum for purposes of compliance with the section.

In Okoye v. State, supra, this Court held that a Judge is not bound D to hold preliminary inquiry for purposes of complying with the Evidence Act. Coker, JSC, said at page 722:

“But, although the judge is not bound to hold preliminary inquiry, he is nonetheless required to favour an opinion that the child does not E know the nature of an oath in order to make the section operative.”

Learned counsel for the respondent made very serious and strong efforts to distinguish the case of Okon v. The State, supra, and the group of cases from the present case. According to him, Okoye v. State, supra, was the position of the law until 1988 when the position was changed in F the case of Okon v. State (1988) 19 NSCC 156 and the group of cases. See Mbele v. State (1990) 4 NWLR (Pt. 145) 484 and Sambo v. State (1993) 6 NWLR (Pt. 300) 399. In those cases, counsel claimed as indicated above, that this Court relied heavily on the opinion of the learned G Author, Akinola Aguda in his book entitled Law Relating to Evidence in Nigeria, page 299, at paragraphs 23 to 25. He said that the above decisions were based on the decisions of English Courts in R. v. Reynolds 34 Cr. AR 63; R. v. Surgenor 27 Cr. AR 175 and R. v. Dunne 21 Cr. AP 176.

H Much as I appreciate the scholarship involved in the analyses of both the English and Nigerian cases, I do not think there was really the need to go that far. I say so because there is really no visible difference between the procedure adopted by the learned trial Judge and the case law beyond

Okoye where this Court settled the procedure to be adopted by a trial Judge.

As correctly pointed out by learned counsel for the respondent, this Court dealt with the matter in 1988 in the case of Okon v. State, supra. What did this Court say and what did the learned trial Judge do in the case on appeal? This Court held that (1) Once a witness is a child, by the combined effect of sections 154 and 182(1) and (2) of the Evidence Act, the first duty of the Court is to determine first of all whether the child is sufficiently intelligent to understand the questions he may be asked in the course of his testimony and to be able to answer rationally. This is tested by the court putting on him preliminary questions which may have nothing to do with the matter before the court. (2) If, as a result of these preliminary questions, the Court comes to the conclusion that the child is unable to understand the questions or to answer them intelligently, then the child is not competent witness within the meaning of section 154(1). But if the child passes this preliminary test then the Court must proceed to the next test as to whether, in the opinion of the Court, the child is able to understand the nature and implication of an oath. (3) If after passing the first test, he fails this second test, then being a competent witness, he will give evidence which is admissible under section 182(2), though not on oath. If, on the other hand, he passes the second test so that, in the opinion of the Court, he understands the nature of an oath, he will give evidence on oath.

In *Mbele v. State, supra*, this Court followed the above decision in Okon. This Court went further and held that once there are clear indications in the record of proceedings that a trial Judge carried out the preliminary investigation envisaged by sections 154 and 182 of the Evidence Act before taking the evidence of a child or an infant, that would mean at least *prima facie*, that the said inquiry was carried out even though the actual questions and answers in the course of the investigation are not recorded. It will then be open to a party contending that the requisite investigation was not carried out to rebut this *prima facie* opinion by showing either that there was no investigation at all or that what the trial

Judge called an investigation under sections 154 and 182 was a parody or travesty of the investigation envisaged.

In *Sambo v. State*, supra, this Court held that section 183(1) of the Evidence Act is aimed at a child who does not understand the nature of an oath. The Court followed its earlier decision in *Okon v. State*, supra.

I have taken the case law and I should now take what the learned trial Judge did in terms of procedure. At page 2 of the Record, the prosecutor said:

“My first witness PW1 is under aged girl of 14 years old. We are not sure whether she can give evidence on oath or not.”

Following the statement of the prosecutor, the learned trial Judge recorded as follows:

“That being the case some questions will be put to the witness to find out if she can give evidence on oath or not.”

The Judge then asked PW1 thus: *“What is your name?”*. PW1 answered as follows:

“My name is Gambo Muhammed. I know God and I live at Ubba Village. But I do not know what God will do to me if I tell lies. I do not know what oath is.”

The Judge then recorded as follows:

“That being the answer the witness gave in response to the questions asked by the court, I am satisfied that she cannot give evidence on Oath since she does not appreciate the usefulness of taking oath. She is therefore to give unsworn evidence.”

In my view, the learned trial Judge clearly complied with the procedural requirements as enumerated in the cases examined above. And so I ask, why the furore on the part of counsel for the appellant? The learned trial Judge’s first question requesting for the name of the witness qualifies as *“preliminary question which has nothing to do with the matter before the court”*, using the language of this Court in *Okon v. State*, supra. I say so because the question, *“what is your name?”* has nothing to do with the matter before the court, which is murder. The question was aimed at testing the intelligence of PW1. If a child of 14 years cannot give a correct answer to the

question, then the trial Judge is entitled to hold that the child lacks intelligence. But she gave her name as Gambo Muhammed, which is correct.

I see some gap in the record and it is in respect of the answers that immediately followed after the name of PW1. Let me read the three sentences once again to make a point:

“I know God and I live at Ubba Village. But I do not know what God will do to me if I tell lies. I do not know what oath is.”

I realize that the learned trial Judge did not record the questions which he asked that gave rise to the answers PW1 gave above in the three sentences. Does that destroy the case of the respondent? I think not. In *Mbele v. State*, supra, this Court held that the provisions of the Evidence Act will be satisfied “*even though the actual questions and answers in the course of the investigation are not recorded.*” I am of the view that the procedure vindicates the position of the law in *Mbele v. State*.

I think I can still go further on the authority of *Mbele v. State*. *Mbele* shifts the burden on the party contending that the requisite investigation was not carried out to rebut this prima facie opinion by showing that either that there was no investigation at all or that what the trial Judge called investigation under sections 154 and 182 was a parody or travesty of the investigation envisaged. Did the appellant discharge that burden? The answer is a big “No”. Learned counsel submitted that the trial Judge failed to carry out the preliminary tests or investigations required under section 183(1) and (3). With the greatest respect, he got the point wrong in the light of the case law. It is sad that learned counsel did not refer to the case law but merely gave an apparent magisterial submission based on the section. If he had read the case law, he should have refrained from the submission he made.

Learned counsel for the respondent ought not to have laboured that hard to distinguish the decisions of this Court from those of the English courts. There was really no need for that, as the learned trial Judge, in my view, clearly complied with the decisions of this Court, coming after

Okoye v. State. **In sum, I hold that the learned trial Judge complied strictly with the provisions of section 183(1) and (2) of the Evidence Act.**

And that takes me to the issue of what learned counsel for the
 B appellant calls “*serious and material contradictions*”. The law of contra-
 dictions stands in two contradictory positions. **The first is that if
 contradiction is material, it will tilt the appeal in favour of the party
 relying on the contradiction, which in this case, is the appellant. The
 second, and the opposite of the first, is that if the contradiction is
 C immaterial (the opposite of material), it will not be of any assistance
 to the party raising it, again in this case, the appellant.** See generally
 Itauma v. Akpe-lme (2000) 7 SC (Pt. 2) 24; Olohunde v. Adeyoku (2000)
 6 SC (Pt.3) 118; Atano v. AG Bendel State (1988) 2 NWLR (Pt. 75) 201;
 D Kalu v. State (1988) 4 NWLR (Pt. 90) 503; Mogaji v. Cadbury Nig. Ltd.
 (1985) 2 NWLR (Pt. 7) 393; Arehia v. The State (1982) 4 SC 78; Muka
 v. The State (1975) 9-10 SC 305; Onugbogu v. The State (1974) 9 SC 1.

**Where the ground of appeal relied upon was that of contradic-
 E tions in the evidence of witnesses, as in this appeal, it is not enough
 to warrant a reversal of judgment merely for the appellant to show
 the existence of those contradictions, without showing further that
 the trial Judge did not advert to and consider the effect of those
 F contradictions. For an appellant to succeed on the ground of contra-
 dictions in the evidence of witnesses for the prosecution, the
 contradictions must be shown to amount to substantial disparage-
 ment of the witnesses concerned, making it dangerous or likely to
 result in a miscarriage of justice to rely on the evidence of the
 G witness or witnesses.** See Enahoro v. The Queen (1965) 1 All NLR 125.
 See also The Queen v. Ekanem (1960) 5 FSC 14; Omisade v. The Queen
 (1964) 1 All NLR 233.

Learned counsel for the appellant sees contradiction in the evidence
 H of PW1 and PW2. What was the evidence of PW1 and PW2? PW1 said
 inter alia in her evidence-in-chief:

*“Then from there he, the accused cut her with a machet(sic) at her
 hand for the first time and as well as the middle of the head. Then she fell*

down. After she fell down the accused kept on cutting her with the matchet(sic) and the accused then left the scene. I tried to raise her up but I could not as such I went to our house and lodged a report of what happened.”

PW2, in his evidence in-chief said:

“I am ten years old... She is now deceased. I do not know how she died.”

Can the evidence of PW2 be said to contradict the evidence of PW1? Contradiction is a statement, action or fact that contradicts another or itself. **A contradictory statement is a statement which states the opposite of what is being contradicted. A contradictory statement is an affirmation of the contrary of what was earlier stated or spoken.** For a statement to be contradictory, it should be a direct opposite of what was earlier stated or spoken.

With the greatest respect to learned counsel for the appellant, I do not agree with him that the evidence of PW2 contradicted that of PW1. This is because what PW2 said in evidence is not the opposite or an affirmation of the contrary of what PW1 said. The evidence of PW2 could have been said to be contradictory if it was to the following or like effect:

“The accused Sale Dagayya did not kill or murder the deceased” or “It was XYZ that killed or murdered the deceased; not the accused Sale Dagayya.”

Such evidence is in direct contradiction or conflict with the evidence given by PW1. But that is not the situation here. The issue therefore fails.

Learned counsel also raised the issue of corroboration of the evidence of PW1. He argued that the unsworn evidence of PW1 was not adequately corroborated. He relied on section 183(3) of the Evidence Act. The subsection reads:

“A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.”

By the subsection, an accused cannot be convicted on the uncorroborated evidence of a witness. In other words, for purposes of conviction, the evidence of a child within the meaning of section 183(1) of the Act must be corroborated.

B Learned counsel for the respondent sees evidence of corroboration from the testimonies of PW3, PW5, DW1 and DW2. I think I largely agree with him. PW3, the grandfather of PW1 and nephew to the appellant said in evidence in-chief:

C *“Gambo came to me and informed that Sabuwa is dead. She informed that Sale killed the deceased... I then went straight to Kaugama Police Station to report what happened... I was given a police vehicle with some policemen and we went to the scene where we saw her dead body...”*

D While the first three sentences amount to hearsay evidence, the last sentence clearly corroborated the evidence of PW1, when PW3 said that the body of the deceased was found at the scene described by PW1.

That is not all. PW4, the police officer, also corroborated the evidence when he said:

E *“A team of policemen, led by the DCO went to the scene of the crime. On reaching there the said deceased Sabuwa had died already and the accused had left the scene to his house. We went to the house of the accused and met him at home and we arrested him. I found a stick stained with some blood in his possession... The suspect was taken to the station and he gave a statement after he was cautioned and the accused made a statement of confession in nature....”*

G The evidence of PW4 is another corroboration of the evidence of PW1, as the deceased was seen at the scene of accident as stated by PW1 and PW3.

Again, that is not all. PW5, the medical practitioner, in his evidence also said:

H *“In the presence of the police, some other people and the nurses, I began to examine the corpse. Three deep lacerations were obvious on the corpse. One was on the right side of the head, the second one on the middle of the head. The third laceration was on the right whist... On the head, there was a huge blood clot... The cause of death was haemorrhage shock*

secondary to cuts received by the deceased... the lacerations on the corpse of the deceased cannot be self inflicted.”

The above evidence, again, corroborates the evidence of PW1. In her evidence, PW1 said that the deceased had cuts on the hands and the head and that the appellant did the cuts. In the circumstance, the submission of learned counsel for the appellant on corroboration fails, as the learned trial Judge complied with section 183(3) of the Evidence Act. After all, corroboration entails the act of supporting or strengthening a statement of a witness by fresh evidence of another witness. Corroboration does not mean that the witness corroborating must use the exact or very like words, unless the matter involves some arithmetics. That will reduce the straightforward adjectival matter to a pedantic level; and I do not think the procedure will be prepared to take or admit such pedantry.

And that takes me finally to the defence of alibi. The appellant said in his evidence in-chief that he was at the mosque attending the Friday prayer between 1.15 p.m. and 2.15 p.m. and that he was not at the scene of crime, not to talk of killing the deceased.

The learned trial Judge reacted to the defence of alibi at page 19 of the Record:

“The accused person by his evidence and that of his senior brother raised the defence of alibi. The question to be asked at this stage is this, can the accused in view of the evidence of PW1, an eye witness, the evidence of which I believe raise the defence of alibi? It is settled law that where there is an eye witness to the commission of an offence, the question of alibi does not arise. It becomes the question of credibility of the witnesses. See the case of Okozi v. The State (1989) 1 NWLR (Part 100) 642 at 666. I am of the considered view that the accused person cannot successfully raise the defence of alibi.”

What did the Court of Appeal say on the issue? The Court of Appeal dealt with it at pages 89 and 90 of the Record:

“When an accused set up an alibi, he does not thereby assume the responsibility of establishing the same, the onus still lies on the prosecution to prove beyond reasonable doubt that the accused was not only at the

scene of crime but that he committed the offence for which he is tried... The law on the defence of alibi is that the jury should be directed that they should not disregard evidence of alibi unless there is no stronger evidence against it... In the present case the prosecution adduced sufficient and accepted evidence to fix the accused at the scene of crime at the material time, his alibi is thereby also logically demolished.”

The defence of alibi is that at the time the crime or alleged crime was committed, the accused was somewhere else; not at the place the crime was committed or allegedly committed. See generally *Adio v. State* (1986) 3 NWLR (Pt. 31) 714; *State v. Aibangbee* (1988) 3 NWLR (Pt. 84) 548 and *Adekunle v. State* (1989) 5 NWLR (Pt. 123) 505. In other words, it is the case of the accused that he was not at the scene of crime or *locus criminis* at the material time when the crime was committed or alleged to have been committed. And so the accused says that he cannot by any stretch of imagination be said to have committed the crime, as it is humanly impossible for him to be in two places at the same time and moment. In view of the importance of the time element in the defence, months, days, hours, minutes and even in some cases seconds, count in the determination of the criminality of the accused person. After all in the determination of criminal responsibility, minutes count, if not seconds. It is a fact that an offence could be committed within a second of the clock. And so the court has to take into consideration the time element to the minutest detail in its search for criminal responsibility on the part of the accused.

The defence of alibi crumbles the moment the prosecution gives superior evidence, that is a more believable evidence than that of the accused, by fixing permanently the accused person not only at the scene of crime but also in the commission of the crime, in a way that if a photograph was taken at the time, or point of the *actus reus* of the accused, it will clearly show or depict him in ‘romance’ with the crime he is charged with. The matter is as exact as that.

Learned counsel for the appellant submitted very strongly that the prosecution has a duty to investigate the defence of alibi. He did not

however submit that failure on the part of the prosecution to investigate the alibi vitiates the proceedings and therefore exculpates or exonerates the appellant from criminal responsibility. He however cited the case of Onafowokan v. The State (1987) 3 NWLR (Pt. 61) 538 at 552 on the onus of the appellant to introduce evidence of alibi. In Onafowokan, this Court B allowed the appeal on other grounds and not on the ground of failure on the part of the prosecution to investigate the alibi put up by the appellant. Although the alibi put forward by the daughter of the appellant was not investigated, this Court did not allow the appeal on that ground. It rather C held and correctly for that matter that evidence of alibi by an accused person cannot be easily brushed aside except it is neutralized by greater and more convincing contrary evidence from the prosecution.

It is however the law that failure of the prosecution to investigate the facts and circumstances given by an accused person D of his whereabouts renders the alibi unrebutted and it may vitiate the proof beyond reasonable doubt against the accused raising the alibi. See Okosi v. State (1989) 1 NWLR (Pt. 100) 642. But the position will be different if the prosecution has more convincing or E stronger evidence as to the guilt of the accused person as in this appeal. See Onafowokan v. State, supra.

Still on the defence of alibi, the appellant gave a specific time when he was in the mosque and in the house of Muhammed Kure and that was between 1.00 p.m. and 2.30 p.m. on the fateful day of 10th F December, 1979. I ask: who gave the evidence that the appellant killed the deceased between 1.00 p.m. and 2.30 p.m. on that day? Certainly PW1 did not give such evidence and none of the witnesses did so. And so the alibi is to no avail. The murder could have taken G place before the time the appellant claimed he was in the mosque and the house of Muhammed Kure. The murder could also have taken place after the period. The exact time the murder took place was not given by any witness and so the appellant flew the wrong balloon. H

It is common for accused persons charged with the offence of murder to raise the defence of alibi. They like it, and understandably so. It is one defence in which most accused persons find very handy in their

desire and effort to be discharged and acquitted of the charge against them. But the procedural law does not easily avail them.

Although the proof of the guilt of the accused is on the prosecution and so too the investigation of the defence of alibi, the onus lies on the accused to discharge the evidential burden that he was in fact not at the scene of crime at the time the offence was committed and that he was somewhere else. From the state of our adjectival law, the evidential burden is not easy to discharge in the light of overwhelming and incriminating evidence from the prosecution such as the one in this appeal, as the evidence relates to PW1 which was corroborated by other witnesses.

I come to the inevitable conclusion that the prosecution discharged the burden of proof in this case and that the defence of alibi was a mere farce. Accordingly, the appeal fails and it is dismissed. I affirm the death sentence passed on the appellant by the learned trial Judge which was also affirmed by the Court of Appeal. Our law has no sympathy for the appellant and so he must face his death sentence by hanging. I have no discretion to exercise in the matter. May he seek forgiveness from the Almighty God, which is the most important thing for him to do now. God still loves him although God hates the sin that he committed.

F

ONU JSC

The two issues the parties to this appeal agree have arisen for our determination and which are coterminous and in my confirmed opinion overlap, are those formulated by the Appellant and adopted by the Respondent in their Brief as follows:

Issue (1) Whether the Court of Appeal was right when it held that the trial court followed the procedure laid down in section 183(1) & (3) of the Evidence Act governing the reception and treatment of the evidence of a child.

(2) Whether having regard to the totality of credible evidence before the trial court; the decision of the Court of Appeal affirming the decision

of the said trial court was unwarranted or unreasonable.

(3) Whether the decision of the trial High Court was properly sustained by the Court of Appeal having regard to its evaluation of the plea of alibi put forward by the Appellant.

In my consideration of the appeal, I wish to consider issues (1) and (2) together and then issue 3 separately as follows: -

“Section 183(1) In any proceedings for any offence unsworn evidence of any child who is tendered as a witness and does not, in the opinion of the Court, understand the nature of an oath, may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.”

See also section 229(2) of the Criminal Procedure Code Cap. 39 Laws of Jigawa State of Nigeria 1998 which deals with the unsworn evidence of a child in that it provided for the reception of such evidence of the child produced as a witness in criminal proceedings who cannot be and is not sworn because he cannot understand the nature of an oath. The entire provisions of section 183 comes under PART X of the Evidence Act. The said part deals with the taking of oral evidence in court.

Section 180 which is the first section in the part of the said Act provides:

“180 save as otherwise provided in section 182 and 183 all oral evidence given in any proceedings must be given upon oath of any person declaring that the taking of any oath whatsoever is, according to his religious belief, unlawful or who by reason of want of religious belief ought not to, in the opinion of the court, to be admitted to give evidence upon oath.”

(2) The fact that in any case evidence not given upon oath has been received, and the reasons for the reception of such evidence shall be recorded in the minutes of the proceedings”

Subsection 2 of the above quoted section imposes a duty on the trial court to record the reasons for departing from the provisions of section 180. But there is no such duty imposed on the court by section 183 which on a fair reading has clearly left the whole matter to the “*opinion of the*

court”.

It was further submitted that from the foregoing there would be nowhere in the wordings of section 1 83(1) of the Evidence Act that would require the court to conduct any inquiry or test to determine the competency of the child witness, what the section required is for the Judge who sees and hears the child witness should form an opinion on the competency of the said witness, hence this court in the case of *Onyegbu v. State* (1995) 4 NWLR (Pt.391) 510 at 529 held thus:

C “*The opinion about child witness is the opinion of the court.....when the Judge sits alone, he is undoubtedly the person whose opinion is relevant. That explains why emphasis is laid in the above provision of the Evidence Act on the phrases.*

D “*If the court is of the opinion*” “*In the opinion of the court.* “*Unless the court considers that*” and “*if the court considers that and “if the court thinks fit and expedient.”*

Similarly, this Court in the case of *Okoye v. State* (1972) Vol. 7 NSCC 717 declared succinctly thus:

E “*But, although the Judge is not bound to hold preliminary inquiry, he is nonetheless required to form an opinion that the child does not understand the nature of an oath in order to make the section operative.*”
Vide the dictum of Coker, JSC.

F Be that as it may, this issue of preliminary inquiry before receiving the evidence of a child witness crept back into our law through the case of *Okon v. State* (1988) Vol. 19 NSCC 156 some sixteen years after it had been decisively rejected by this Court, way back in 1972 in *Okoye v. State* (supra).

G This Court in the case of *Okon v. State* (supra), *Mbele v. State* (1990) 4 NWLR (Pt. 145) 484 and *Sambo v. State* (1993) 6 NWLR (Pt. 300) 399 relied heavily on the opinion of Akinola Aguda in his book *LAW RELATING TO EVIDENCE IN NIGERIA* at paragraphs 23 - 25 of
H page 299 and the judgment of Kester, Ag. J., as he then was in *William Omosivbe v. C. O. P* (1959) WNLR 209 in arriving at the decision that preliminary inquiry before the reception of a child witness’s testimony in court is mandatory. What this Court failed to consider in the cases of

Okon, Mbele and Sambo (supra) is that the opinion of Kester, J. as he then was, and relied upon by this Court were based on the English authorities of *R. v. Reynolds* 34 Cr. A. R. 63; *R. v. Surgenor* nor 27 Cr. A. R. 175 and *R. v. Dunne* 21 Cr. A. R. 176 which were tried with juries as compared to this appeal where the trial Judge sat alone without a jury. Hence, it is not mandatory upon him to conduct a preliminary inquiry before receiving the evidence of P.W.1 and I so hold.

On this I refer to *Okoye v. State* (supra) where the learned counsel for the appellant cited and relied on some of the above mentioned English cases in challenging the reception of the evidence of a child witness without preliminary inquiry by the trial Judge. In dismissing the appeal, this Court per Coker, JSC stated the law at page 722 paragraphs 5-30 of the report thus:

“In his argument learned counsel for the appellant had submitted quite properly that cases like R. v. Reynolds (1950) 34 C.A.R decided on the basis of this section. Unlike the case on appeal before us, these two cases were tried with juries. In R. v. Reynolds the conviction was set aside on the grounds that the issue of competence of the young witness were (sic) tried or taken in the absence of the jury i.e after the jury had been asked to retire. In setting aside the conviction in that case, the Lord Chief Justice (Goddard L.C.J) observed thus: -

“It should be regarded as most excepted that any evidence should be given in a criminal trial in the absence of the jury.”

Earlier on in the judgment (like in *Reynolds*, Supra) the court had observed that it was important that the jury should hear the child’s answers to questions put to her to ascertain her competency to take oath so as to assist them to come to a conclusion as to the weight they should attach to the evidence of the child. The court further stated:-

“A fortiori, the jury should be present when a witness is called to assist the court by telling the court what his or her experience of the child is and what impression he or she has formed of the child’s character. The jury will then have before them all the available information with regard to the child’s reputation or character for truthfulness.

So much is clear of a child witness from these cases and others of the like. The opinion of the child witness is the opinion of the court and it is easy to see why the jury should also know these facts. When a Judge sits alone the position is entirely different and he is preeminently the person whose opinion is relevant.”

In the case in hand on appeal herein, the learned trial Judge formed an opinion on the competency of PW1 to testify before the court (as required by law vide section 183(1) of the Evidence Act) and the case of Okoye v. State (supra) when he held at page 2 of the Record as follows:

“That being the answer the witness gave in response to the questions asked by the court, I am satisfied that she cannot give evidence on oath since she does not appreciate the usefulness of taking an oath. She is therefore to give unsworn evidence.”

From the foregoing observation of the learned trial Judge, it is apparent that he must have appreciated the intelligence of the PW1 and considered her to be a competent witness when he allowed her to live unsworn evidence; there being; nothing in the records, in my view, which shows that in his opinion PW1 is not a competent witness. On the other hand, the learned trial Judge came out clearly and expressed his opinion that PW1 is not a competent witness when he stated at page 3 of the printed record of the trial court thus:

“Unsworn (due to his age) and cannot appreciate the nature of telling the truth and the consequence of telling lies”

What it means is that it is axiomatic that a person who cannot appreciate the nature of telling the truth is not a competent witness. See Sambo v. State (supra) where Olatawura, JSC stated at page 422 paragraph F - G of the report thus:

“Any witness whether an adult or child who has no regard for truth should not be believed.”

In the instant case, the learned trial Judge having reiterated that - *“I am not unmindful of the fact that PW1 gave evidence not on oath but the intelligence exhibited by the witness and her composure in the witness box whilst testifying have made me to undoubtedly believe her evidence.”*

I cannot but agree with the above observation and the point being driven home here to the effect that PW1 did indeed possess sufficient intelligence that she (PW1) possessed sufficient intelligence and understood the duty of speaking the truth hence he (the learned trial Judge) discharged the duty conferred upon him by section 183(1) of the evidence B Act Cap. 112 Laws of the Federation of Nigeria, 1990. Besides, as there are manifestly no contradictions in the evidence of PW1 and PW2 upon which the trial court relied to convict the Appellant and which the Court below without equivocation affirmed, I see no reason to interfere with the C conclusion arrived therein.

The prosecution having proved its case against the appellant beyond reasonable doubt, I hold that the lower court was right when it held that the trial court had complied with section 183(1), 183(3) of the Evidence Act as well as section 155(1) of the Evidence Act Cap. 112, the latter which D provides that

“155(1) All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of E tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind.”

Because of the foregoing, it cannot be stated that the invocation of the provisions of section 149(d) of the Evidence Act Cap. 112 availed the F Appellant.

On the issue of the defence of alibi, it was submitted on Appellant's behalf that where there is an eye-witness to the commission of the offence or credible evidence that fixed the accused person at the scene of the crime, the defence cannot be sustained by the court. The cases of Balogun G v. A. G. Ogun State (2002) 6 NWLR (Pt.763) 512 at 536 and Njovens v. State (1973) 8 NSCC 257 as well as the evidence of PW1 were called in aid.

Having considered the case law to wit: both English, (the latter being H of persuasive purport only) and Nigerian cases set out above, I do not think there was really the need to proceed that far because there is really no visible difference between the procedure adopted by the learned trial Judge

and the case law after Okoye (supra) where this Court settled the procedure to be adopted by a trial Judge and which is now the modus and set out for the Judge's guidance as the combined effect of sections 154 and 182(1) and (2) of the Evidence Act. In other words, the first duty of
 B the court is to determine first of all whether the child is sufficiently intelligent to understand the questions he may be asked in the course of his testimony and to be able to answer them rationally. This is tested by the court putting to him preliminary questions which may have no bearing on
 C the matter before the court. If, as a result of these preliminary questions the court arrives at a conclusion that the child is unable to understand the questions or to answer them intelligently, then the child is not a competent witness within the meaning of section 154(1). But if the child overcomes the preliminary test then the court must proceed to the next test as to
 D whether, in the opinion of the court, the child is able to understand the nature and implication of an oath.

If after passing the first test, he can fails this second test, then being a competent witness, he render evidence which is admissible under section
 E 182(2), though not on oath.

If on the other hand, he scales the second test so that in the opinion of the court he passes the test, namely that he understands the nature of an oath, he will give evidence on oath.

F The prosecution in the instant case having proved its case against the Appellant beyond reasonable doubt.

For the foregoing reasons, and the more overwhelming ones contained in the judgment of my learned brother Niki Tobi, J.S.C, a preview of which I had before now, I too dismiss the appeal and affirm
 G the decision of the two courts below

KATSINA-ALU JSC

H I have had the advantage of reading in draft the judgment of my learned brother Tobi JSC in this appeal. I entirely agree with it. The appeal clearly is without merit.

For the reasons given in the lead judgment, I also dismiss the appeal

and affirm the decision of the two courts below.

MOHAMMED JSC

The appellant was tried and convicted by the trial High Court of Justice of Jigawa State of the Offence of culpable Homicide punishable with death under section 221(b) of the Penal Code. He was accordingly sentenced to death by hanging in accordance with the Law. The particulars of the offence contained in the charge were that the appellant on the 10th day of December, 1999 at about 1300 hours at Gidan Gamji village of Kaugama Local Government Area of Jigawa State, committed Culpable Homicide punishable with death by attacking the deceased, one Sabuwa Mohammed with a machete and stick, thereby inflicting injuries resulting in the death of the deceased. The facts of the case are quite simple and are lucidly set out in the judgment of my learned brother, Tobi JSC, with which I am in complete agreement. On the facts as established by the prosecution from the evidence of the witnesses called by it, particularly the evidence of the eye witness PW1, the learned trial judge Tijjani Abdullahi J (as he then was), found the appellant guilty as charged and convicted him. The appellant's appeal to the Court of Appeal, Kaduna Division against his conviction and sentence was equally dismissed hence his appeal to this court.

In the appellant's brief of argument, the following three issues were distilled from the grounds of appeal filed by the appellant for the determination of the appeal.

"1. Whether their Lordships of the Court of Appeal were not in error in their evaluation of the evidence of P.W.I against the appellant regard being had to the provisions of section 183(1) and (3) of the Evidence Act in confirming the conviction and sentence of the appellant by the High Court.

2. Whether in the light of the serious and material contradictions, doubts and inconsistencies in the case of the prosecution, the Court of Appeal was not in error to have affirmed the judgment of the trial High Court bearing in mind that the prosecution had the duty to prove the guilt

of the appellant beyond reasonable doubt.

3. *Whether the decision of the trial High Court was properly sustained by the Court of Appeal having regard to its evaluation of the plea of alibi put forward by the appellant."*

B I shall comment briefly on the complaint of the appellant in the second issue for determination in which the appellant alleged the existence of serious and material contradictions, doubts and inconsistencies in the case of the prosecution.

C From the appellant's brief of argument it is apparent that the serious and material contradictions and inconsistencies complained of in this issue relate principally to the evidence of PW1 and PW2. While PW1, a child of 14 years of age gave vivid evidence of how the appellant attacked and inflicted matchet injuries on the deceased, PW2 a boy of 10
D years of age who was in company of PW1 when asked how the deceased died said he did not know. This is what the learned counsel to the appellant described as serious contradictions. With utmost respect, I do not think he is right. The word contradiction comes from two Latin words - contra,
E which means opposite, and dicere, which means to say. Therefore in ordinary conversation to contradict is to speak or affirm the contrary. Hence in the law of evidence, a piece of evidence is contradictory to another when it asserts or affirms the opposite of what the other asserts, and not necessarily when there are some minor discrepancies in, say,
F details between them. In other words, contradiction between two pieces of evidence goes rather to the essentiality of something being or not being at the same time. Whereas minor discrepancies depend rather on the person's astuteness and capacity for observing meticulous details. On
G really what constitutes contradiction in evidence, Nnaemeka-Agu JSC in Ayo Gabriel v. The State (1989) 5 NWLR (pt.122) 457 had this to say at page 468:-

H *"A piece of evidence contradicts another when it affirms the opposite of what that other evidence has stated, not when there is just a minor discrepancy between them. It is useful to bear in mind the fact that the word 'contradict' comes from two Latin words contra (opposite) and dicere (to say). Two pieces of evidence contradict one another when they*

are by themselves inconsistent. On the other hand, a discrepancy may occur when a piece of evidence stops short of, or contains a little more than, what the other piece of evidence says or contains some minor differences in details.”

In the instant case therefore, the mere fact that PW2 said he did not know how the deceased died, does not contradict the evidence of PW1 who testified that it was the appellant who attacked and inflicted machete cuts on the deceased which the medical evidence confirmed was the cause of death of the deceased. In this respect, no part of the evidence of PW1 was contradicted by the evidence of PW2.

For the foregoing reasons and other fuller reasons contained in the judgment of my learned brother Tobi JSC with which I entirely agree, there is no merit at all in this appeal which I also hereby dismiss. The conviction and sentence of the appellant for the offence of Culpable Homicide punishable with death under section 221(b) of the Penal Code are accordingly hereby affirmed.

OGBUAGUJSC

This is an appeal against the decision/Judgment of the Court of Appeal, Kaduna Division delivered on 19th day of July, 2004 - per Ba’aba, JCA unanimously, affirming the conviction and sentence to death of the Appellant by hanging, by the trial Judge - Abdullahi, J. (as he then was) on 31st July, 2001.

Dissatisfied with the said decision, the Appellant has appealed to this Court on five (5) grounds of appeal. I note that Ground 5, reads as follows:

“The Judgment of the Court of Appeal, Kaduna Division is unwarranted, unreasonable and manifestly unsupportable having regard to the weight of evidence, contradictions, inconsistencies and disparities in the totality of evidence adduced by the prosecution at the trial on the basis of which the Court of Appeal affirmed the decision of the trial court”. (the underlining mine)

It need be stressed and this is settled, that in a criminal appeal, the point, is not the preponderance of evidence on one side which outweighs

the evidence on the other side. See Aladesuru & ors. v. The Queen (1956) A.C. 49; 39 Cr. App. R.184 P.C. and Enitan & 2 ors. v. The State (1986) 3 NWLR 604 S.C. But in the case of Mbam Iboko & ors. v. Police (1965) NMLR 384 this Court (per incuriam), stated that High Court Judges should
B see this, as a pardonable mistake to frame a ground of appeal as provided in a Rule of court, and delete the words “weight of evidence” and invite counsel to argue the appeal from conviction on the facts with the right approach as laid down in Queen v. Omisade & ors. (1964) NMLR 67 @ 78.

C It must also be borne in mind that this ground, is all about the omnibus ground of appeal and it’s the way, or manner it is couched. It is judicially recognized that an omnibus ground of appeal in a criminal case, is differently drafted/couched from such a ground of appeal, i.e., in a
D criminal case, it is framed as follows:

“the judgment is unreasonable and cannot be supported having regard to the evidence”,

See also B.P. (West Africa) Ltd. v. Alien (1969) 2 SCNLR 388

E In a civil case, it is:

“the judgment is against the weight of evidence”.

See Akibu v. Opaleye & anor (1974) 11 S.C. 189

I was minded to strike out the said ground because, the couching
F is also verbose. But being a pardonable mistake and in view of the said decision in Iboko & ors. v. Police (supra), I will tolerate it in that the said mistake, is that of counsel and not that of the Appellant.

As regards the issues formulated by the parties in their respective
G Brief, my learned brother, Tobi, JSC, with respect, has thoroughly and admirably, dealt with the same in his lead Judgment, that I can hardly improve on it. But by way of emphasis, in the case of Mbele v. The State (1990) 4 NWLR (pt.45) 484 which is also reported in (1990) 7 SCNJ. 12 @ 20, it was held that before a child of tender years, is allowed to give
H evidence, that it is the duty of the presiding Judge, to satisfy himself as to whether or not, the child is in a position to be sworn as envisaged by Sections 154 (now 155) and Section 182 (now 183) of the Evidence Act -even though the actual questions and answers in the course of the

investigation, are not recorded. That once it is clear in the record of proceedings that a trial Judge, carried out the preliminary investigation, before taking the evidence, that, would mean, at least, *prima facie*, that the said enquiry was carried out.

A reading of the recording of the learned trial Judge, after his attention was drawn by the prosecutor as appears at page 2 of the Records, as to the effect that the P.W.I, was a minor or under aged, and the posture/ procedure he adopted, in my humble and respectful view, shows that he was fully aware of the provision of Section 183(1) of the Evidence Act. It shows that *prima facie*, he complied with the said Section by carrying out a preliminary investigation “even though the actual questions and answers in the course of the investigation, are not recorded”.

The provision of Section 155(1) of the Evidence Act therefore, become pertinent. It reads as follows:

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.”

(the underlining mine)

In other words, a child who is prevented from understanding the questions put to him or from giving rational answers to those questions by reason of his/her tender years, surely and certainly, is not and cannot be a competent witness.

It should and ought to be noted, that there is no age limit stated in the section. As rightly stated by Dr. Aguda (of blessed memory) in paragraph 23 - 95 at page 299 of his book titled “*Law and Practice Relating to Evidence in Nigeria*”, the duty of a trial Judge, where a child appears before him to give evidence, is to determine,

(a) whether the child is sufficiently intelligent to be able to understand questions put to him or her or to be able to answer questions put to him/her rationally.

(b) whether he or she is in the opinion of the court, able to understand the nature of an oath.

The learned counsel for the Appellant, undoubtedly, agrees at page 2 of their Brief, as to the above duty of a trial Judge. He has submitted that it follows that a child that expressly stated that he does not know what God will do to him if he tells lies, can by no stretch of legal imagination, be said to understand the duty of speaking the truth. Unfortunately or deliberately, he did not state that it is settled law, that a trial Judge, would certainly err in law or be wrong, to exclude the evidence of such a child, merely because, the child, does not understand the nature of an oath.

In other words, the evidence of such a child and that of the P.W.1 in the instant case, is not altogether inadmissible. It only means, that it is only admissible as unsworn evidence of a child under Section 183(1) of the Evidence Act. The implication therefore, is that because of the provision in sub-section(3) of Section 183, the Appellant, cannot properly be convicted, if there is no corroboration of the evidence of such a child or that of the P.W.1 in the instant case. See *Mbele v. The State* (supra). See perhaps, Section 38(1) of the Children & Young Persons Act, 1933 of England.

In the case of *Inspector-General of Police v. Sunmonu* (1957) WRNLR 23 referred to in Dr. Aguda's said Book, Ademola, CJ. (West as he then was), referred to the English case of *R v. Southern* (1930) 22 Cr. App. R. 6 and held, as follows:

"..... It is clear from this case that the evidence of a child would be properly admitted if the court is satisfied that the child does not understand the nature of an oath. Before admitting such evidence, however, it is the duty of the judge to satisfy himself that the child is sufficiently intelligent to appreciate what he was saying and understand the duty of speaking the truth".

(the underlining mine)

At the said page 2 of the Records, after the preliminary investigation by the trial Judge, the following appears:

"Court: That being the answers the witness gave in response to the questions asked by the court, I am satisfied that she cannot give evidence on oath since she does not appreciate the usefulness of taking an oath. She is therefore to give unsworn evidence".

(the underlining mine)

I do not therefore, see, with respect, all the unnecessary “*fuss*”, by the learned counsel for the Appellant to fault the procedure adopted by the learned trial Judge and rightly, in my respectful but firm view, affirmed by the court below. More importantly, I note, that the learned counsel for the Appellant in the trial court, never raised any objection to the procedure adopted by the learned trial Judge. He fully participated at the trial and even cross-examined the P.W.1. With respect, the said complaint in this issue, is clearly unavailing to the present learned counsel and the Appellant.

In respect of the corroboration of such evidence stated by me hereinabove, which undoubtedly, is mandatory and is not a mere matter of practice, it has to be borne in mind and this is also settled, that corroborative evidence, must be evidence which confirms in some material particular, not only that the crime has been or was committed, but also that it was the Appellant who committed it. The corroboration, need not be direct evidence that the accused person or Appellant, committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime. See *Mbele v. The State* (supra); *The Queen v. Ekpata* (1957) 2 FSC.1 and *Okafor v. Commission of Police* (1964) 1 ANLR 303, 304.

For the unsworn evidence of a child to be corroborated, see *The Queen v. Ekalogu* (1960) NSCC 144\ *Okpanefe v. The State* (1969) NSCC (Vol.6) 382 and *Olaleye v. The State* (1970) NSCC (Vol.6) 250.

In the case of *John Okoye v. The State* (1972) NSCC (Vol.7) 717 @ 723 cited and relied on by the Respondent in its Brief (it is also reported in (1972) 12 S.C. 115 @ 125-126 (or Page 77 @ 84 of Lawbreed Ltd. S.C. Report) - per Coker, JSC., it is settled however, that if a trial Judge is of the opinion that a child is capable of understanding the nature of an oath, it is not necessary for him to carry out any preliminary investigation in that regard. See also *Okoyomon v. The State* (1973) NSCC (Vol.3) 170 cited and relied on by the Respondent in its Brief (it is also reported in (1973) (1) NMLR 292 and (1973) 1 S.C.. 21). This is why perhaps, it is also settled, that if a trial Judge believes the sworn evidence of a child, he is entitled to act on that testimony alone just as if it is a sworn testimony of

an adult. See Arebamien v. The State (1975) 5 U.I.L.R. (University of Ife Law Report) (Pt. II) 144 S.C. This is because, there is no requirement in law, that the sworn testimony of a child, must be corroborated.

Now, there is the evidence of the P.W.3 at pages 3 and 4 of the
 B Records to whom, the P.W.I reported about the attack by the Appellant,
 on the deceased and who in turn, alerted and or reported the incident, to
 the Police. Remarkably and significantly, he was not cross-examined by
 the learned counsel for the Appellant. The effect, in the instant case in my
 C view, is that he accepted in its entirety, his evidence in chief. - i.e. that they
 found the body/corpse of the deceased at the spot described to him by the
 P.W.I and that the wound he saw/observed on the deceased, tallied with
 the ones described to him, by the P.W.I.

P.W.4 is the Police constable, who testified at page 4 of the
 D Records. He also was not cross-examined by the defence. He swore that
 the Appellant made a statement to the Police that was confessional in
 nature.

P.W.5 is the Medical Officer who performed the autopsy or post
 E mortem examination on the body of the deceased. He described in detail,
 the nature of the wound or injury he found on the said body. He gave
 evidence as to the cause of death. Said he,

*“The cause of death was haemorrhage shock secondary to cuts
 F received by the deceased..... The lacerations on the corpse of the
 deceased cannot be self inflicted”.*

The cross-examination was brief,

Ans: It was the Police and a relation of the deceased that brought
 her to the hospital.

G The P.W.3 testified that he was among those that took the deceased
 body to the said hospital. Again, the material evidence of the P.W.5, was
 never challenged under cross-examination.

The Appellant and his blood brother testified about the serious
 H problem between the deceased with one Ibrahim their elder brother
 concerning witchcraft and the deceased bewitching the said Ibrahim
 Imam. On the date of the incident, according to D.W.2, the Appellant came
 and met the said Ibrahim, very sick in their mother’s house. The

relationship between the deceased and the family of the Appellant, had deteriorated so much that the matter, was reported to the District Head of their Village who, according to the D.W.2, “settled the matter”. Any wonder, it was very or so convenient, that the Appellant and the DW2, “faked” the alleged alibi which onus, they could not discharge. This is because, although the P.W.I, clearly gave evidence of the presence of the Appellant at the scene and his vicious attack with a matchete on the deceased, as noted by me hereinabove, the cross-examination was scanty. At page 3 of the Records, the answers under cross-examination, appear as follows:-

“I know one Ibrahim M. Ali. I do not know whether he is alive or not. Ibrahim M. Ali is the father of the accused person. I do not know the reason why the accused attacked my Grand mother. I do not know the reason why we left Gidan Ganji for Ubba”.

(the underlining mine)

The underlined words, clearly suggest that the P.W.I, was asked whether she knew the reason why the accused attacked the deceased. A suggestion which confirms that the Appellant, actually attacked the deceased and the learned defence counsel wanted to know from the P.W.I, if she knew the reason for the attack. I am in no doubt that the Appellant, attributed his alleged elder brother’s sickness, to the alleged/purported witchcraft of the deceased. ;

However, I hold that there is/was sufficient corroborative evidence in respect of the evidence of the P.W.1.

The learned trial Judge at page 19 of the Records, stated inter alia, as follows:

“Coming back to corroboration I hold with ease that the evidence of both DW1 and DW2 regarding the relationship of the deceased and the two of them; the previous dispute the deceased had with their brother concerning witchcraft which said dispute resulting in the two of them appearing before the District Head and the fact that at the time of the incident the said brother of the accused Ibrahim was seriously sick and that the accused saw the sick brother in the house of their mother, all these pieces of evidence have provided sufficient corroboration of the evidence

of P.W.F’.

I agree. I have already stated so or made the same findings of fact. The court below at page 91 of the Records, noted that the P.W.I, described by the learned trial Judge as a very intelligent girl of 14 years, gave a vivid description of the injuries the Appellant inflicted on the deceased, a which tallied with evidence of P.W.5 Practitioner. About the PW1, the learned trial Judge, stated at the said Page 19 of the Records as follows:

“I have already stated elsewhere that the witness P.W.I impressed me as a truthful witness and I have no doubt in my mind, in the light of the evidence of P.W.1 and the corroborative pieces of evidence outlined supra, that it was the accused person that caused the death of the deceased, I am not unmindful of the fact that PW1 save evidence not on oath but the intelligence exhibited by the witness and her composure in the witness box whilst testifying have made me to undoubtedly believe her evidence. It is therefore my considered opinion that the prosecutions (sic) have proved this ingredient of the offence and I so hold”.

(the underlining mine)

I note that the court below at pages 85 and 86 of the Records, listed the findings of fact by the learned trial Judge at pages 13 to 21 of the Records. These findings of fact, have not effectively, been faulted by the Appellant and his learned counsel in their Brief. It further stated at page 88 thereof, that it is the law that an Appellate court, cannot interfere with the finding of a trial court on the credibility of a witness. It cited and relied on the case of Onyegbu v. The State (1995) 4 NWLR (Pt. 391) 510 @ 528 -529 (it is also reported in (1995) 4 SCNJ. 275). I agree.

In respect of Issue 2 of both parties, I too, see no contradictions, doubts and inconsistencies, in the case of the prosecution and particularly, the alleged contradictions in the evidence of the PW1 and P.W.2. P.W2 also gave unsworn evidence due to his tender age - he was ten (10) years of age. The learned trial Judge noted that she could not appreciate the nature of telling the truth and the consequence of telling lies. His evidence was very brief and as I noted hereinabove, he was not cross-examined by the defence. He was (9) nine years at the time of the incident. The court below, also held that there were no contradictions and inconsistencies in

the evidence of the PW1 and PW.2. It was right and justified to so hold.

In concluding this Judgment, I note that there are concurrent findings of the two lower courts. The attitude of this Court in respect thereof, is firmly established in a line of decided authorities. If I must cite one or two cases, see recently, Chief Ojo (substituted by Bola N. Ojo) & anor. v. Anibure & 7 ors. (2004) 5 SCNJ. 56 @ 68- 69; Osba v. Wokoma (2005) 14 NWLR (Pt. 944) 118; (2005) 7 S.C. (Pt.II) 123 @ 136 and Ogwumba v. The State (1993)5 NWLR (Pt. 291) 660 @ 671; (1993) 6 SCNJ. 217.

I therefore, render my answers to Issues 1 and 2 of the Appellant's Brief, in the Negative, while in respect of Issue 3, it is rendered in the Affirmative/Positive.

In respect of Issue 1 of the Respondent, in his Brief, my answer is in the Affirmative, while in respect of Issue 2, it is rendered in the Negative.

It is from the foregoing and the fuller reasons and conclusions of my learned brother, Tobi, JSC, in his said lead Judgment, that I too, find no merit whatsoever in the appeal which fails and it is accordingly dismissed. I also hereby, affirm the said decision of the court below affirming the Judgment of the trial court. The law should take its course.

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