

SUPREME COURT OF NIGERIA

7TH JULY, 2006. SC. 242/2005

**CORAM:- S. M. A. BELGORE CJN, A. I. KATSINA-ALU,
D. MUSDAPHER, S. A. AKINTAN, I. F. OGBUAGU, JJSC**

EMMANUEL BEN APPELLANT

V.

THE STATE RESPONDENT

COURTS - Concurrent findings of fact - Attitude of Supreme Court - It will not disturb concurrent findings of two lower courts - Unless shown to be perverse - And such has not been shown - In the instant case (H1)

CRIMINAL PROCEDURE - Murder - Medical evidence - Dispensability of - Where cause of death is obvious - Medical evidence is of no practical or legal necessity - In homicide cases (H2)

FACTS

Appellant was arraigned on a charge of murder at the Imo State High Court. The case of the Prosecution which was believed by the trial court was that on 30th June, 1986, in the morning hours, the deceased, one Ndukwe Iroanya was returning from the stream, carrying a Jerrycan of water, when he was waylaid by the appellant, armed with an "Icheku" stick. When deceased saw the accused on his path approaching him menacingly, he tried to run back the way he was coming from. Appellant however outpaced him and aimed blows with the stick at the deceased. The first blow missed the target but the second one hit the head of the deceased directly with a great force whereupon deceased fell down and started convulsing all over his body. Appellant immediately took to his heels. Deceased was carried to the hospital by his relatives but died before the doctors could attend to him.

On the other hand, Appellant's story was that he had a dispute with the deceased the day before the incident. According to him, deceased had slapped his sister's child and when he enquired from the

deceased what the matter was, deceased also jumped on him and with the aid of some of deceased's family members, caused him injuries. Appellant reported this to the police as well as to the local chief who ordered that deceased should take Appellant to the local chemist for treatment of his injuries. Deceased and his family later gave N10 as cost of treatment to the Appellant. Appellant denied waylaying deceased. He said he was coming from chief's palace at same time as deceased was returning from the stream and that upon seeing him, deceased set down his water can, picked up a stick and came after him. He tried to run away but deceased caught up and dealt him stick blows whereupon he picked a stick too and started hitting back. At a point, deceased's own stick fell off and Appellant now hit him on the forehead. He saw the deceased fall down and so ran away for fear. At close of case, trial judge accepted the story of the prosecution, rejected the plea of self-defence put up by the Appellant and so found appellant guilty as charged. Appellant's appeal to the Court of Appeal was dismissed. Hence he brought this further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right in affirming that the absence at the trial of medical evidence as to the cause of death was not fatal to the prosecution case.

2. Whether the Court of Appeal was right in confirming and affirming the conviction and sentence of the appellant by the trial court.”

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

Concurrent findings of fact

1. The learned trial Judge and the Justices of the court below accepted the version of the evidence led by the prosecution as to how the deceased was murdered. There was therefore concurrent findings of fact by the two lower courts. The position of the law is that this court will not disturb such concurrent findings of the two lower courts unless it is shown that such findings were perverse or that there was a substantial error either in the substantive or procedural law which, if uncorrected, will lead to a miscarriage of justice. The appellant has failed to satisfy any

of the requirements prescribed above which must be met before the concurrent findings of fact made by the two lower courts could be tampered with by this court. Those findings of fact therefore remain valid and intact. (p. 2652 G)

Murder - Medical evidence

2. The main issue left to be resolved in the appeal therefore is whether it was proper and acceptable in law to dispense with medical evidence as to the cause of death in a murder trial as in this case. The position of law in this respect has been stated in numerous cases. It is that in cases where a man was attacked with a lethal weapon and he died on the spot, cause of death can properly be inferred that the wound inflicted caused the death. Put in another form, where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide case. Such a situation arises where death was instantaneous or nearly so.

Applying the law as declared above to the facts established in this case, the deceased, a young man of about 26 years old, was struck on the head with a big stick (Exh. B). He fell down immediately unconscious. He never regained consciousness until he was pronounced dead a few hours later in the hospital. These facts are quite sufficient upon which the learned trial court rightly found that the cause of death was the lethal blow the deceased received on his fore-head as a result of which he fell down and became unconscious. And as it was shown that it was the appellant that inflicted the lethal blow, his conviction for the murder of the deceased by the trial court without receiving any medical evidence as to the cause of death was quite in order. The Court of Appeal was also right in affirming the said conviction and sentence passed on the appellant. (p. 2653 B)

REPRESENTATION

Chief C.A.B. Akparanta (with Mr. R.M. Emem) for appellant.
Chief S.O. Akuma, Attorney-General Abia State (with U.T. Nwachukwu, Esq., D.C.L., and V.O. Chukwu, Esq., S.C.) for the respondent.

CASES REFERRED TO

- Tonara Bakuri v. The State [1965] NMLR 163 at 164,
 Eric Uyo v. Attorney-General of Bendel State [1986] 13 N.W.L.R. (pt. 17) 418
 Onwumere v. The State [1991] 4 N.W.L.R. (pt. 186) 428
 Nwachukwu v. The State 10 [2002] 12 N.W.L.R. (pt. 782) 543
 Odonigi v. Oyeleke [2001] 6 N.W.L.R. (pt. 708) 12 at 32-33
 Akinsanya v. UBA Ltd. [1986] 4 N.W.L.R. (pt. 35) 273
 Dibiamaka v. Osakwe [1989] 3 N.W.L.R. (pt. 107) 101
 Animashaun v. Olojo [1990] 6 N.W.L.R. (pt. 154) 111

STATUTES REFERRED TO

- Evidence Act, ss. 154(1) and 155(1)
 Criminal Code Cap. 30, Laws of Eastern Nigeria, 1963, s. 319(1)

LEAD JUDGMENT BY AKINTAN JSC

- The appellant, Emmanuel Ben, was arraigned before Umuahia High Court in Imo State on an information by which he was charged with the offence of murder, contrary to section 319(1) of the Criminal Code, Cap. 30, Laws of Eastern Nigeria 1963 applicable to Imo State. The particulars of the offence are that the said appellant, on the 30th day of June, 1986 at Amaworn Oboro Ikwuano in the Umuahia Judicial Division murdered one Ndukwe Iroanya. The appellant pleaded not guilty to the charge and the trial took place before Maranzu, J. Six witnesses testified for the prosecution. At the close of the prosecution's case, the appellant gave evidence in his defence and closed his case.

- At the close of the case for the defence, and after accepting written addresses from both counsel in the case, the learned trial Judge delivered his reserved judgment in the case on 6th June, 1989. The learned trial Judge held in his said judgment that the prosecution had proved its case against the said appellant who was accordingly convicted and sentenced to death. The appellant's appeal to the Court of Appeal against the conviction and sentence was dismissed. The present appeal is from the

judgment of the Court of Appeal in the case delivered at the Port Harcourt Division of that court on 11th November 2004.

The facts of the case, as given by the main eye-witness, Ogbuji Onwuzuruigbo, who testified as P.W.1, are as follows as reproduced from his evidence as recorded by the learned trial Judge:

“..... .On that day, i.e., 30th June, 1986) at about 9:15 am, I was in front of my house holding one of my small children and the other two children were also playing in front of my house. Later I saw the deceased, Ndukwe Iroanya, as he was returning from the stream carrying a jerrycan of water. He passed by in front of my house and he then greeted me, he was carrying his jerrycan of water on his head as he passed by. Shortly after I saw late Ndukwe Iroanya as he was returning again towards me without his jerrycan. He was walking backwards at a very fast rate and I shouted and asked him what was wrong that he was retracing his steps backwards so fast without his jerrycan of water. Ndukwe Iroanya then replied and told me that the accused, Emmanuel Ben way-laid him on the road. Soon afterwards I saw the accused himself coming and he was holding a long Icheku stick and he hit the deceased with the “Icheku” stick firstly and missed his target, the accused hit the deceased a second time and hit the head of the deceased directly with a great force and the deceased Ndukwe Iroanya fell down on the ground and was shaking all over his body. When the accused saw that the deceased had fallen on the ground and was mortally wounded, he (the accused) took to his two slippers shoes on his hand and ran away.....”

The witness, P.W.1, said further that on seeing the appellant running away after the deceased, he (P.W.1) said he shouted on the appellant to come back and see the man he had killed but the man did not heed to his call. Instead the man ran away. The deceased was eventually carried away from the spot by his relations sent for by P.W.1. The man did not regain consciousness before he eventually died later on the same day on arrival at the hospital but before the doctors could attend to him in the hospital. A post-mortem examination was carried out on the corpse. But the doctor who carried out the examination was not available to testify at the trial.

The accused told the police in his statement (Exh. A) that the dispute between him and the deceased started a day before the incident leading to the man's death. The appellant alleged that the deceased had slapped the appellant's sister's child. When he enquired from the deceased why he slapped the child, the deceased failed to give him any explanation. Rather, the appellant said he too was attacked by the deceased and some members of his family. He said he sustained injuries as a result of the attack on him and he had to report the incident first to the police and later to the local chief. The police directed that the deceased and members of his family that beat the appellant up and inflicted wounds on him should take him to the local chemist for treatment and pay the cost of such treatment. They did not do so. But later that day, they offered N10 as cost of such treatment.

On the next day which was the day of the incident, the appellant gave his account of what happened as follows in his said statement to the police:

".....As I was going, I saw Ndukwe (the deceased) returning from the stream because the road that led to the Chief's place is the same road to our stream. He carried down his water can and ran back and I was coming because there is a house built at the corner of the road. When I got to the corner of the house I saw him with a stick coming. I ran back; he pursued me and hit me. Then I got a stick also in front of me. It was that time that Dee Ogbuji ran and saw us hitting each other with the sticks and the stick of the deceased fell on the ground; then I used my own stick and hit him on his forehead and he fell down. I started running into the bush. On Monday I slept inside the bush and on Tuesday....."

The appellant's account of the incident, as given in his evidence at the trial is similar to what he said in his statement to the police (Exh. A). He told the trial court in his evidence given in his defence, inter alia, as follows:

"On 30th. June, 1986 at about 8 am in the morning when I was going to the house of Chief Johnson Aguwamba when I met the deceased, Ndukwe Iroanya, as he was returning from stream. When the

deceased, Ndukwe Iroanya, saw me, he put down the water he was carrying on his head and moved into a nearby house and collected a stick and as I approached him he hit me on the head with a stick and I fell back and he came back again and hit me a second time with the same stick on my back and I fell down. I then picked up a stick from a nearby stick-fence and he attempted to hit me a third time, I warded off the attack with the stick I had picked up and the stick the deceased was carrying fell off while I was still having my own stick and he fell down. I hit him on his head. When he fell down, I went to lift him from the ground because he was still alive. At this juncture, P.W.1 Ogbuji Onwuzurigbo, came and stated that I had hit his daughter's son and that I should wait for him to come. When he came, he was carrying a cutlass and I saw him coming with the cutlass and I then left the deceased whom I was trying to lift and ran away. I ran into the bush. From the bush I found my way to Umuahia police station where I reported to the police that I had fought with someone and his brother was chasing me with a cutlass."

The learned trial Judge accepted the version of the incident given by the prosecution and rejected the defence put up by the appellant that he acted in self defence. The appellant was accordingly found guilty as charged and sentenced to death. As I already stated earlier above, the appellant's appeal to the court below was dismissed.

Two grounds of appeal were filed against the decision of the court below. The parties filed their respective briefs of argument in this court. The following two issues were formulated in the appellant's brief which were also adopted in the respondent's brief:

"1. Whether the Court of Appeal was right in affirming that the absence at the trial of medical evidence as to the cause of death was not fatal to the prosecution case.

2. Whether the Court of Appeal was right in confirming and affirming the conviction and sentence of the appellant by the trial court."

The main point canvassed in the appellant's issues 1 and 2 is the failure of the prosecution to lead medical evidence as to the cause of death. It is submitted that in a murder case, the prosecution has to establish the cause of death with certainty and show that it was the act of the

accused person that caused the death. But in the instant case, the learned trial Judge is said to have drawn the inference that “the deceased died from injuries he sustained from the act of the accused person in spite of the absence of medical evidence.” It is contended that there was no evidence from any of the prosecution witnesses in the case as to any injuries allegedly inflicted on the deceased or the nature of such injuries. It is submitted that while agreeing with the court below that where no medical evidence is available or sought, there must be, to establish the cause of death, evidence compelling the inference that the deceased died as a result of an act or omission of the person charged with causing his death. It is further submitted that the evidence of P.W.1 or any other prosecution witnesses did not attain that requisite degree of drawing from an irresistible or compelling inference of the cause of death in the instant case. Medical evidence is therefore said to be necessary and desirable in the instant case and in its absence, the learned trial Judge is said to have acted wrongly in convicting the appellant and the court below was also wrong in affirming the conviction and sentence.

It is submitted in reply in the respondent’s brief that medical evidence, though desirable in establishing the cause of death in a murder case, it is not indispensable where there are facts which sufficiently show the cause of death to the satisfaction of the court. It is argued that from the evidence led in the instant case, there was no other intervening act between the time the deceased was hit with the stick on the head and the time he died. The learned trial Judge was therefore right in holding that the evidence led was sufficient to justify dispensing with medical evidence as to the cause of death.

The learned trial Judge and the Justices of the court below accepted the version of the evidence led by the prosecution as to how the deceased was murdered. There was therefore concurrent findings of fact by the two lower courts. The position of the law is that this court will not disturb such concurrent findings of the two lower courts unless it is shown that such findings were perverse or that there was a substantial error either in the substantive or procedural law which, if uncorrected, will lead to a miscarriage of jus-

tice. See *Odonigi v. Oyeleke* [2001] 6 N.W.L.R. (pt. 708) 12 at 32-33; *Akinsanya v. UBA Ltd.* [1986] 4 N.W.L.R. (pt. 35) 273; *Dibiamaka v. Osakwe* [1989] 3 N.W.L.R. (pt. 107) 101; and *Animashaun v. Olojo* [1990] 6 N.W.L.R. (pt. 154) 111. In the instant case, **the appellant has failed to satisfy any of the requirements prescribed above which must be met before the concurrent findings of fact made by the two lower courts could be tampered with by this court. Those findings of fact therefore remain valid and intact.**

The main issue left to be resolved in the appeal therefore is whether it was proper and acceptable in law to dispense with medical evidence as to the cause of death in a murder trial as in this case. The position of law in this respect has been stated in numerous cases. It is that in cases where a man was attacked with a lethal weapon and he died on the spot, cause of death can properly be inferred that the wound inflicted caused the death. Put in another form, where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide case. Such a situation arises where death was instantaneous or nearly so. See *Tonara Bakuri v. The State* [1965] NMLR 163 at 164, per Ademola, C.J.N.; *Eric Uyo v. Attorney-General of Bendel State* [1986] 13 N.W.L.R. (pt. 17) 418; *Onwumere v. The State* [1991] 4 N.W.L.R. (pt. 186) 428 and *Nwachukwu v. The State* 10 [2002] 12 N.W.L.R. (pt. 782) 543.

Applying the law as declared above to the facts established in this case, the deceased, a young man of about 26 years old, was struck on the head with a big stick (Exh. B). He fell down immediately unconscious. He never regained consciousness until he was pronounced dead a few hours later in the hospital. These facts are quite sufficient upon which the learned trial court rightly found that the cause of death was the lethal blow the deceased received on his fore-head as a result of which he fell down and became unconscious. And as it was shown that it was the appellant that inflicted the lethal blow, his conviction for the murder of the deceased by the trial court without receiving any medical evidence as to the cause of death was quite in order. The Court of Appeal was also

right in affirming the said conviction and sentence passed on the appellant.

In the result, I hold that the appeal fails. I accordingly dismiss it and affirm the conviction and sentence passed by the learned trial Judge and affirmed by the court below.

BELGORE CJN

This appeal lacks merit and I agree with my learned brother, Akintan, J.S.C. that it only deserves dismissal. For the reasons clearly set out in the said judgment I also dismiss it.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Akintan, J.S.C. in this appeal. I agree entirely with it. The appeal clearly has no merit.

The appellant struck the deceased on the head with a big stick. He fell down unconscious, never regained consciousness until he died a few hours later in hospital. Medical evidence was not necessary to determine the cause of death in the circumstances of this case. It could properly be inferred that the wound inflicted caused the death of the deceased. The learned trial Judge rightly convicted the appellant. The Court of Appeal was also right in affirming the said conviction and sentence.

In the result I also dismiss the appeal and affirm the conviction and sentence passed on the appellant.

OGBUAGU JSC

I have had the privilege of reading before now, the lead judgment of my learned brother, Akintan, J.S.C. just read out and delivered by him. I agree with his reasoning and conclusion that the appeal fails. However, I will make my own contribution by way of emphasis.

This is an appeal by the appellant against the decision of the

Court of Appeal, Port-Harcourt Division delivered on 11th November 2004 affirming the conviction and sentence of death passed on the appellant by “ the High Court of the then Imo State now Abia State sitting in Umuahia and presided over by Maranzu, J. (Rtd.)

There are two (2) grounds of appeal which read as follows:

“(I) The learned Justices of the Court of Appeal erred in law in holding with the trial court that the absence of medical evidence in the case as to the cause of death was not fatal to the prosecution (sic) case.

Particulars of Error

(i) The cause of death was not otherwise established in the case,

(ii) There was no certainty that the act of the accused caused the death of the deceased.

(iii) The facts and circumstances of the case made it both desirable and essential to prove the cause of death by medical evidence.

(2) The decision of the Court of Appeal is unreasonable having regard to the evidence before the trial High Court.”

The appellant has raised two (2) issues for determination, namely,

“(1) *Whether the Court of Appeal was right in affirming that the absence at the trial of medical evidence as to the cause of death was not fatal to the prosecution (sic) case.*

(2) *Whether the Court of Appeal was right in confirming and affirming the conviction and sentence of the appellant by the trial court.”*

I note that while Issue No. 1 covers Ground 1 of the Grounds of Appeal, Issue No. 2 covers or “encompasses” Ground 2 of the Grounds of Appeal which is an Omnibus ground of appeal.

The respondent in its brief of argument, has raised a Preliminary Objection in respect of the said Issue No. 2 which it says, is incompetent. My first observation, is that all the three (3) cases relied on by the respondent why the appellant should not be allowed to argue the said ground, are civil cases. They are *Oforkire & Anor. v. Madueke & 5 Ors.* [2003] 106 LRCN 799 (it is also reported in [2003] 3 S.C. (pt. III) 74; [2003] 1 S.C.N.J. 440) and [2003] 5 N.W.L.R. (pt. 812) 166, *Ajide v. Kelani* [1985] 3 N.W.L.R. (pt. 12) 285 and *Galadima v. Alhaji Tambai & 11 Ors.* [2000] 11 N.W.L.R. (pt. 67) 1; (it is also reported in [2000] 6

S.C.N.J. 190 and it dealt with the issues of raising an objection to jurisdiction).

Although the two other cases dealt with appeals from the Court of Appeal to this court which raise grounds of appeal other than those of law alone being incompetent where prior leave has not been obtained to file them, I note that the respondent, has relied on section 233(2) of the Constitution of the Federal Republic of Nigeria, 1999 (which is in pari materia with section 213(2) of the 1979 Constitution of the Federal Republic of Nigeria). Sub-section 2(d) of both Constitutions, deal with *“decision in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court.”*

This provision, is applicable to the instant case leading to this appeal. It could therefore, be seen that the three cases (supra) and the further cases of *The State v. Omeh* [1983] 5 S.C. 20, *Ojeme v. Momodu* [1983] 3 S.C. 173 and *Nwankwo v. FRC* [2003] 4 N.W.L.R. (pt. 809) C.A. cited and relied on by the respondent, are most irrelevant and inapplicable to this case. Rather, the case of *Gabriel Ewharieme & 3 Ors. v. The State* [1985] 3 N.W.L.R. (pt. 12) 272 at 279 S.C. cited and relied on by the learned counsel for the appellant in their reply brief, is apposite to the subject-matter of the preliminary objection which is with respect, therefore, completely misconceived. I so hold.

I note that during the oral hearing of this appeal on 4th May, 2006, the learned counsel for the respondent, merely, referred to the preliminary objection at page 3 of their brief. He did not address or seek leave to address the court in respect thereof before the hearing of the appeal. It was Chief Akparanta who first, told the court that he had quickly filed a reply brief to the Objection. Therefore, although a notice of preliminary objection pursuant to Order 2 rule 9 of the Rules of this court, may validly be raised to question the competence of an appeal in the respondent's brief of argument (as was done in this case) - See *Auto Import Export v. Adebayo & 2 Ors.* [2002] 18 N.W.L.R. (pt. 799) 554; [2002] 103 LRCN 2397; [2002] 12 S.C.N.J. 124 at 139, citing several other authorities in respect thereof, but on the authorities, since the ob-

jection was not raised before the hearing of this appeal or at any other stage thereafter, this court will ignore it and I hereby and accordingly discountenance it. See the cases of Chief Nsirim v. Nsirim [1990] 3 N.W.L.R. (pt. 138) 285 at 296-297; [1990] 5 S.C.N.J. 174 and Oforkire & Anor. v. Maduiké & Ors. (supra) at pages 80-81. In other words, B although the notice of preliminary objection, can be given in the respondent's brief, but a party filing it in the said brief, must ask the court for leave to move the said notice before the oral hearing of the appeal commences, otherwise, it will be deemed to have been waived C and therefore, abandoned.

The respondent, has also formulated two (2) issues for determination, namely,

“4.1 Whether from the facts and circumstances of this case medical evidence, as to the cause of death of the deceased was not indispensable.” D

4.2 Whether from the facts and circumstances of this case the Court of Appeal was right in affirming the conviction and sentence of the appellant.” E

It is clear to me that the said issues of both parties, are similar although differently couched. In both briefs, the statement or proposition of the law as regards the desirability of medical evidence as to the cause of death has been stated or highlighted. It is also agreed by the parties, F that though desirable in establishing the cause of death in a murder trial, it is not indispensable depending on the circumstances of each case.

In my respectful view, if the learned counsel for the appellant, read carefully the facts of this case as appear in the records - i.e., the evidence of P.W.1 in particular at pages 18 lines 15-30 and 19 lines 1-17 G and lines 25-28 and his evidence under cross-examination at pages 20 lines 30-33 and 21 lines 1-2, I believe that he would not have, with respect, dissipated his energy in submitting that,

“.....the standard of proof required in a murder case was not attained in the instant case as there was no medical evidence in the case to unequivocally establish the cause of death and to provide the necessary nexus between the death of the deceased and the act of the appel- H

lant.”

For the avoidance of doubt, the material evidence of the P.W.1 appear inter alia, as follows:

“He died on 30th June, 1986.On that day at about
 B 9:15 a.m. I was in front of my hours (sic) (house). Later I saw the
 deceased, Ndukwe Iroanya, as he was returning from the stream carrying
 a jerrycan of water. He passed by in front of my house and he then
 greeted me; he was carrying his jerrycan of water on his head as he
 C passed by, shortly after I saw late Ndukwe Iroanya so (sic) (as) he was
 returning again towards me without his jerry can. He was walking back-
 wards at a very fast rate and I shouted and asked him what was wrong
 that he was retracing his steps backwards so fast without his jerrycan of
 water. Ndukwe Iroanya then replied and told me that the accused, Emmanuel
 D Ben waylaid him on the road. Soon afterwards I saw the (sic) accused
 himself coming and he was holding a long stick (Icheku) and he hit the
deceased with the “Icheku” stick firstly and missed his target, the ac-
cused hit the deceased a second time and hit the head of the deceased
 E directly with a great force and the deceased. Ndukwe Iroanya fell down
on the ground and was shaking all over his body. When the accused saw
that the deceased had fallen on the ground and was mortally wounded,
he (the accused) took to his two slippers shoes (sic) and ran away. I
 F began to shout on the accused to come back and see the man he had
killed but he would not heed to my call instead he ran away. I continued
to shout and as a result of my shout two young men came to the scene and
they were Mr. Onyemachi Achonife and Mr. Udo Uwakanwa. I then
 G directed these two young men to carry the mortally wounded Ndukwe
Iroanya to his home and they did so.....
 When the accused ran away I collected the icheku stick with which he hit
 the deceased and kept same in my house. When eventually the police
 came in respect of this case I gave them the icheku stick..... “
 H (The underlining mine)

Under cross-examination, he swore, inter alia, as follows:

“..... I do not know whether they were fighting before. All
 I know is that I saw the accused armed with a stick and the deceased had

no stick with him and it was the accused who hit the deceased with the stick which he had and the deceased slumped down with pains." (The underlining mine)

P.W.3 - a civil servant in the Education Board and the brother of the deceased, testified inter alia, as follows:

"..... When I arrived home, I saw my brother Ndukwe lying seriously ill at home and I arranged for a taxi that took him to the hospital, i.e., Queen Elizabeth Hospital. On my way to the hospital I directed the taxi to stop at Umudike Police Station where I reported the incident before proceeding to the hospital. At the hospital my brother Ndukwe vomited blood from his nose and his mouth. Following the direction of the doctor, Ndukwe now deceased was taken to the Emergency ward section of the hospital and from there he (Ndukwe) was later admitted in another ward but before he could be put on bed there he died that same day 30th June. 1986. The body of my late brother Ndukwe was then taken to the mortuary.....". (The underlining mine)

This means and shows, that there was no medical treatment at all before the deceased died or as crudely put in the appellant's brief "before he expired"!

So, from the above evidence, can it be honestly submitted that "medical evidence was necessary and desirable in the instant case" and that:

"In it's absence it cannot be said that the prosecution had proved the charge of murder against the appellant, since there was no proof of both the cause of death and that it was the act of the said accused/appellant that caused the death, being two of the three essential ingredients of murder besides the fact of death. (See Cpl. A. Anwenya (sic) (it is Emwenya) v. A-G, Bendel State (sic) (it is of) [1993] 6 N.W.L.R. (pt. 297) 29 at 36 B-C S.C. (ii) Akinfe v. State [1988] 3 N.W.L.R. (pt. 85) 729 at 744 H. 7 A.B. S.C.)

To have affirmed otherwise had led to a miscarriage of justice in the case.....".

I think not. With respect, it is idle to so submit in the face of the solid evidence of the P.W.1, P.W. 3 and P.W. 6.

At pages 33 of the records, the P.W.6 - the IPO (Investigating Police Officer), testified that when the deceased was brought to their Police Station on their way to the hospital, that the deceased was then “unconscious and unable to talk”. That it was alleged that the deceased was beaten with a wood by the accused person and that on receipt of this complaint, entry of wounding, was made in their diary and that the P.W.3, was directed to take the deceased to the hospital. That “about forty-five minutes after they left the station, the brother came back and stated that the deceased had died”.

I or one may ask again where is the perceived or imagined intervening act or factor between the time the deceased was attacked or gravely assaulted by a hit or strike with a stick/wood on his head, and he slumped and fell on the ground, was seen by his brother P.W.3 seriously ill, was seen at the police station by P.W.6 to be unconscious, had vomited blood from his nose and mouth and the time he died on the same date of the incident? I see none as there was none and I so hold.

It is now firmly established, that where there is other evidence upon which the cause of death can be inferred (as in the instant case), it is not vital to have resort to Medical Report. See *Liman v. 20 The State* [1976] 6 U.I.L.R., (University of Ife Law Report (pt. II) 248.

In the case of *Onwumere v. The State* [1991] 4 N.W.L.R. (pt. 186) 428 cited and relied on in the respondent’s brief of argument, (it is also reported in [1991] 5 S.C.N.J. 150 at 162, 163, 170), it was held that there was overwhelming evidence that the nature of the assault on the deceased, was that he the accused/appellant, intended to cause grievous bodily harm and that death having resulted directly from such act of the accused/appellant and within (24) twenty four hours (all as in the instant case), that the conclusion, is inevitable that death resulted from the consequences of that act.

It was also held that the trial court may, in the absence of medical evidence, decide the cause of death on the evidence before him showing unequivocally the nexus between the death of the deceased and the unlawful act of the deceased. That medical evidence, though desirable in establishing the cause of death in a case of murder, is not indispensable

where there are facts which sufficiently, show the cause of death to the satisfaction of the court. The case of *Lori v. The State* [1980] 8-11 S.C. 81; *Osarodion Okoro v. The State* [1988] 5 N.W.L.R. (pt. 94) 255 at 289; [1988] 12 S.C.N.J. 19; and *Garos Bwashi v. The State* [1972] 6 S.C. 91 where the court below drew the necessary inferences as to the cause of death from available facts in the case and convicted the accused of murder, were referred to. B

Indeed, *Karibi-Whyte, J.S.C.* at page 447 of the N.W.L.R. (not page 444 and also partly reproduced in the respondent's brief), stated inter alia, as follows: C

"The rationale for this proposition which is founded on logic and common sense is that since the act of the accused is the most proximate event to the death of the deceased, it could be regarded as the deciding factor even where it may be taken as merely contributory to the death of the deceased. As long as the intention to kill or to do grievous bodily harm has been established. The intention for the offence of murder is complete. - See Queen v. Ntah [1961] 1 All NLR 590; [1961] 2 SCNLR 250". [The underlining mine] D

Belgore, J.S.C., (as he then was - now C.J.N.) in his own concurring contribution/judgment, stated inter alia, as follows:

"The best evidence to establish death is medical evidence but its absence is not necessarily fatal to prosecution's case if other evidence is available. If there is sufficient evidence of death and the cause of death is linked with the accused person and nobody else, a conviction on that evidence will not be vitiated by the absence of medical report..... But on the evidence before the trial court which the Court of Appeal rightly never interfered with, (as in the instant case), it was proved beyond reasonable doubt that the act of the appellant caused the death of the deceased....." [The underlining mine] F

See also the cases of *Adamu v. Kano N.A.* [1956] 1 FSC 25; [1956] SCNLR 65; *Bakuri v. The State* [1965] NMLR 163 and *Oamhem H v. The State* [1984] 4 S.C. 1 and many others in this regard. In the case of *Eric Uyo v. Attorney-General, Bendel State* [1986] 1 N.W.L.R. (pt. 17) 418 at 429 where in fact the death of the deceased occurred from the G

act of the appellant within the period of one year and a day, it was held that the presumption was that the act of the appellant, was the cause of death, except it could be shown that the deceased died from a cause other than the act of the appellant. That the consequence is not different even if he did not intend to kill the deceased.

In the instant case, the death of the deceased was caused by the injuries he sustained through the act of the appellant and not whether from the medical point of view, death was caused by such injuries. I so hold. See R. v. Effanga [1969] 1 All NLR 339. Even in Cpl. Emwenya's case (supra) cited and relied on by the learned counsel for the appellant in their brief, (it is also reported in ([1993] 6 S.C.N.J. 166) it was also held that it is not all cases of murder that a medical report showing the cause of death is imperative. It also referred to the case of Adamu v. Kano Native Authority (supra). That medical evidence is not necessary where the cause of death can be inferred from the 5 circumstances.

As regards Issue No. 2, it is now settled that an appeal predicated on the omnibus or general ground, is not at large. It cannot be used to raise an issue of law as has been done in the appellant's brief. Such issue of law must be raised as a separate ground of appeal and made an adjunct to the omnibus ground of appeal. See Davies v. Powell Duffying Collaries [1942] A.C. 601 at 616-617 and Omega & Ors. v. Micho & Co. & Ors. [1961] All NLR 324; [1961] 2 ANLR 209; [1961] 2 SCNLR 107.

The said issue, together with all the arguments based on it, fail and are accordingly dismissed.

However, Ex abundanti cautela, I note that the appellant under this Issue 2, has made reference or allusion to P.W.1, being a relation of the deceased. But remarkably, the learned counsel, has submitted in their brief that,

"..... The point being made in this part of our humble submission is not necessarily that these prosecution witnesses were tainted witnesses as such, but that being the close relations of the deceased, their evidence in the absence of evidence by independent witnesses, and medical evidence, ought to have been treated with great care and caution. A trial court in a criminal trial is enjoined to approach with care and cau-

tion the evidence of relations of crime victim because of their relationship to the victim (see Opayemi v. State [1985] 2 N.W.L.R. (pt. 9) 101 S.C.)”.

Apart from this submission amounting, with respect, to a drowning man, trying to hold or cling on a straw, so to say, the learned counsel, having conceded that the said two witnesses, “are not tainted witnesses as such”, then the entire submission, become, with respect, academic. But in dismissing the above submission, it is now settled that blood relationship with a deceased person does not make a witness a tainted witness or an accomplice in a murder or homicide case. Of course, such a witness, is a competent and in fact, a compellable witness by virtue of section 154(1) or 155(1) of the Evidence Act even if he is an accomplice by virtue of section 177 or 178 of the Act. See *Ishola v. The State* [1978] 9-10 S.C. 81 and *Akalonu v. The State* [2002] 6 S.C.N.J. 332 at 336.

With respect, another “watery” submission in paragraph (iv) under this Issue No. 2, is that the P.W.1 did not identify Exhibit B - the said stick used by the appellant in hitting the deceased. It is submitted that this failure, “*has added further doubt and uncertainty in the prosecution’s case*”. I still wonder, if the learned counsel for the appellant, actually perused well and diligently, the records and if he did, whether he appreciated all the evidence of the witness. This is because, here again, the P.W.6 testified at page 34 of the records, that it was the P.W.1 who handed over to the inspector Cosmos Izukwu who “co-investigated the case with him”, the stick “allegedly used by the accused on the deceased”. He identified the stick and stated that “it is the same piece of wood handed over to the Inspector in my presence”. The said stick was tendered without any objection by the defence counsel - Ijiomah, Esqr., and was thereafter, marked Exhibit “B” by the trial court.

I had earlier in this judgment, reproduced the evidence of the P.W.1 wherein he stated that he collected the said stick with which the appellant used in hitting the deceased and that when eventually the police came in respect of this case, he gave or handed over the same to them - the police. Of importance however, is that the appellant, admitted hitting the

deceased, with a stick in “retaliation”

Yet, there is another misconception on the part of the learned counsel for the appellant in the last two sentences in their paragraph (ii) of Issue No. 2 also wherein the following appear:

B “.....What the P.W.1 allegedly saw was, it is humbly submitted the end of the encounter and not the beginning. To hold therefore that there was neither an antecedent incident nor was the appellant provoked by the deceased, would with respect, be highly speculative in the circumstances of the instant case. [the underlining mine]

C I note that from pages 82 to 87 of the records, the learned trial Judge, dealt thoroughly and painstakingly, with the case of the appellant - the conflict between his statement to the police - Exhibit “A” and his evidence in court and stated at page 85 lines 15-32 of the records, as D follows:

“It is because of the above reasons that I reject the story of the accused as regards the encounter between him and the deceased and instead I accept and regard as true, the evidence of P.W.1 that there was no fight at all between the accused and the deceased and that when the deceased saw the accused he was frightened of the accused when the deceased told him (P.W.1) that he (the accused) had waylaid him (the deceased) and he quickly put down his jerry can of water and started retracing his steps backwards fast and without giving the accused any type of provocation either orally or physically. I believe that the deceased without assaulting the accused and the accused still smarting under the previous alleged assault moted (sic) (meted) out to him by the deceased procured a stick, chased the deceased and hit him on the very delicate part of his body, his head and the deceased slumped down on the ground.” [The underlining mine]

At page 87 lines 1-19 of the records, the learned trial Judge, had this to say,

H “I am reinforced in my view that the accused was motivated by malice generated by his encounter and skirmishes the previous night with the deceased and his brother P.W.3 and his wife by the observations, of Idigbe, J.S.C. in the case of:

Jimoh Ishola (alias Ejigbadero) versus The State [1973] 9 & 10 S.C. 81 at page (sic) 104 - 105."

He reproduced and adopted the same. At page 89, lines 8-16, His Lordship, stated inter alia, as follows:

"Having regard also to the evidence of P.W.1 which said evidence I believe. Holding as I do that the accused deliberately and intentionally killed the deceased.....".

His Lordship at page 104A lines 4 and 5 stated thus: "The case against the accused person has been proved.....".

From all the above, even dealing with the omnibus ground and the arguments in support in the appellant's brief, learned counsel for the appellant may now (if he cares) realise honestly, that he was standing on quick sand in the appeal that absolutely lacks substance and merit. The court below - per Omenge, J.C.A. at pages 143 and 144, stated inter alia, as follows:

"The learned trial court below considered the defence of the appellant and correctly came to the conclusion that if death results from the committal of a grievous bodily harm to another, it constitutes a murder. See section 316(2) of Criminal Code Laws of the Federation and the facts tendered by P.W.1 shows that the said Ndukwe received grievous harm, which resulted in his death. The injury has been proved beyond reasonable doubt to have been caused by the appellant; and an irresistible circumstantial evidence makes the cause of death referable to the serious injury caused to the deceased by the appellant. It is therefore admissible in law as proof of cause of death as held by the court below. I have no reason to hold otherwise. I affirm therefore the conclusion.

There was no believable evidence of provocation before the trial court. I see no such evidence in the record. The appeal is founded on non existent and contrived opinion expressed in the brief. It is incompetent. The appeal is refused and dismissed." [The underlining mine]

I note that it is the same counsel that represented the appellant and prepared/settled the brief in the court below, that is also representing and prosecuting this appeal. Apart from Issue 3 in the court below, the other issues and the argument in support thereof, are substantially the

same or similar to those in this court. Perhaps, he wants to try his luck. Fortunately, there is no game of chance in this court.

Fabiyi, J.C.A. in his own concurrent judgment, stated inter alia, as follows:

B “.....Evidence of a Medical Officer, if available, would only confirm the obvious.....

The evidence led by the prosecution was cogent and compelling. The act of the appellant caused the death of the deceased.....”.

C In concluding this contribution/judgment, I note that there are the concurrent findings of fact by the two lower courts and this being the case, this court cannot interfere, since the two said decisions of the said courts, are not perverse and there is no element of any miscarriage of justice 2 e therefrom. The evidence as borne out from the records, are D overwhelming and perhaps, “consuming” so to say. See recently, the cases of Onwuama v. Ezeokoli [2002] 2 S.C.N.J. 271; Amusa v. The State [2003] 1 S.C.N.J. 518; [2003] 1 S.C. (pt. III) 14; Ubani & 2 Ors. v. The State [2003] 18 N.W.L.R. (pt. 851) 224 at 247; [2003] 12 S.C.N.J. E HI at 127-128; and Chief Ojo & Ors. v. Anibire & Ors. [2004] 5 S.C.N.J. 56 and many others in this regard.

It is from the foregoing and the more detailed facts, reasoning and conclusion in the lead judgment of my learned brother, Akintan, J.S.C. F that I too, dismiss the appeal. I accordingly, affirm the decision of the court below affirming the said judgment of the trial court.

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