

SUPREME COURT OF NIGERIA
23rd FEBRUARY, 2007 SC.55/2003
CORAM:- S. U. ONU, D. MUSDAPHER, G. A. OGUNTADE,
W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC

1. JOHN OGBU APPELLANTS
2. LINUS EZE
V.
THE STATE RESPONDENT

PRACTICE & PROCEDURE - Exhibits - Decision - Equity, good conscience and fair hearing - Demand that documents duly tendered - Be considered in deciding a case - Subject to their materiality and relevance (H1)

CRIMINAL PROCEDURE - Appeals - Issues - Lost exhibits - Where unnecessary and irrelevant in the determination of the issues - Court of Appeal can validly resolve those issues (H2)

APPEALS - Evidence - Evaluation - Lost statements to police - Where trial court has properly evaluated them - It is not Court of Appeal's duty - To repeat the evaluation (H3)

CRIMINAL PROCEDURE - Murder - Evidence - Contradictions - Where not material - Court will not interfere with the prosecution's case (H4)

CRIMINAL PROCEDURE - Murder charge - Under the Penal Code - What the prosecution must prove - Includes that accused did not care - Whether death will result from his act - And the charge here was proved (H5)

FACTS

The prosecution's case is that at about 21.00 hours on the 12-10-1986, the appellants and one Ikechukwu were returning home from a

naming ceremony at Maiduguri. Midway in their journey they stopped over at Merryland Hotel and had more drinks. After leaving the hotel, they met the deceased who engaged Ikechukwu in a discussion over an undisclosed subject, thereby delaying their return. 1st appellant became worried for he was tired and wanted to get home. He consequently told the deceased not to waste their time by continuing the discussion with Ikechukwu. When the deceased continued with the discussion, 1st appellant approached him and a fight ensued. 1st and 2nd appellants jointly beat up the deceased, lifted him up by the legs and hit his head on the ground. This led to his death before he could get to the General Hospital, Maiduguri. Appellants were charged with culpable homicide punishable with death before the Borno State High Court, Maiduguri.

The case of the defence is simply that it was the deceased who started the fight by giving 2nd appellant a blow and he did not retaliate. That the deceased persisted, tried to use his leg in a karate fashion in the process of which he missed his target, fell down, collapsed and later died. The trial court found the appellants guilty as charged and sentenced them to death. Their appeal to the Court of Appeal was dismissed. They have further appealed to the Supreme Court seeking to establish inter alia, that they were denied fair hearing when the Court below determined their appeals without the Exhibits which were lost.

ISSUES FOR DETERMINATION

“1. Whether the Appellants were denied their fundamental rights to fair hearing when the Court below determined their appeals without the Exhibits tendered at the trial court (Ground 6)

2. Whether the learned Justices of the Court of Appeal were right when they upheld the evaluation of evidence by the learned trial judge and affirmed the convictions and sentences of the Appellants (Grounds 4 & 5).

3. Whether the learned Justices of the Court of Appeal were right when they held that there were no substantial contradictions in the evidence of PW1 at the trial court (Ground 3).

4. Whether the charges against the Appellants were proved beyond reasonable doubt to warrant the affirmation of their convictions and

sentences by the court below (Ground 1 of the Notices of Appeal in the main record and Ground 7 Notices of Appeal in the Supplementary record).

5. Whether the learned Justices of the Court of Appeal were right in over ruling themselves of their earlier finding that loss (sic) Exhibits tendered will be fatal to the determination of the appeal before them and proceeded to determine the appellants' appeal without first considering the effect of the loss of the said Exhibits (Grounds 1 & 2)."

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

Exhibits - Decision

1. It is in accord with equity and good conscience as well as the right to fair hearing that all material and relevant facts and documents duly tendered and admitted in proceedings have to be taken into consideration in reaching a decision in the case or matter. From the appellants' brief it is clear that the exhibits which learned counsel is complaining about are the medical reports and the statements of the accused persons. To resolve the issue under consideration it is my considered view that the materiality and relevance of the said exhibits to the determination of the appeal before the lower court must be examined in relation to the issues that called for determination by that court. (p. 815 F)

Appeals - Issues - Lost exhibits

2. A glance at the above issues for determination before the Court of Appeal glaringly shows that the lost exhibits, to wit, medical reports and statements of the appellants are not only unnecessary but irrelevant for their determination. None of the issues is related to the exhibits or any exhibit at all. The medical reports could have been relevant if the cause of death was being questioned and, may be, there is no other direct evidence on how the deceased met his death or that direct eye witness account is alleged to be inconsistent with the medical report. Instead issue No. 1 is complaining of inconsistency or contradictions in the evidence of PW1 which evidence was relied upon by the trial court to convict the appellants. I hold the firm view that the said issue can validly and effectively be resolved without the lost exhibits particularly as the said

exhibits are not material neither are they relevant to the determination of that issue. What the Court of Appeal was required to do, and in fact did, is to examine the evidence of PWI and see whether there are contradictions therein and to proceed further to determine, where contradictions are found to exist, whether they are material contradictions which could render the evidence of PWI unreliable.

It is also very obvious that the lost exhibits are not relevant to the determination of the issue as to whether a miscarriage of justice was occasioned when the trial judge delivered the judgment in the case six months after addresses of counsel. (p. 816 B)

Evidence - Evaluation - Lost statements to police

3. In the instant case the relevant issue before the Court of Appeal, as found in this judgment made an evaluation of the lost statements of the appellants to the police irrelevant. In any event the learned trial judge had painstakingly evaluated the evidence before the court and had ascribed probative value thereto, which is the primary function of the trial judge. That being the case I hold the considered view that it is not the duty of the Court of Appeal to repeat same particularly as that court had come to the conclusion that the evaluation was properly done by the trial judge. (p. 818 B)

Murder - Evidence - Contradictions

4. It should be noted that both the trial judge and the lower court considered the contradictions complained of by learned counsel for the appellants and came to the conclusion that they were not material contradictions to warrant interference by the court. In resolving the issue I cannot put it any better than what OBADINA JCA stated at pages 176 - 178 of the record, inter alia, thus:-

“----- the contradiction in the evidence of PWI at the trial, vis-à-vis his statement to the police, is, to my mind, not substantial. The contradictions are not only of minor nature, but also highly immaterial to main ingredient of the offence charged. The main issue is that the appellants beat the deceased, hit him and lifted him up by the two legs and hit

his head on the ground, on the 12th of October, 1986. The PWI gave evidence of what happened at the scene of the crime on the 12th of October, 1986..... His evidence that he was at the scene of the crime has not been contradicted or challenged. He stated so in his statement to the police and what he stated in his evidence at the trial was almost verbatim B with what he told the police in his statement. The contradiction in the evidence at the trial vis-à-vis his statement to the police, if it could be described as contradiction, is mainly as to where he went on the 13th October, 1986, a day after the incident. To my mind the discrepancy as to C where he traveled to on the 13th of October, 1986 is immaterial to his being at the scene of the crime on the 12th of October, 1986 which he stated in his statement to the police and almost verbatim in his evidence at the trial..... I take the view that it is immaterial whether the PWI D traveled to Monguno or New Mante on the 13th of October, 1986..... The learned trial (sic) critically reviewed and appraised the evidence and came to the conclusion that the discrepancy was not material to be fatal to the prosecution case. I whole heartedly agree with the learned trial judge..... In my view, the discrepancies in the towns to which the witness E said he traveled after the incident and the time factor of two - three weeks that he said he made statement as against a period of about eight months, are not material enough to be fatal to the prosecution's case. It is my view that the evidence of PWI at the trial is substantially consistent F with his statement to the Police.....”

I therefore resolve the issue against the appellant. (p. 821 E)

Murder charge - Under the Penal Code

5. For the prosecution to succeed in a charge of culpable homicide punishable with death under the Penal Code, the following ingredients must be established: G

- (a) the death of the deceased;
- (b) that the death resulted from the act of accused; and H
- (c) that the accused knew that his act will result in the death or did not care whether the death of the deceased will result from his act, see Durwode v. State (2000) 15 NWLR (pt. 691) 467 at 487 - 488.

From the believed evidence of PWI alone, the charge against the appellants is sustainable since it is clear that it was their acts that resulted in the death of the deceased on the day in question.

I hold the further view that the appellants knew that the act will result in the death of the deceased or did not care whether the death of the deceased would result therefrom. How can someone use the head of another person as a pestle to pound the ground and not expect him to die from such brutal action! Was such an act intended to make the deceased healthy or elongate his life? I hold the firm view that the prosecution did prove the charge of culpable homicide punishable with death against the appellants and therefore resolve the issue against the appellants.
(p. 823 E/ 824 C)

D **NOTABLE POINTS OF INTEREST**

OGBUAGUJSC

1. Repetition of an argument - Does not improve its efficacy

I will pause here to observe that most of the submissions in the Appellants' Brief, are substantially, the same as those in the court below. It is now settled that repetition of an argument, does not improve its efficacy. Mere repetition of an argument, does not improve an earlier arid, weak or completely unacceptable argument. (p. 829 B)

F *2. Murder - When medical report is not vital*

Now, if I may revert to the issue of the lost Medical Report, in a plethora of decided authorities, it is now firmly established that where there is other evidence upon which the cause of death can be inferred, it is not vital, to have resort to Medical Report. See the case of Liman v. The State (1976) 6 UILR (Pt.II) 248. A court can also, in the absence of a Medical Report, properly infer the cause of death from the evidence and the circumstances of the case (as in the instant case). (p. 829 E)

H *3. Failure to file respondent's brief - Effects*

I wish to state that the failure of the Respondent to file a Respondent's Brief, it is now firmly established, is of no consequence and it is immate-

rial. An Appellant must succeed or fail in his own Brief or case. But although the filing of a Respondent's Brief, is not automatic, failure to so file, may amount to the Respondent being deemed to have admitted the truth of everything stated in the Appellant's Brief in so far as such, is borne out by the Record of proceedings. B

There is however, a But or hitch or rider so to say. The absence of a Respondent's Brief, will not place the Appellant at an undue advantage. This is because, the Respondent, has already, a judgment of the court below or a trial court, in his favour. Findings of a lower court, are presumed correct, until they are set aside. (p. 831 A) C

REPRESENTATION

S. Oyawole Esq. for the appellants.

No appearance for the respondent who is reported served hearing Notice on 27/11/06. D

CASE REFERRED TO

Effiong v. Ironbar (1965) NMLR 413 at 416 E

Anyanwu v. State (2002) 13 NWLR (pt. 783) 107 at 127 & 140

Engineering Ent. Of Niger Contractors Co. of Nig v. A-G of Kaduna State (1987) 2NWLR (pt. 57) 381 at 391

Ahmed v. State (1999) 7 NWLR (pt. 612) 641 at 672 F

Onwe v. State (1975) 9-11 S.C 23 at 31

Akpabio v. State (1994) 7 NWLR (pt. 359) 635

Okoro v. State (1964) All NLR 423

Egboghonome v. State (1993) 7 NWLR (pt. 306) 383 at 410 G

Dogo v. State (2001) 3 NWLR (pt. 699) 192 at 211 - 212

Awopejo v. State (2001) 18 NWLR (pt. 745) 430 at 442 - 443

Gabriel v. State (1989) 5 NWLR (pt. 122) 457

Onuoha v. State (1989) 2 NWLR (pt. 101) 23 at 33

Commissioner of Police v. Omenukwere (1992) 2 NWLR (Pt.590) 190 H
C.A

Waziri v. Waziri (1998) 1 NWLR (Pt.533) 322 C.A

U.S.A. Plc v. Ajileye (1999) 13 NWLR (Pt.633) 116 C.A

STATUTES & RULES REFERRED TO

Penal Code ss. 221 (a) & (b), 79, 222 (4)

Court of Appeal Rules 2002 O. 4 r. (1)(f)

B Evidence Act s. 138

Constitution of Nigeria 1979 s. 258(4)

LEAD JUDGMENT BY ONNOGHEN JSC

C This is an appeal against the decision of the Court of Appeal holden at Jos in appeal No. CA/J/185C/91 delivered on the 9th day of December, 2002 affirming the conviction and sentence of the appellants by the Borno State High Court holden at Maiduguri in charge No. M/4C/97 presided by OGUNBIYI J, (as she then was).

D The appellants were charged with the following offence:

“COUNT 1

That you, John Ogbu and Linus Eze, on or about the 12th October, 1986, at about 2100 hours at Gomari Ward, Maiduguri, did commit culpable Homicide punishable with death in that you caused the death of Basil Eziam by doing an act to wit:- Beating, lifting Basil Eziam (deceased) by the legs and hitting his head against the ground with the knowledge that his death would not only be likely but the probable consequence of your act, and you thereby committed an offence punishable under section 221(b) of the Penal Code.

COUNT 2.

That you John Ogbu and Linus Eze, on or about the 12th October, 1986, at about 2100 hours at Gomari Ward, Maiduguri had formed a common intention between yourselves to commit Culpable Homicide punishable with death and in furtherance of which you did the following criminal act, to wit:- Beating and lifting Basil Eziam (deceased) by the legs and hitting his head against the ground which is an offence punishable under section 221(b) of the Penal Code read together with section 79 of the Penal Code.”

At the trial, the prosecution called seven witnesses while the appellants testified and called three witnesses. In a judgment delivered on

the 4th day of October, 1990 the learned trial judge found the appellants guilty of the offences charged and sentenced them to death. Appellants were dissatisfied with that decision and appealed to the Court of Appeal which affirmed the decision of the trial court and dismissed their appeal.

Upon further appeal to this court, the issues for determination as B distilled from the grounds of appeal at pages 2 and 3 of the Amended Appellants' Brief of Argument filed on 12/5/04 by S. OYAWOLE Esq. of counsel for the appellants are as follows:-

"1. *Whether the Appellants were denied their fundamental rights C to fair hearing when the Court below determined their appeals without the Exhibits tendered at the trial court (Ground 6)*

2. *Whether the learned Justices of the Court of Appeal were right D when they upheld the evaluation of evidence by the learned trial judge and affirmed the convictions and sentences of the Appellants (Grounds 4 & 5).*

3. *Whether the learned Justices of the Court of Appeal were right E when they held that there were no substantial contradictions in the evidence of PW1 at the trial court (Ground 3).*

4. *Whether the charges against the Appellants were proved beyond F reasonable doubt to warrant the affirmation of their convictions and sentences by the court below (Ground 1 of the Notices of Appeal in the main record and Ground 7 Notices of Appeal in the Supplementary record).*

5. *Whether the learned Justices of the Court of Appeal were right G in over ruling themselves of their earlier finding that loss (sic) Exhibits tendered will be fatal to the determination of the appeal before them and proceeded to determine the appellants' appeal without first considering the effect of the loss of the said Exhibits (Grounds 1 & 2)."*

The respondent filed no brief of argument neither was any oral argument preferred on its behalf.

It is the prosecution's case that on 12th October 1986 at about H 2100 hours the appellants and one Ikechukwu were returning home from a naming ceremony in Ngomari Ward, Maiduguri but midway in their journey, they decided to have more drinks at Merryland Hotel, Maiduguri. The incidence took place after they left the said hotel and continued their

return home. On getting to Ngomari Bus Stop, the appellants and Ikechukwu met the deceased, Basil Ezian who then engaged Ikechukwu in a discussion over an undisclosed subject thereby delaying their return. The 1st appellant became worried for he was tired and wanted to get home and consequently told the deceased not to waste their time by continuing with the discussion with Ikechukwu. When the deceased continued with the discussion, 1st appellant approached the deceased and a fight ensued as a result of which 1st and 2nd appellants jointly beat up the deceased and lifted him up by the legs and hit his head on the ground which subsequently led to the death of the deceased before he could get to the General Hospital, Maiduguri.

The case of the defence is simply that it was the deceased who started the fight by giving Linus, the 2nd appellant a blow but that 2nd appellant did not retaliate. The deceased persisted and at a stage tried to use his leg in a Karate fashion to attack the 2nd appellant in the process of which he missed his target and fell down and collapsed and later died.

In arguing issue No. 1, learned counsel for the appellants submitted that the appellants were denied their fundamental right to fair hearing when the Court of Appeal determined their appeals without the exhibits tendered at the trial court. Referring to pages 151 and 158 of the record, learned counsel stated that the appeal before the lower court was first heard and judgment reserved to 8th July, 1998 but that the judgment could not be written because the exhibits were not traced; that parties were subsequently told to take steps to retrieve the exhibits to enable the court consider the appeal; that after exhaustive efforts involving the police, Registrars of the courts, and counsel it was discovered that the exhibits were lost, and the lower court was duly informed; that the lower court consequently ordered counsel to address on the way forward in the circumstance resulting in the appellants' counsel filing a complementary brief of argument on the issue which was taken into consideration by the lower court in the judgment on appeal before this Court. Referring to order 4 Rule (1) (f) of the Court of Appeal. Rules 2002 learned counsel submitted that it is the duty of the Registrar of the trial court to compile record including exhibits and forward same to the appellate court. To

emphasis the point further learned counsel cited and relied on Effiong v. Ironbar (1965) NMLR 413 at 416; Anyanwu v. State (2002) 13 NWLR (pt. 783) 107 at 127 & 140; that since the decision of the trial court placed reliance on the exhibits the exhibits were very important for the review of that decision by the Court of Appeal; that exhibits A and I the medical reports were not before the lower court even though the trial court based its conclusion on them. Referring to page 159 of the record learned counsel submitted that the lower court made a summersault with regard to its earlier holding that it would be impossible to decide the appeal without the exhibits by holding that the loss of the exhibits did not constitute a hinderance to the determination of the appeal; that the court could, in the circumstance either strike out the appeal, or order a retrial or grant an equitable relief where either of the two options above will not meet the justice of the case but stated that on the authority of Engineering Ent. Of Niger Contractors Co. of Nig v. A-G of Kaduna State (1987) 2 NWLR (pt. 57) 381 at 391 striking out of the appeal would not meet the justice of the case since the appellants were not the cause of the loss; that an order of retrial would be oppressive on the appellants particularly as the exhibits were lost; that the proper thing to do in the circumstance is to quash the conviction and sentence of the appellants.

It should be noted that the above submissions of counsel are the same with what he submitted before the lower court in his complimentary brief which submissions were duly considered in the judgment now on appeal before this court.

It is in accord with equity and good conscience as well as the right to fair hearing that all material and relevant facts and documents duly tendered and admitted in proceedings have to be taken into consideration in reaching a decision in the case or matter. From the appellants' brief it is clear that the exhibits which learned counsel is complaining about are the medical reports and the statements of the accused persons. To resolve the issue under consideration it is my considered view that the materiality and relevance of the said exhibits to the determination of the appeal before the lower court must be examined in relation to the issues that called for determi-

nation by that court. The issues were three and they are as follows:-

“(1) Was the learned trial judge right to have relied on the evidence of PWI in convicting the accused persons despite the grave inconsistencies contained therein?”

B *(2) Whether the judgment delivered by the learned trial judge six months after address did not occasion miscarriage of justice?*

(3) Whether the failure of the court below to consider the evidence of the defence did not occasion miscarriage of justice?”

C A glance at the above issues for determination before the Court of Appeal glaringly shows that the lost exhibits, to wit, medical reports and statements of the appellants are not only unnecessary but irrelevant for their determination. None of the issues is related to the exhibits or any exhibit at all. The medical reports **D** could have been relevant if the cause of death was being questioned and, may be, there is no other direct evidence on how the deceased met his death or that direct eye witness account is alleged to be inconsistent with the medical report. Instead issue No. 1 is **E** complaining of inconsistency or contradictions in the evidence of PWI which evidence was relied upon by the trial court to convict the appellants. I hold the firm view that the said issue can validly and effectively be resolved without the lost exhibits particularly as the **F** said exhibits are not material neither are they relevant to the determination of that issue. What the Court of Appeal was required to do, and in fact did, is to examine the evidence of PWI and see whether there are contradictions therein and to proceed further to determine, where contradictions are found to exist, whether they **G** are material contradictions which could render the evidence of PWI unreliable.

It is also very obvious that the lost exhibits are not relevant to the determination of the issue as to whether a miscarriage of **H** justice was occasioned when the trial judge delivered the judgment in the case six months after addresses of counsel.

With regard to the third issue it is clear that the complaint is against lack of consideration of the evidence by the appellants which can easily

be determined by looking at the proceedings and the judgment of the trial judge. When one looks at the record it is clear that every relevant portion of the exhibits for the purpose intended by counsel or court were copiously referred to and reproduced in the judgment and the briefs of counsel, particularly learned counsel for the appellants. For instance the statement of PWI was tendered admitted and marked as exhibit J and was one of the exhibits lost in transit but reproduced by the learned trial judge at page 92 of the record while learned counsel for the appellants reproduced same at page 3 of the Appellants' Brief filed on 17/10/95 at pages 112-124 of the record. I therefore find no merit in issue No. I which I accordingly resolve against the appellants. B
C

On issue No. 2 learned counsel for the appellants submitted that the lower court erred in endorsing the evaluation of evidence by the learned trial judge in affirming the conviction and sentence of the appellants; that the trial judge rejected the evidence of the appellants on the ground that it was a retraction of their statement to the police and the Court of Appeal agreed with the trial judge when the alleged retracted statement of the appellants were not seen or examined by the Court of Appeal. Learned counsel then submitted that the finding of the court below that the learned trial judge considered the appellants' evidence, disregarded it and that the evaluation of the evidence by the trial judge cannot be questioned is therefore based on speculation contrary to the decision in Ahmed v. State (1999) 7 NWLR (pt. 612) 641 at 672; Onwe v. State (1975) 9-11 S.C 23 at 31; Akpabio v. State (1994) 7 NWLR (pt. 359) 635; Okoro v. State (1964) All NLR 423. D
E
F

Learned counsel further submitted that the lower court "*ought to have painstakingly gone through the evidence so evaluated in the matter before it; that is the oral evidence and the exhibits tendered in the course of the trial*" before the court can categorically pronounce on the evaluation of evidence by the learned trial judge but that since the exhibits were lost the lower court was in error in holding that the finding of the trial judge cannot be faulted. G
H

It must be pointed out that learned counsel for the appellants did not make an issue out of the finding by the trial judge that the evidence of

the appellants was a retraction of their statements to the police so as to make it imperative for the Court of Appeal to be skeptical about the finding or to make the statements to the police relevant exhibits for examination or evaluation by the Court of Appeal. It is important to always keep in focus the fact that matters before the courts are determined on the issues that call for resolution in the dispute between the parties. **In the instant case the relevant issue before the Court of Appeal, as found in this judgment made an evaluation of the lost statements of the appellants to the police irrelevant. In any event the learned trial judge had painstakingly evaluated the evidence before the court and had ascribed probative value thereto, which is the primary function of the trial judge. That being the case I hold the considered view that it is not the duty of the Court of Appeal to repeat same particularly as that court had come to the conclusion that the evaluation was properly done by the trial judge.**

On issue 3, learned counsel for the appellants submitted that there were material contradictions in the evidence of PWI rendering his evidence unreliable; that while the evidence of PWI is on record his statement to the police was one of the lost exhibits. Learned counsel referred to page 3 lines 3 to 19 of the record where the relevant evidence of PWI in court can be found and page 92 lines 32 to 40 of the same record where the statement of PWI to the police was reproduced by the learned trial judge in the judgment and submitted that where a witness makes an extra judicial statement which is inconsistent with his testimony at the trial, such testimony is to be treated as unreliable while the statement is not regarded as an evidence on which a court can act and cited and relied on the case of Egboghonome v. State (1993) 7 NWLR (pt. 306) 383 at 410; Dogo v. State (2001) 3 NWLR (pt. 699) 192 at 211 - 212; Awopejo v. State (2001) 18 NWLR (pt. 745) 430 at 442 - 443; Gabriel v. State (1989) 5 NWLR (pt. 122) 457; Onuoha v. State (1989) 2 NWLR (pt. 101) 23 at 33.

The inconsistencies, learned counsel stated are:-

(i) that PWI testified that he saw the deceased collapse but upon being recalled for further cross examination; he said on his return from

New Mante he was informed by his wife that Basil was dead as a result of which PWI said he decided to report at the C.I.D. to state what he knew about the case.

(ii) that PWI stated in his testimony that he left for Monguno on the day following the incident whereas in the said statement PWI said he left Maiduguri to New Mante. B

(iii) that PWI said in court that he gave his statement to the police on 5/6/87 whereas under further cross examination he said , *“ I reported at the C.I.D. because I know then that after the period of 2-3 weeks the matter must have been transferred to the C.I.D by that time.”* C

(iv) that PWI stated in one breath that he went on his own to the C.I.D. while on another breath he stated that he got to know from his wife that the police needed him.

(v) that PWI stated that he returned from his journey a week after the incident to hear that the deceased had died whereas he had earlier stated that the deceased died at the scene of the incident. D

(vi) that PWI said he made his statement to the police 2-3 weeks after the incident whereas he did so after 8 months of the incident. E

Learned counsel then urged the court to hold that the inconsistencies are material and to resolve the issue in favour of the appellants.

The issue under consideration is whether there were material contradictions and discrepancies in the evidence of PWI to justify the intervention of this court in the conviction and sentence of the appellants. Is it correct to say that the statement of PWI, exhibit J is contradictory of the testimony of the said PWI before the court? It is important to note that exhibit J, the statement of PWI was reproduced both by learned counsel for the appellants in his brief and the trial court in its judgment. G
The said exhibit J reads as follows:-

“On 12/10/86 at about 2200 hours I was coming back from outside. On reaching one hotel at Gwamari Chiki called Mary Land Hotel, I saw the two men beating one man in front of the hotel. They were hitting him and they lifted him up again and they hit his head down from there one man who I don’t know his name came and separated them then the two people who were fighting one man whom I don’t know their H

names, but can be recognize if seen, hold the person they were beating up but by then the man was already dead the following day 13/10/87 I left Maiduguri to New Mante I was at New Mante until about one week. I came back and heard that the person the two people were fighting
 B on the 12/10/87 at about 2200 hrs had died.....”

In his testimony before the court, PWI stated thus:-

“I live at Nwan Ciki Maiduguri. I am a contractor and also drives my vehicle as a Taxi. I had never known the accused persons except on
 C the date of the incident, the incident happened on the 12th October, 1986. On the 12th of October 1986, I was coming from my working place at Gomari Ciki where we used to park our vehicle after close of day. On my
 D way coming back to my house I saw two men hitting one boy. The two people I saw were the accused persons in court. I saw one person who was trying to separate them when they were hitting the boy. Although it was in
 E the night, there was florescent light. I then asked some around as to whom the victim was. The accused lifted up the boy by turning the two legs up and hitting the head on the ground. I saw the boy collapsed, and
 F people scattered. I too went away. On the 13th the following day, I left for Monguno. On the 5th of June, 1987, I gave my statement to the police and that is all.”

In his evidence given under further cross examination after being
 F duly recalled, PWI stated as follows:-

“I went to the police myself because I was present when the incident happened. I went to the police about two weeks or three after the incident happened. I could not go the same day the incident happened because I travelled to New Mante. The incident happened on the 12th
 G October and I went to New Mante on 13th October, 1981. I mean to say 1986 and not 1987. On my return from New Mante, I went to the State C.I.D Headquarters Maiduguri. At the C.I.D I could now remember the name of the officer I met. I did not see the officer I met. I did not see the
 H officer in this court on the day I gave evidence. At the C.I.D I was received as one of the witnesses in the case. I was aware on my return from New Mante that I was one of the prosecution witnesses before I went to the C. I. D. On my return from New Mante, I was told by my wife that

Basil was dead following which I decided to report at the C.I.D to state what I know about the case. I got to know through my wife that I shall be required as one of the prosecution witnesses. She did not tell me how she got to know..... when the incident happened it was first reported at the Gwange Police Station. I reported at the C.I.D because I know then that after the period of 2- 3 weeks the matter must have been transferred to the C.I.D by that time.” B

In the case of Enahoro v. The Queen (1965) NMLR 265 at 281 - 282, this Court considered the question as to what constitutes material contradictions that would warrant a reversal of a judgment of the lower court in the following terms:- C

“In the case of Omisade, we pointed out that where the ground of appeal relied upon was that of contradictions in the evidence of witnesses, 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 avert to and considered the effects of those 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.” D E

It should be noted that both the trial judge and the lower court considered the contradictions complained of by learned counsel for the appellants and came to the conclusion that they were not material contradictions to warrant interference by the court. In resolving the issue I cannot put it any better than what OBADINA JCA stated at pages 176 - 178 of the record, inter alia, thus:- F

“----- the contradiction in the evidence of PWI at the trial, vis-à-vis his statement to the police, is, to my mind, not substantial. The contradictions are not only of minor nature, but also highly immaterial to main ingredient of the offence charged. The main issue is that the appellants beat the deceased, hit him and lifted him up by the two legs and hit his head on the ground, on the 12th of October, 1986. The PWI gave evidence of what happened at the scene of the crime on the 12th of October, 1986..... His evidence that he was at the scene of the G H

crime has not been contradicted or challenged. He stated so in his statement to the police and what he stated in his evidence at the trial was almost verbatim with what he told the police in his statement. The contradiction in the evidence at the trial vis-à-vis his statement to the police, if it could be described as contradiction, is mainly as to where he went on the 13th October, 1986, a day after the incident. To my mind the discrepancy as to where he traveled to on the 13th of October, 1986 is immaterial to his being at the scene of the crime on the 12th of October, 1986 which he stated in his statement to the police and almost verbatim in his evidence at the trial..... I take the view that it is immaterial whether the PWI traveled to Monguno or New Mante on the 13th of October, 1986..... The learned trial (sic) critically reviewed and appraised the evidence and came to the conclusion that the discrepancy was not material to be fatal to the prosecution case. I whole heartedly agree with the learned trial judge..... In my view, the discrepancies in the towns to which the witness said he traveled after the incident and the time factor of two - three weeks that he said he made statement as against a period of about eight months, are not material enough to be fatal to the prosecution's case. It is my view that the evidence of PWI at the trial is substantially consistent with his statement to the Police....."

I therefore resolve the issue against the appellant.

On issue No. 4 learned counsel for the appellants submitted that the prosecution did not prove the offence of culpable homicide punishable with death against the appellants beyond reasonable doubt and that the court below was in error when it affirmed the judgment of the trial court; that the burden of proving that the appellants are guilty of the offence charged rests with the prosecution relying on section 138 of the Evidence Act; cited the cases of Nweke v. State (2001) 4 NWLR (pt. 704) 588 at 602 - 603; Bakare v. State (1987) 1 NWLR (pt. 52) 579 at 587 - 588; that the prosecution did not establish the cause of death particularly as the evidence of PWI and PW6 and exhibits H and I did not establish the cause of death nor link the death to the acts of the appellants; that the evidence of PW6 is hearsay as he was not in the employment of the General Hospital when exhibits H and I were made. In any

event, that none of the prosecution witnesses said the appellants used heavy object to hit the deceased on the neck nor was it proved that the deceased sustained injuries on the head as would have been the case if PW6 statement that the cause of death would have been an impact from solid and strong object “where heavy weight falls on the neck or a very heavy moving object coming into contact with the neck. Sharp solid object fling or used (sic) on the neck” were to be correct; that the cause of death not having been proved, the court should acquit and discharge the appellants.

In the alternative learned counsel submitted that the appellants ought to have been convicted of manslaughter based on the evidence under section 222(4) of the Penal Code. For that submission counsel cited and relied on *Okonji v. State* (1987) NWLR (pt. 52) 659 at 673 - 674.

I had earlier in this judgment reproduced the three issues before the lower court and it is very clear that the present issue was not part of the issues for determination before that court. That being the case, the lower court had no opportunity to pronounce on it. I have carefully gone through the record before this court and it is clear that learned counsel for the appellants never sought leave of either the lower court or of this court to raise the issue as a fresh point of law in this court as is required by law.

However **for the prosecution to succeed in a charge of culpable homicide punishable with death under the Penal Code, the following ingredients must be established:**

- (a) the death of the deceased;
- (b) that the death resulted from the act of accused; and
- (c) that the accused knew that his act will result in the death or did not care whether the death of the deceased will result from his act, see *Durwode v. State* (2000) 15 NWLR (pt. 691) 467 at 487 - 488.

From the facts of the case, there is no doubt at all that the deceased, Basil, died. What the appellants are contesting is that the death of the deceased was a result of the acts of the appellants. However there are eye witness accounts of the fight between appellants and deceased par-

ticularly the fact that the appellants beat up and held the deceased by the legs, lifted him up and hit his head on the ground as a result of which the deceased died on 12th October 1986. PWI in particular gave evidence of what happened at the scene which evidence was believed by the learned B trial judge. The evidence of PWI was not contradicted neither was it really challenged by the defence. The defence did not contend that PWI was not at the scene of crime on the day in question.

As regards the testimony of PW6 it is very clear that he testified C based on the medical record available to him by virtue of his employment particularly exhibits H & I. He need not be the author or maker of those documents to interpret same. In any event, what PW6 said is consistent with the evidence of PWI as to the beating of the deceased and the lifting up of the deceased and hitting his head on the ground. **From the be- D lieved evidence of PWI alone, the charge against the appellants is sustainable since it is clear that it was their acts that resulted in the death of the deceased on the day in question.**

I hold the further view that the appellants knew that the act E will result in the death of the deceased or did not care whether the death of the deceased would result therefrom. How can someone use the head of another person as a pestle to pound the ground and not expect him to die from such brutal action! Was such an act F intended to make the deceased healthy or elongate his life? I hold the firm view that the prosecution did prove the charge of culpable homicide punishable with death against the appellants and therefore resolve the issue against the appellants.

G On issue No. 5 I hold the considered view that it has the same substratum as issue No. 1 already considered and resolved in this judgment and as such it needs no further consideration except to add, for the purpose of emphasis, that the lost exhibits having been found to be irrelevant for the determination of the issues before the Court of Appeal, the H decision of that court to hear and determine the appeal without the said exhibits did not result in a miscarriage of justice to warrant any interference by this Court.

In conclusion, the five issues having been resolved against the

appellants, it is obvious that the appeal is without merit and is consequently dismissed by me.

Appeal dismissed.

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ONU JSC

Having been privileged to read before now the judgment of my learned brother Onnoghen, JSC just read, I agree with him that the appeal is without merit and I too dismiss it.

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Appeal dismissed.

MUSDAPHER JSC

I have had the preview of the judgment of my Lord Onnoghen, JSC just delivered with which I entirely agree. For the same reasons therein contained, which I respectfully adopt as mine, I too, dismiss the appeal and hold that the loss of the exhibits had no hearing on the issues submitted to the court for the determination of the appeal. In any event there is sufficient other evidence upon which the court confirmed the conviction for culpable homicide punishable with death. I accordingly dismiss the appeal and affirm the decisions of the lower courts.

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OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Onnoghen JSC. I agree with his reasoning and conclusion. It is my view that this appeal has no merit. I would also dismiss it. I affirm the judgments of the two courts below.

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OGBUAGU JSC

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I have had the privilege to read before now, the lead Judgment of my learned brother, Onnoghen, JSC, just delivered. I agree with his reasoning and conclusion that the appeal fails and should be dismissed. How-

ever, for purposes of emphasis, I will make my own contribution.

This is an appeal against the decision of the Court of Appeal, Jos Division, (hereinafter called “the court below”), delivered on 9th December, 2002 dismissing the appeal of the Appellants and affirming their convictions and sentence to death.

Dissatisfied with the said decision, each of the Appellants, have appealed to this Court on three (3) grounds of appeal in their separate Notice of Appeal. I note that the Respondent did not file any Brief in spite of the fact that it was duly served with both the Appellants’ Brief and as Amended and the Hearing Notice. On 30th November, 2006 when the appeal came up for hearing, learned counsel for the Appellants - Oyawole, Esqr, confirmed this fact.

From the facts of this case as appear at page 69 of the Records; and from the evidence of the PW2, boil down to the simple fact that there was a fight between the 1st Appellant and the deceased. In the course of the fight, the Appellants, jointly beat the deceased and lifted him up by his legs and dashed his head on the hard ground which led to his death before he got to the General Hospital. In the circumstances, a Medical Report, certainly became and was unnecessary in my respectful view. The exhibits that were lost and which heavy weather has been made by the learned counsel for the Appellants, are the Medical Report which I have held is/was unnecessary in the circumstance of this case leading to this appeal and the Statements of the Appellants to the Police.

I note that the Appellants testified in their own defence and were cross-examined. They also called witnesses who testified and were cross-examined. At the close of the defence, both learned counsel for the parties, addressed the learned trial Judge who in his judgment, considered all the defences of the Appellants including that of self-defence. The learned trial Judge, thoroughly reviewed and evaluated the evidence of both the prosecution and the defence. On the decided authorities which he referred to and relied on at page 98 of the Records he held to the effect, that an accused person, can be convicted on the evidence of a single witness provided his evidence is credible and be of such quality and cogency, that the court, could safely rely on it in coming to a decision in

the case or matter. The cases are The State v. Collins Ojo Aibangbe & anor. (1983) 3 NWLR (Pt.84) 584 @ 592-593; Anthony Igbo v. The State (1979) 1 All NLR 70 @ 75; Commissioner of Police v. D. Kwaive 14 WACA 319 and Alonse v. Inspector-General of Police (1959) 4 FSC 203 @ 204. On the 1st count, he believed the evidence of the P.W.1 which B count he held, was proved beyond reasonable doubt and convicted the Appellants as charged.

On the 2nd count, the learned trial Judge referred to the case of Akhinmien (spelt as Akinkunmi) & 3 ors v. The State (1987) 1 NWLR C (Pt.52) 608 (it is also reported in (1987) 3 SCNJ. 24.) as to the ingredients necessary to be present before common intention, could be invoked which he reproduced. At page 99 of the Records, His Lordship stated as follows:

“From the evidence before this court and in particular the joint D acts by the accused in carrying out the act as per that stated before this court, the common intention in this instance is that which as rightly argued by the prosecution be judged from the surrounding circumstance of the case. This is moreso especially where the evidence reveals that the E accused jointly lifted up their victim and again jointly hit his head on the ground. The intention must have been that formed there and then and manifested itself in their acts. Furthermore, the act of hitting the deceased’s head on the ground was undoubtedly in itself unlawful giving rise to the F offence having been committed that is to say murder. Moreover, with the accused hitting the deceased’s head on the ground as they did the natural probable outcome of (sic) consequence of the act is that resulting into the death of the victim as it is in the matter at hand.....”.

[the underlining mine] G

He thereafter, held that the prosecution had satisfied all the ingredients necessary and giving rise to the invoking of Section 79 of the Penal Code. That the prosecution had also proved the charge against the two accused persons for an offence contrary and punishable under Section 221 (b) of the Penal Code read together with the said Section 79 of the Penal Code. Consequently, he convicted the Appellants as charged. In H effect, the learned trial Judge, convicted the Appellants on both counts of

the charges against them.

I have taken pains to reproduce herein, the relevant findings of fact and the holding of the trial court having regard to issues 1, 2, 4 and 5 of the Appellants in their Amended Brief of Argument filed on their behalf. What is plain to me and I so hold is that the complaint of the learned counsel for the Appellants about loss of the said exhibits, and that the court below later wrote its Judgment without them, with respect, is misconceived.

The court below - per Obadina, JCA, considered the evidence of PW1 and at pages 176 and 177 of the Records and found as fact and held rightly, in my view, that it was not contradictory so as to affect the credibility of the PW1. It stated at page 176 thereof inter alia, as follows:

“..... The contradiction in the evidence of PW1 at the trial, vis-à-vis his statement to the Police, is, to my mind, not substantial. The contradictions are not only of minor nature, but also highly immaterial to main ingredient (sic) of the offence charged. The main issue is that the Appellants beat the deceased, hit him and lifted him up by the two legs and hit his head on the ground, on 12th of October, 1986....”.

[the underlining mine]

I agree.

At pages 183 to 188 of the Records, the court below, admirably and correctly, referred to the review and evaluation of the evidence by the learned trial Judge and the submissions of the learned counsel for the prosecution and the Appellants. At page 184 of the Record, the following appear, inter alia.

“A close and careful reading of the Judgment does not seem to support the complaint of the learned counsel for the Appellants. On the contrary, it seems to show that the learned trial Judge painstakingly reviewed considered and appraised the evidence of the Appellants who testified as D.W.1 and D.W.2 at the trial. From pages 78-80 of the record of appeal, the learned trial Judge considered in detail the case of the 1st Appellant who gave evidence as DW1. Similarly, the learned trial Judge also reviewed and appraised the case of the 2nd Appellant who also testified as DW2, from page (sic) 80-81 of the record of appeal. The evidence

of the DW3 was also well reviewed. The learned trial court also reviewed and appraised the evidence led by the prosecution in relation with the ingredients of the offence with which the Appellants were charged and the addresses of counsel on both sides.....”.

[the underlining mine]

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I also agree. I have substantially, stated or said so earlier in this Judgment.

I will pause here to observe that most of the submissions in the Appellants’ Brief, are substantially, the same as those in the court below. It is now settled that repetition of an argument, does not improve its efficacy. Mere repetition of an argument, does not improve an earlier arid, weak or completely unacceptable argument. See the cases of Calabar East Co-operative Thrift & Credit Society Ltd. & 3 ors. v. Etim E. Ikot (1999) 12 SCNJ. 321 @ 339 - per Achike, JSC (of blessed memory) and F.S.B. International Bank Ltd .v. Imano Nig. Ltd. & anor. (2000) 7 SCNJ. 65 @ 74. See also all the submissions in the Complementary Brief of the learned counsel for the Appellants all of which, were also adequately considered by the court below.

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Now, if I may revert to the issue of the lost Medical Report, in a plethora of decided authorities, it is now firmly established that where there is other evidence upon which the cause of death can be inferred, it is not vital, to have resort to Medical Report. See the case of Liman v. The State (1976) 6 UILR (Pt.II) 248. A court can also, in the absence of a Medical Report, properly infer the cause of death from the evidence and the circumstances of the case (as in the instant case). See the cases of Adamu v. Kano N.A. (1956) 1 FSC. 25; Bakori v.The State (1980) 8-11 S.C. 81; Eric Eyo v. Attorney-General, Bendel State (1986) 1 NWLR (Pt.17) 418; Oforlete v. The State (2000) 7 SCNJ. 162 - per Kalgo, JSC, and Alarape & 3 ors. v. The State (2001) 2 SCNJ. 162 @ 189 - per Iguh, JSC, just to mention but a few. In the case of Onwumere v. The State (1991) 5 SCNJ. (Pt.1) 150 @ 168; (1991) 4 NWLR (Pt.186) 428 @ 444, it was held that where the cause of death is obvious, Medical evidence ceases to be of any practical or legal necessity in homicide cases. Such a situation arises, where death was instantaneous or nearly so. That medi-

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cal 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. See also the cases of *Lori v. The State* (1980) 8-11 S.C. 81 and *Bwashi v. The State* B (1992) 6 S.C. 93.

If I may repeat it, the Appellants lifted the two legs of the deceased and dashed his head on the ground. He died ever before he got to the Hospital. As a matter of fact, in the issues of the Appellants in the court C below which appear at page 114 of the Records, cause of death, was not questioned or raised and therefore, it cannot be raised in this Court without leave being sought and obtained.

On common intention, it is settled that it may be inferred from D circumstances described in the evidence led before the trial court (as in the instant case) and it need not be provable only by the express agreement of the accused persons. See *Bada & anor. v. The Queen* 10 WACA 249; *Ogu Ofor & anor. v. The Queen* (1955) 15 WACA 4 @ 5; *R v. Atanyi* (1955) 15 WACA 34; *Alagba & ors. v. The King* (1950) 19 NLR E 129 and *Digbekim & 2 ors. v. The Queen* (1963) 1 All NLR 388, 394 and many others.

I note that Issue 2 relating to the delivery of the trial court's judgment six (6) months after address of counsel, is not one of the issues F raised and canvassed in the appeal before this Court. I believe the provisions of Section 258(4) of the 1979 Constitution of the Federal Republic of Nigeria and the decided authorities, in this regard, were/are appreciated by the learned counsel for the Appellants. In Nos. 8 and 9 of the "Summary and Conclusion", of the Appellants' Brief, the alternative issue G of conviction of the Appellants for the lesser offence of manslaughter, was not raised in the court below and so it cannot be raised in this Court as no leave was sought or granted.

Before concluding this Judgment, I note that there are the concurrent H findings of facts by the two lower courts and the attitude of this Court in respect thereof, is clear and firmly settled to the effect that it will not interfere. See the cases of *Nasamu v. The State* (1979) 6-9 S.C. 153; *Sebakin v. The State* (1981) 55 @ 75 and *Adio v. The State* (1986) 2

NWLR (Pt.24) 581 and many others.

Finally, I wish to state that the failure of the Respondent to file a Respondent's Brief, it is now firmly established, is of no consequence and it is immaterial. An Appellant must succeed or fail in his own Brief or case. But although the filing of a Respondent's Brief, is not automatic, B failure to so file, may amount to the Respondent being deemed to have admitted the truth of everything stated in the Appellant's Brief in so far as such, is borne out by the Record of proceedings. See the cases of Commissioner of Police v. Omenukwere (1992) 2 NWLR (Pt.590) 190 C.A.; C Waziri v. Waziri (1998) 1 NWLR (Pt.533) 322 C.A. and U.S.A. Plc v. Ajileye (1999) 13 NWLR (Pt.633) 116 C.A.

There is however, a But or hitch or rider so to say. The absence of a Respondent's Brief, will not place the Appellant at an undue advantage. D This is because, the Respondent, has already, a judgment of the court below or a trial court, in his favour. Findings of a lower court, are presumed correct, until they are set aside. See the case of Management Enterprises Ltd. & anor. v. Otusanya (1987) 4 S.C. 367; (1987) 4 SCNJ. E 10.

It is from the foregoing and the fuller reasons and conclusion in the lead Judgment of my learned brother, Onnoghen, JSC, that I too, find no merit in this appeal which fails and it is also dismissed by me. I also affirm the decision of the court below affirming the decision of the trial F court.

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