

SUPREME COURT OF NIGERIA
23RD MAY, 2008 SC. 207/2007
CORAM:- A. I. KATSINA-ALU, S. A. AKINTAN,
M. MOHAMMED, W. S. N. ONNOGHEN,
I. T. MUHAMMAD, JJSC

ENESI LUKMAN ABDULLAHI APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Identity of accused - Proof - Where witness failed to mention the name of an accused - Whom he knew before commission of the crime - To the police at earliest opportunity - It detracts from the credibility of his evidence at trial (H1)

COURTS - Identity evidence - Evaluation - Duty of Court - In evaluation of identity evidence - Even when witness claims he recognized accused - Court must warn itself that mistakes are some times made in the recognition of close relatives (H2)

FACTS

The appellant was one of six accused persons arraigned at the Okene Division of the Kogi State High Court on a two count charge of conspiracy and armed robbery. The case of the prosecution was that the accused persons had committed three robberies on or about the 9th and 11th August, 2001. The victims of the robberies were Paul Nzewi and Benneth Onwugbufor, who testified as P.W.1 and P.W. 2, respectively. It was said that P.W.1 was robbed on 9th August and on 11th August, 2001 while P.W. 2 was robbed on 11th August, 2001. All the incidents of robbery occurred at night. Both P.W.1 and P.W.2 claim to have known the appellant before the robbery attacks on them. According to P.W.1, when the robbers forcibly entered his room for their purpose on 9th August, the electric bulb was on in the room and he was able to recognize the appellant before one of the robbers broke the bulb. P.W.2 also claims that when the robbers visited him on 11th August his light was on and he was able to recognize the appellant. However, though both P. W. 1 and P. W. 2 said

they reported to the police after the respective robbery attacks on them, they did not mention the fact that they know any of the robbers. Nor did they mention this fact to any of the neighbours who came to commiserate with them at the wake of the robbery attacks. It was not until five days after the last robbery attack that they disclosed the identity of the appellant as one of those that robbed them.

After trial, the learned trial judge found the accused persons guilty as charged. They were each sentenced to seven years imprisonment on the count of robbery and N3, 000.00 fine or one year in lieu on the conspiracy count. Appellant had appealed against his conviction to the Court of Appeal but his appeal was dismissed. He has brought this further appeal to the Supreme Court. His contention is that there was insufficient evidence to prove that he was one of the robbers as claimed by the prosecution witness.

ISSUE FOR DETERMINATION

"Whether there was a proper identification of the appellant?"

HELD (Unanimously allowing the appeal per ***KATSINA-ALU JSC***)

Identity of accused - Proof

1. It is significant to point out at this stage that P.W.1 and P.W.2 did not explain throughout the trial why they failed to mention the name of the appellant.

The position of the law is this. Where a witness failed to mention the name of an accused whom he knew before the commission of a crime, to the Police at the earliest opportunity, that would detract from whatever credibility the trial court may wish to ascribe to his evidence. In addition he should describe the clothes the accused wore at the scene of the crime. Surely, this is common sense and failure to adopt this common sense approach would inevitably result in the acquittal and discharge of the accused. (p. 2195 H)

Identity evidence - Evaluation - Duty of Court

2. Recognition is undoubtedly more reliable than identification of a stranger. But even when the witness is purporting to recognize someone whom he knows, the trial Judge must warn himself that mistakes in recognition of close relatives and friends are sometimes made. In criminal trials, the burden is always on the prosecution to prove its

case beyond reasonable doubt. It is incumbent upon the court to arrive at its decision through a process of reasoning which is analytical and commands confidence.

So having regard to these facts and circumstances, was the appellant at the scene of the crime? He said he was not. He told the Police at the earliest opportunity that he was in his house sleeping at the material time. His wife Sikirat Lukman testified as D.W.4 and confirmed her husband's alibi. The Police conducted a search of the appellant's house shortly after his arrest and found nothing incriminating the appellant. The prosecution did not present any other evidence that linked the appellant with the commission of the crime with which he was charged. (p. 2196 C)

NOTABLE POINT OF INTEREST

MOHAMMED JSC

1. Finding on identity was perverse as it was not based on credible evidence

The law is trite that, where a trial court had drawn a conclusion from accepted or proved facts and which facts do not prove the prosecution's case, an appellate court has a duty to interfere with such findings because they are perverse. In the instant case where the identity of the appellant was not established by credible evidence, the interference by this court has become necessary. (p. 2198 H)

REPRESENTATION

Chukwuma-Machukwu Ume, (with him; C. U. Ekomaru, I. M. Njika, U. J. Chukwu and E. Dyagas), for the Appellant.

Joe A. Abrahams, Attorney-General, Ministry of Justice, Lokoja, Kogi State, (with him; C. E. Adejo), for the Respondent.

CASES REFERRED TO

Udeh v. The State (1999) 5 S.C. (Pt.1) 87; (1999) 7 NWLR (Pt.609) 1

Wakala v. The State (1991) 8 NWLR (Pt.211) 552

R. v. Turnbull (1976) Cr. App. R. 132

Abudu v. The State (1985) 1 NWLR (Pt.1) 55

Okolo v. Uzoka (1978) 4 S.C 77 ; (1978) 4 S.C (Reprint) 53

- Fatoyinbo v. Williams (1956) SCNLR 274
Adio v. State (1986) 2 NWLR (Pt.24) 581
Dare Kada v. The State (1991) 11-12 S.C. 1
Tsaku v. The State (1986) 1 NWLR (Pt. 17) 516
C.O.P v. Tijani Alao (1959) WRNLR 39
B Idahosa v. The Queen (1965) NMLR 85
Ikemson v. The State (1998) 6 S.C. (Pt.I) (1998) 1 ACLR 80 at 102
Balogun v. A-G of Ogun State (2002) 2 S.C. (Pt.II) 89; (2002) 2 SCNJ 186
C Ahmed v. The State (2001) 12 S.C. (Pt.1) 135
Anekwe v. The State (1998) ACLR 426 at 433

STATUTE REFEREED TO

Penal Code, ss. 97(1) and 298(C)

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LEAD JUDGMENT BY KATSINA-ALU JSC

This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 16th January, 2007. The appellant and five others were the accused persons at the trial court. They were charged before Okene High Court on a two count charge of conspiracy and armed robbery as follows:-

E *“That you Monday Lawal, Abu Osah, Enesi Lukman Abdullahi, Abdulazeez Hassan, Hassan Suberu, and Mohammed Ismaila on or about the 9th and 11th of August, 2001, at Paul Nzeni and Benneth Onwugbufors’ Residence Iruvuchaba Okene in Okene Local Government Area within the Kogi State Judicial Division agreed to an illicit Act, to wit, you agreed to commit armed robbery at the premises of Paul Nzeni and Benneth Onwugbufors’ residence, Iruvucheba*
F *Okene and that same act was done in pursuance of the agreement and that you thereby committed the offence of criminal conspiracy punishable under Section 97(1) of the Penal Code.*

That you, Monday Lawal, Abu Isah, Enesi Lukman Abdullahi, Abdulazeez Hassan, Hassan Suberu, and Mohammed Ismaila on or about the 9th and 11th of August, 2001, at Paul Nzeni and Benneth Onwugbufors’ Residence, Iruvucheba Okene in Okene Local Government Area within the Kogi State Judicial Division while armed with guns, machetes and cutlasses attacked one Paul Nzeni and
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Benneth Onwugbufor and robbed Paul Nzeni of the sum of N52,000.00 in cash and Benneth Onwugbufor the sum of N68,000.00 and you thereby committed the offence of armed robbery punishable under Section 298 (c) of the Penal Code;”

Accused persons absconded from prison custody and could not be apprehended to stand trial for the two offences. The two accused who stood trial were Abu Isah and Enesi Lukman Abdullahi (2nd and 3rd accused respectively). They were tried and convicted of the two count charge. They were each sentenced to seven years imprisonment on the count of robbery and =N=3,000.00 fine or one year in lieu on the conspiracy count. The sentences of imprisonment were to run concurrently. Their appeals to the Court of Appeal were dismissed, hence the present appeal to this court by Enesi Lukman Abdullahi.

The parties filed their respective Briefs of Argument in this court. The appellant formulated the following lone issue in the appellant’s Brief:-

“1. Whether from the totality of the evidence adduced at the trial court, the Court of Appeal rightly affirmed that the charges of conspiracy and armed robbery against the appellant were proved beyond reasonable doubt?”

The respondent in its’ Brief of Argument, adopted the sole issue raised by the appellant.

I think the core issue in this appeal is whether there was a proper identification of the appellant. This issue clearly relates to visual identification of the appellant. It was the case of the prosecution that the appellant and one Abu Isah, who was tried along with him committed three armed robberies against P.W.1 Paul Nzewi and P.W.2 Benneth Onwugbufor. It was said that P.W.1 was robbed on 9th August, 2001 and 11th August, 2001. P.W.2, it was contended, was robbed on 11th August, 2001. All the incidents occurred at night. The case of the prosecution is as told by P.W.1 and P.W.2, the two victims of the robberies. I think it is vital to relate the whole story as given by these witnesses.

P.W.1 gave evidence and stated as follows:-

“On 9/8/2001 about 1.50 a.m., I was sleeping in my room when I heard a knock on my door. I asked who was knocking but

there was no response. Instead the door of my room was forced open. I quickly rose up from my bed as three men, armed, came into my room. The three men were the two accused persons and one other man who is at large now. I grabbed the man who is now at large and he hit my head with the gun he was holding as a result of which I fell down.

The 3rd accused was holding a knife and a stick. He broke the bulb in my room. The accused person who is now at large pulled me up and asked me to take them, to where I kept my money. I opened my cupboard which was containing the sum of N42,000. The 2nd accused person who was holding a gun picked the money from my cupboard. I was told to lie down which I did. I was lying down when the three armed robbers left.

My daughter by name Uchenna and two of my neighbours by name Achuchukwu and Salihu took me to a clinic where I was treated and discharged. I was able to recognize the accused persons and the other person at large because I saw them clearly before they broke the bulb in my room. At the time they struck the light in my room was on.

On 11/8/2001 about 2.10 a.m. I was sleeping in my room when I heard a knock on my door. Before I could do anything, the door of my room was forced open by the same set of armed robbers i. e. the two accused persons and the one at large. The 2nd accused person was holding a gun while the 3rd accused person was holding a stick. The one at large was holding a gun. My daughter was shouting for help but there was no help.

The person at large demanded for my money and I gave him the sum of N15,000 that was in my room.

The 3rd accused person said I was a stubborn man and ordered me to lie down. I lied down and he was beating me with a stick he was holding.

The 2nd accused person and the one at large forced my daughter to take them to my neighbour's room. My neighbour's name is Benneth Onwugbufo.

There was a gunshot into my sitting room which scattered some of my property there.

While I was lying down on the floor in my room, I heard some-

body asking whether they had got the money to which someone responded, yes, after which they all left. It was at this stage that I got up from where I was lying down. I later went to the clinic for treatment, after each robbery incident I went to report to the Police

By Afeigbe: The accused persons were arrested after the second armed robbery incident. When I made the first report to the Police, I did not mention the names of the accused persons. The accused persons were not masked when they robbed me. I knew the accused person at large and the 2nd accused person before the incident.

The names I mentioned in my statement to the Police were Monday, Abu and Oje Audu in respect of the first robbery incident. In respect of the second robbery incident I mentioned Monday and Ojo Audu. The person I referred to as Ojo Audu is the 3rd accused person before the court.

The person I referred to as Abu in my statement to the Police is the 2nd accused person before the court.

When my neighbours came to take me to the hospital, I did not tell them about the identity of the armed robbers.

(Underlining for emphasis)

For his part P.W.2 gave evidence and said:-

“On 9/8/2001 about 1.10 a.m. I took my wife to the Total Filling Station, Okene, to board a bus to Aba. On getting back to my house, I discovered that the fluorescent light which was on before I went out was no longer on. When I was wondering what happened, my neighbour’s daughter, Uchenna Nzewi told me that armed robbers had just struck in our compound.

I went into my neighbour’s room where I met him crying. He, P.W.1, told me that armed robbers had just attacked him and made away with his money.

On 11/8/2001 about 2.30 a.m. I was sleeping in my room when I heard gunshots. I got up and peeped through my window and saw some men downstairs. I recognized those men. They are Monday, James, Ojo, Hassan and German, an electronic repairer and Abu. The 2nd accused is Abu while the 3rd accused is an electronic repairer, popularly known as German.

These men climbed upstairs to my room where they demanded

that I should open the door or they would kill me. I refused to open the door but they forced it open. When they came in my light was on. The 3rd accused person and the one at large by name Monday pointed torch light on my face and demanded for N1 million. I told them that I did not have that type of money. Monday shouted that I should bring the money and I responded by shouting "Jesus." I was ordered to lie down on my face by Monday who put a gun to my head and demanded that I should bring N1 million. I told him I had none and that they should ransack my room take whatever amount of money they saw. They were searching my room for money. After sometime, I heard someone shouting outside saying "Mapo, Sergeant, Alright" as a result of which all of them left. When I gathered myself I stood up and went round my room where I discovered that the armed robbers including the accused persons had made away with the sum of N68,000.

I came out of my room and I saw my neighbour, P.W.1, who told me that he was also robbed by the accused persons.

About 9.00a.m. both the P.W.1 and myself went to report to the Police. We also reported to the head of the Iruvuchaba Community." (Underlining for emphasis)

It will be seen clearly from the evidence of P.W.1 and P.W.2 - the two victims of the robberies that they knew the appellant and the accused persons by name at the time of the incidents. Both witnesses recognized the appellant. It is also clear that they reported these incidents to the Police and their community leader on the morning of the days in question. Lastly, the witnesses testified that they did not disclose the identity of the appellant to the Police nor the head of their community nor indeed to P.W.1's neighbours who took him to hospital

In his issue 1, the appellant contended that his purported recognition by P.W.1 and P.W.2 was an after thought and a farce meant to implicate the appellant for whatever reason. This, it was pointed out, was borne out by the failure of the victims of the robberies (P.W.1 and P.W.2) to disclose the identity of the appellant to either the Police when they made their reports or to the head of the community immediately after the incidents. The witness (P.W.1) also did not mention the name of the appellant to his neighbours who took him to

hospital as one of the persons who robbed him. It was also said that this omission, which was not explained, was fatal to the case of the prosecution.

It was further pointed out that P.W.1 and P.W.2 waited until five days after they were robbed before disclosing the identity of the appellant and the other accused persons who they alleged robbed them. If, it was submitted, the learned trial Judge had averted his mind to this fact, he would have rejected the evidence linking the appellant to the robberies.

The respondent in Reply pointed out that the evidence called by the prosecution shows that the appellant in company of his colleagues in crime robbed the P.W.2 immediately after robbing the P.W.1. It was said that in these circumstances it was immaterial whether these witnesses mentioned the name of the appellant to the Police at the time they made reports to the Police. The respondent further submitted that the evidence of these witnesses is sufficient to support the conviction of the appellant for the offences with which he was charged.

As I have pointed out earlier on in this judgment, the appellant was the 3rd accused at the trial. The main evidence against him came from P.W.1 and P.W.2. They were the victims of the robberies. The two witnesses claimed that they knew the appellant long before the incidents and that he lived in the area. They knew him by name. It was also their evidence that he participated in the three armed robbery attacks on them on 9th and 11th August, 2001. They also disclosed that when they first reported the matter at the Police Station shortly after each robbery incident none of them told the Police that they knew any of the robbers that attacked them. They also did not disclose the identity of the appellant to the head of the community to whom they reported. P.W.1 in addition did not tell his neighbours who took him to hospital after the attack that he knew any of the robbers.

The record shows that it was after about five days later that the witnesses mentioned the names of some of the robbers, including that of the appellant.

It is significant to point out at this stage that P.W.1 and P.W.2 did not explain throughout the trial why they failed to mention the name of the appellant.

The position of the law is this. Where a witness failed to mention the name of an accused whom he knew before the commission of a crime, to the Police at the earliest opportunity, that would detract from whatever credibility the trial court may wish to ascribe to his evidence. In addition he should describe the clothes the accused wore at the scene of the crime. Surely, this is common sense and failure to adopt this common sense approach would inevitably result in the acquittal and discharge of the accused. See Udeh v. The State (1999) 5 S.C. (Pt.1) 87; (1999) 7 NWLR (Pt.609) 1, Wakala v. The State (1991) 8 NWLR (Pt.211) 552, R. v. Turnbull (1976) Cr. App. R. 132. Recognition is undoubtedly more reliable than identification of a stranger. But even when the witness is purporting to recognize someone whom he knows, the trial Judge must warn himself that mistakes in recognition of close relatives and friends are sometimes made. See R. v. Turnbull (1976) Cr. App. R. 132, Abudu v. The State (1985) 1 NWLR (Pt.1) 55. In criminal trials, the burden is always on the prosecution to prove its case beyond reasonable doubt. It is incumbent upon the court to arrive at its decision through a process of reasoning which is analytical and commands confidence.

So having regard to these facts and circumstances, was the appellant at the scene of the crime? He said he was not. He told the Police at the earliest opportunity that he was in his house sleeping at the material time. His wife Sikirat Lukman testified as D.W.4 and confirmed her husband's alibi. The Police conducted a search of the appellant's house shortly after his arrest and found nothing incriminating the appellant. The prosecution did not present any other evidence that linked the appellant with the commission of the crime with which he was charged.

Having regard therefore to the circumstances of this case, I think the verdict was unsafe and unsatisfactory. I would therefore allow this appeal and set aside the conviction and sentence. The appellant is accordingly acquitted and discharged.

AKINTAN JSC

The appellant and another co-accused were arraigned, tried and convicted at Okene High Court for the offence of armed robbery. They were both convicted and sentenced to terms of imprisonment. The appellant's appeal to the Court of Appeal against his conviction and sentence was dismissed. The present appeal is against the judgment of the Court of Appeal dismissing his appeal to that court. B

The main attack launched against the judgment in this court is against the evidence relied on in support of the conviction of the appellant. It is argued that the evidence relating to the identity of the appellant, as given by the two witnesses who happened to be the victims of robberies, should have been treated as unreliable. The reason given for that contention is that although each of the two witnesses claimed to have known the appellant long before the incident, yet they failed to disclose his name and identity to both the Police and others shortly after the incidents and even at the time they made their statement to the Police on the incident. It was after about five days later that the two principal witnesses decided to name the appellant as one of the people that carried out the robbery and no reason was given for the delay. C D E

The omission to disclose the identity of the appellant at the earliest opportunity is said to be enough to vitiate the credibility of the evidence given by the two principal witnesses. I share the same view. I had the privilege of reading the draft of the leading judgment written by my learned brother, Katsina-Alu, JSC. For the reason I have given above and the fuller reasons given in the leading judgment which I hereby adopt, I agree that there is merit in the appeal. I accordingly allow it and set aside the conviction and sentences passed on the appellant and I replace them with an order of discharge and acquittal. F G

MOHAMMED JSC

This appeal is against the judgment of the Court of Appeal, Abuja Division dismissing the appellant's appeal on 16/1/2007, against H

his convictions and sentences by the High Court of Justice of Kogi State, of the offences of Conspiracy and Armed Robbery under Sections 97(1) and 298(c) of the Penal Code.

The appellant together with five other persons were arrested and detained in prison custody on the accusation of having been involved in a number of armed robberies committed in Okene town of Kogi State. However four of the persons accused along with the appellant had absconded during a jail break and could not be apprehended to stand trial. Consequently, the appellant and one other accused, were tried together and convicted by the trial High Court. Their appeal to the Court of Appeal was heard and dismissed. The present appeal by the appellant alone, is therefore against the dismissal of his appeal. The only issue arising for determination in this appeal, is whether from the evidence on record adduced by the prosecution, the appellant was rightly convicted of the offences of Conspiracy and Armed Robbery, under Sections 97(1) and 298(c) of the Penal Code.

The main complaint of the appellant in this issue is on the quality of the evidence of P.W.1 who connected him by name to the offences he was charged and convicted. It was argued on behalf of the appellant, that since P.W.1 claimed to have known the appellant before the incident of the armed robbery, the witness should not have hesitated to mention his name to the Police at the time of reporting the incident. Learned appellant's counsel therefore attacked the findings of the trial court affirmed by the court below that the fact that P.W.1 said he did not mention the name of the appellant in his report to the Police after the first incident, did not weaken the prosecution's case in anyway, as erroneous. In the circumstances of this case, I fully agree that the failure of P.W.1, who claimed to know the appellant not only by recognizing him on the face but also in name, to give the name of the appellant at first opportunity of reporting the robbery incident as one of the participants, is fatal to credibility of the evidence of P.W.1 on the identity of the appellant as one of those who took part in the robbery. The law is trite that, where a trial court had drawn a conclusion from accepted or proved facts and which facts do not prove the prosecution's case, an appellate court has a duty to interfere with such findings because they are perverse. See Okor v. Uzoka (1978) 4

S.C 77; (1978) 4 S.C. (Reprint) 53, *Fatoyinbo v. Williams* (1956) SCNLR 274, *Adio v. State* (1986) 2 NWLR (Pt.24) 581 and *Dare Kada v. The State* (1991) 11-12 S.C. 1; (1991) 8 NWLR (Pt.208) 134 at 146. In the instant case where the identity of the appellant was not established by credible evidence, the interference by this court has become necessary. B

It is with these few comments that I entirely agree with the judgment of my learned brother, Katsina-Alu, JSC., which I had the opportunity of reading in advance that there is merit in this appeal. Accordingly, I also allow this appeal. The convictions and sentences passed on the appellant under Sections 97(1) and 298(c) of the Penal Code by the trial court and affirmed by the court below, are hereby set aside. The appellant is acquitted and discharged. C

ONNOGHEN JSC

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The appellant was one of six accused persons charged before the Kogi High Court of Justice holden at Okene in charge No. KGS/OK/IC/2002, with offences of criminal conspiracy and armed robbery punishable under Sections 97(1) and 298 (c) of the Penal Code respectively. The appellant was the 3rd accused in the charge. At the conclusion of the hearing, appellant together with the other accused persons were found guilty as charged, convicted and sentenced accordingly. Appellant's appeal to the Court of Appeal holden at Abuja in appeal No. CA/A/15C/05 was dismissed in a judgment delivered by that court on the 16th day of January, 2007, resulting in the instant appeal, the issue for the determination of which has been identified by the learned counsel for the appellant, Chukwuma-Machukwu Ume, Esq., in the appellant's Brief of Argument filed on the 2nd day of August, 2007, is as follows:- E F G

"Was there any proper identification evidence to have enabled the Honourable Court of Appeal arrive to (sic) the conclusion that the appellant committed the robberies?"

There are three robbery incidents involved in the charge and there is evidence that the said robberies were not committed by the same gang of armed robbers. The victims of the robberies are P.W.1 and P.W.2 both of who knew the appellant very well being of the H

same community. P.W.1 was robbed on 9/8/2001 and 11/8/2001, while P.W.2 was robbed on 11/8/2001.

It is the submission of learned counsel for the appellant in the appellant's Brief of Argument that the evidence adduced by the prosecution as to the identification of the appellant as one of the robbers involved in the robberies is not cogent and sufficiently satisfactory to ground his conviction for the offence charged; that there are doubts arising from the identification of the appellant which doubts ought to be resolved in favour of the appellant particularly in view of the fact that appellant denied the charge and raised a defence of alibi; that the identification parade was not conducted in accordance with laid down standard procedure.

Learned counsel further submitted that P.W.1 and P.W.2 never mentioned the name of the appellant as one of those who robbed them soon after the robbery incidents but did so belatedly, four days after the alleged incident as recorded at pages 87 -90 of the record; that if it were true that the appellant was one of the robbers, P.W.1 and P.W.2 would have mentioned him at the first opportunity such as when they reported the matter to the Police and the head of the community immediately after the robbery incident and that the failure to so mention the appellant creates a doubt as to whether P.W.1 and P.W.2 actually recognized those who allegedly robbed them, relying on Tsaku v. The State (1986) 1 NWLR (Pt. 17) 516 at 530, C.O.P v. Tijani Alao (1959) WRNLR 39 at 40, Idahosa v. The Queen (1965) NMLR 85 at 88.

It is the submission of learned counsel for the respondent that the prosecution did discharge the onus placed on them by law to prove the charge against the appellant beyond reasonable doubt; that the prosecution proved that there was an agreement between the accused persons including the appellant to do an illegal act, to wit armed robbery; that the evidence of P.W.1 and P.W.2 established the ingredients of the offence and that the lower courts were therefore right in their decisions; relying on Ikemson v. The State (1998) 6 S.C. (Pt.I) 114; (1998) 1 ACLR 80 at 102, Balogun v. A-G of Ogun State (2002) 2 S.C. (Pt.II) 89; (2002) 2 SCNJ 196 at 209, that the appellant and his colleagues in crime were armed with guns, sticks and cutlasses at the time they committed the armed robbery on P.W.1

and P.W.2; that appellant was present at the scene of crime.

On the issue of identification of the appellant, learned counsel submitted that the argument of his learned friend on the matter is misconceived and lack merit; that evidence show clearly that P.W.2 knew the appellant before the robbery incident and that appellant with others robbed P.W.2 immediately after robbing P.W.1; that it was immaterial whether or not P.W.1 or P.W.2 mentioned the name of the appellant to the Police at the time they made the report or at the earliest opportunity and that the evidence of P.W.2 is sufficient to support the conviction of the appellant for the offences; that the identification parade conducted in this case was unnecessary as the identity of the appellant was never in doubt, relying on Balogun v. A-G of Ogun State (2002) 2 S.C. (Pt.II) 89; (2002) 2 SCNJ 196 at 211-212, Archibong v. The State (2006) 5 S.C. (Pt.III) 1; (2006) 14 NWLR (Pt.1000) 349 at 372, Igbi v. The State (2002) 2 S.C. 67; (2002) 2 SCNJ 63 at 74. Finally, learned counsel urged the court to resolve the issue against the appellant and dismiss the appeal.

It is settled law, that in a criminal trial the onus remains with the prosecution to prove or establish the charge against the accused person(s) beyond reasonable doubt and that the onus or burden of proof never changes/shifts - see the case of Ahmed v. The State (2001) 12 S.C. (Pt.1) 135; (2003) 3 ACLR 145 at 177, Anekwe v. The State (1998) ACLR 426 at 433, Obiakor v. The State (2002) 6 S.C. (Pt.II) 33; (2002) 6 SCNJ. 193. In the instant case, the appellant was charged, along with others with the offences of criminal conspiracy and armed robbery contrary to Sections 97(1) and 298(C) of the Penal Code as applicable to Kogi State. It is therefore the duty of the prosecution, in order to discharge the burden of proof placed on it by law to adduce evidence to establish the following ingredients of the offences :-

“(a) an agreement between two or more persons to do an illegal act or an act which is not illegal by illegal means; and

(b) that illegal act was done in a furtherance of the agreement and that each of the accused persons participated in the illegality - conspiracy. The above is as relates to the offence of conspiracy.”

On the offence of armed robbery, it is the duty of the prosecution to establish by evidence the following ingredient, beyond reasonable doubt, to wit:-

“(a) theft by the accused person(s).

(b) the causing of hurt or wrongful restraint on the victim(s) by the accused person(s).

(c) that the acts complained of were done in the process of committing the theft or in order to commit the theft and/or carry away the property obtained by the theft.

(d) that the accused persons did the acts complained of voluntarily, and

(e) that the accused person(s) was/were armed with dangerous weapons while committing the offence in question.”

It is the case of the prosecution that it discharged the burden of proof placed on it by law by the evidence of P.W.1 and P.W.2 on record and as such the appellant was properly convicted and sentenced by the trial court for the offences charged and that the lower court was therefore right in affirming the said conviction and sentence. The appellant on the other hand, has argued that the prosecution has not placed him (appellant) firmly at the scene of crime having regards to the circumstances in which the appellant was identified or recognized as one of those who carried out the armed robberies. In short, the question is whether the prosecution has proved beyond reasonable doubt that the appellant participated in the armed robberies?

It is not in dispute that P.W.2 knows the appellant prior to the robbery incidents. Also not disputed is the fact that at the time P.W.1 and P.W.2 reported the incidents to the Police, the name of the appellant was never mentioned by them as being one of those who carried out the robberies in question and that the name of the appellant was only mentioned in the statements of P.W.1 and P.W.2 5 to 6 days after the report.

The statement of P.W.1 to the Police stated, *inter alia*, as follows:

“On Thursday being 9th day of August, 2002, at about 1.50 a.m in the night, I was sleeping in my room when I heard a knock on the door, parlour door and I asked who was the person knocking on my door. There was no response (sic) from anybody other than to forced (sic) my door opened and some group of boys numbering about three came inside to meet me where (sic) identified one Mon-

day Abu Awe a panel beater who had a workshop directly opposite Riverside Restaurant, Lagos Road, Okene and one Ojo Mudu to be the three men."

In P.W.2's statement to the Police he stated thus:-

"On 11/8/01 at about 2.10 a.m I was sleeping in my house when I heard a sound of gun downstairs in front of our house. On hearing this sound, I peeped through my window to see what was happening because the florescent light in front of our house was on. There, I was able to see the following people whom I know very well (1) Abu popularly know (sic) as Awe, a panel beater at opposite Riverside Restaurant, Iruvucheba, Okene (2) Monday living in a house beside Riverside Restaurant Iruvucheba, Okene (3) Hassan popularly know (sic) as Katsina who use to stay with Abu alias Awe before....."

At pages 88 and 90 of the record P.W.1 and P.W.2 stated that after the robbery incidents they reported the incident to the Police with P.W.2 adding that he also reported the incident to the head or community leader of Iruvucheba, Okene.

However under cross-examination at page 40 of the record, P.W.1 stated thus:

"When I made the first report to the Police, I did not mention the names of the accused persons. The accused persons were not masked when they robbed me. I know the accused person at large and the 2nd accused person before the incident....."

When my neighbours came to take me to the hospital, I did not tell them about the identity of the armed robbers."

In view of the facts, can it be said that the prosecution has proved that appellant was one of those who robbed the victims - P.W.1 & P.W.2 on dates in question beyond reasonable doubt particularly having regards to the fact that appellant had maintained that he was never at the scenes and even raised a defence of alibi which was testified to by D.W.4? His wife? Is it safe to convict the appellant of the offences charged under the circumstances? I do not think so. Both P.W.1 and P.W.2 know the appellant before the date of the robberies and testified to the fact that the robbers were not masked while carrying out the robberies. Yet at the first opportunity of reporting the incidents to the Police, neighbours and community leader neither

P.W.1 and P.W.2 mentioned the identity of the appellant as being one of the armed robbers who carried out the raid. They only mentioned the name of the appellant 5 days after the incidents and when they made their statements to the Police. There is no explanation from the prosecution as to why P.W.1 & P.W.2 omitted to mention the name of the appellant as being part of the gang of robbers of that date in the first opportunity. I hold the view that the circumstances of the non-mentioning of the name of the appellant to the Police, community leader, and neighbour soon after the robbery incidents has raised some doubts as to the reliability of the statements of P.W.1 & P.W.2 as to the participation of the appellant in the robbery incidents in question particularly as it is in evidence that the said robbers were not masked during the operation.

It is settled law that in a criminal trial the standard of proof is proof beyond reasonable doubt and that where there exists any doubt the same must be resolved in favour of the accused person. In the instant case, I hold the view that the subsequent mentioning of the name of the appellant in the statement of P.W.1 and P.W.2 is clearly an afterthought which raises serious doubt as to the participation of the appellant in the crime in question and therefore hold that the doubt be and is hereby resolved in favour of the appellant.

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Katsina-Alu, JSC., that I too allow the appeal, set aside the judgments of the lower courts and in their place, enter a verdict of not guilty and discharge and acquit the appellant of the charge against him.

MUHAMMAD JSC

I have read before now, the judgment of my learned brother, Katsina-Alu, JSC. I agree with his reasoning and conclusion. The appeal has merit and it is allowed by me too. I abide by all orders made in the leading judgment.