

**SUPREME COURT OF NIGERIA**  
19TH DECEMBER, 2008. SC. 301/2006  
**CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,**  
**M. MOHAMMED, F. F. TABAI,**  
**C. M. CHUKWUMA-ENEH, JJSC**

AGBONMWANRE OMOREGIE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL LAW - Murder - Defences - Self defence - Application of  
- All an accused is required to do is raise the defence - Prosecution  
then has the burden of showing that it does not apply by the evi-  
dence called - As it did in this case (H1)

CRIMINAL PROCEDURE - Murder - Self defence - Injury from de-  
ceased - Accused person who caused death in self defence - Should  
show his injury as justification to his act - At earliest opportunity -  
Which appellant failed to do (H2)

APPEALS - Concurrent findings - Attitude of appellate courts - Un-  
less there is miscarriage of justice - Or violation of some principles of  
law or procedure - Which is not the case herein - Appellate court will  
not interfere therewith (H3)

**FACTS**

The appellant as 1st accused, along with two other persons, was arraigned and tried for the offence of murder at the High Court of Edo State, holden at Benin. At the close of the case for the prosecution, the counsel for the 2nd and 3rd accused persons made a no case submission which was upheld in respect of the 3rd accused. At the end of trial, 2nd accused was discharged and acquitted while appellant was found guilty as charged. He was accordingly sentenced to death.

The case of the prosecution was that appellant, on receiving information that his mother, the 2nd accused, was involved in a fight, rushed to the scene of the fight armed with a broken bottle. The deceased tried to restrain the appellant and was stabbed by the ap-

pellant in the process leading to his death. Appellant's appeal against his conviction was dismissed by the Court of Appeal. Hence he has brought this further appeal to the Supreme Court.

**ISSUE FOR DETERMINATION**

*"Whether or not the defence of self defence was available to the Appellant having regard to the evidence on record."*

**HELD** (Unanimously dismissing the appeal per **MOHAMMED JSC**)  
***Murder - Defences - Self defence - Application of***

1. There is no doubt whatsoever that all the Appellant was required to do was to raise the defence in his plea, leaving the prosecution with the burden of showing without any reasonable doubt, that by the evidence called by it, what the Appellant did in causing the death of the deceased, completely ruled out the defence of self-defence.

I completely agree with the two Courts below that there is overwhelming evidence in support of the conviction and sentence of the Appellant for the offence of murder under Section 319(1) of the Criminal Code CAP 48 Vol. II Laws of Bendel State of Nigeria 1976 as applicable in Edo State. The fight which the Appellant joined because his mother was involved, took place on a street and in broad day light in front of eye witnesses who saw him arriving at the scene of the fight with a broken bottle which he used in stabbing the deceased Friday Agbonghae in the armpit which resulted in causing the death of the deceased the same day at the University of Benin Teaching Hospital. I must note that apart from Appellant, none of the witnesses who were at the scene of the fight that day of 22 November, 1994, saw the deceased with a cutlass not to talk of seeing the deceased attacking the Appellant with the cutlass. (pp. 3741 C/3744 C)

***Murder - Self defence - Injury from deceased***

2. Indeed if it were true that the deceased attacked the Appellant with a cutlass, cutting him on left hand and shoulder, inflicting a wound which left a scar which he showed to the trial Court, the wounds would have been first, shown to the Police at the station where he reported himself after the incident of 22nd November 1994. Failure to have done so on his part, coupled with the clear evidence of P.W.8 Police Investigator who saw the Appellant on the very day of the

incident without any sign of injury on him, seemed to confirm the conclusion of the two Courts below that the story of the cutlass by the Appellant, was a mere after-thought trying to hide behind a defence of self-defence which was rightly found not available to him by the two Courts below. (p. 3744 G)

***Concurrent findings - Attitude of appellate courts***

3. The law is well settled that this Court will not normally disturb concurrent findings of the High Court and the Court of Appeal, unless there is some miscarriage of justice or a violation of some principles of law or procedure.

In the case at hand, there is no justification at all for interfering with the judgment of the trial Court finding the Appellant guilty of the offence of murder and sentencing him to death on the face of the affirmation of that decision by the Court below. This appeal has no merit. It is hereby dismissed. The conviction and sentence of the Appellant for murder by the trial Court as affirmed by the Court below are hereby further affirmed. (p. 3745 B)

**NOTABLE POINTS OF INTEREST**

**MUKHTAR JSC**

*1. Self Defence - Successful plea - Action of accused must have been unavoidable*

Basically self defence that will have any impact on a case to favour an accused person must be such that the action taken by the accused was unavoidable. Authorities abound on when the defence of self-defence can avail an accused person, and these authorities contain the ingredients of self-defence. These ingredients are:-

*“(a) the accused must be free from fault in bringing about the encounter.*

*(b) there must be present an impending peril to life or of great bodily harm either real or so apparent as to create honest belief of an existing necessity.*

*(c) there must be no safe or reasonable mode of escape by retreat, and*

*(d) there must have been a necessity for taking life”.*

(p. 3747 B)

**CHUKWUMA-ENEH JSC**

*2. By his own acts, appellant was the aggressor*

There are no reasonable grounds to believe that the appellant's life has been in any danger as to justify killing the deceased as the only option open to him to save his own life, on the peculiar facts of this case. There is evidence that he broke off from the fray to pick a broken bottle some distance away from the scene of the crime. There is therefore a clear opportunity for the appellant to escape if he wanted but it was not taken up, that is to say, as the appellant by his own acts was the aggressor. That is to say, the evidence has not shown any inclination on the appellant's part to retreat not even when the opportunity presented itself. (p. 3751 D)

**D REPRESENTATION**

Dr. F. A. Irumhekha with Oluwatosin Atanda for the Appellant  
O. S. Uwuigbe (Mrs.) Director Public Prosecutions, Ministry of Justice  
Edo State with T. I. Eghe-Abe (Mrs.) Principal Legal Officer for the Respondent.

**CASES REFERRED TO**

- Aigbadon vs. The State (2000) 4 S.C. (Pt.1) 1 at 11
- Opayemi vs. The State (1985) 2 NWLR (Pt.5) 101 at 102-103
- F Ihueka vs. The State (2000) 4 S.C. (Pt.1) 203 at 231
- Onah vs. The State (1985) 3 NWLR (Pt.12) 236 at 244
- Bozin vs. The State (1985) 2 NWLR (Pt.8) 465 at 481
- Opayemi v. The State (1986) 2 Q.L.R.N. page 1
- Nwede vs. The State (1985) 3 N.W.L.R. (Pt. 13) 444
- G Ekpenyong vs. The State (1991) 7 N.W.L.R. (Pt. 200) 683
- Baridam vs. The State (1994) 1 N.W.L.R. (Pt. 320) 250 at 262
- Kim vs. The State (1992) 4 N.W.L.R. (Pt. 233) 17 at 49
- Duru vs. The State (1993) 3 N.W.L.R. (Pt. 281) 283 at 291 - 292
- Sanyaolu vs. The State (1976) 6 S.C. 37
- H Osayame vs. The State (1966) N.M.L.R. 388
- Nwachukwu vs. The State (1986) 2 N.W.L.R. (Pt. 25) 765
- Onuoha vs. The State (1988) 3 N.W.L.R. (Pt.83) 460

**STATUTE REFERRED TO**

Criminal Code, Cap 48, Vol. II, Laws of Bendel State of Nigeria, 1976, as applicable in Edo State, ss. 319 & 321

**LEAD JUDGMENT BY MOHAMMED JSC**

This appeal is against the judgment of the Court of Appeal Benin Division delivered on 22nd November, 2004, dismissing the appeal filed by the Appellant against the judgment of the trial High Court sitting at Benin City, handed down on 2nd March, 1998, convicting the Appellant of the offence of murder and sentencing him to death.

The Appellant who was the 1st accused at the trial Court was tried along with his own mother as the 2nd accused and another girl as the 3rd accused on a two count charge which stated that -

*“Agbonmwanre Omoregie (M), Elizabeth Omoregie (F) and Isoken Osawaru (F) are charged with the following offences -*

**STATEMENT OF OFFENCE: COUNT 1**

*Conspiracy to murder punishable under Section 321 of the criminal code CAP 48 Vol. II Laws of Bendel State of Nigeria 1976 as applicable in Edo State.*

**PARTICULARS OF OFFENCE**

*Agbonmwanre Omoregie, Elizabeth Omoregie and Isoken Osawaru on or about the 22nd November, 1994 at Benin City within Benin Judicial Division conspired with one another to kill one Friday Agbonghae (M).*

**STATEMENT OF OFFENCE: COUNT II**

*Murder contrary to Section 316(2) and punishable under Section 319(1) of the criminal code CAP 48 Vol. II Laws of Bendel State of Nigeria 1976 as applicable in Edo State.*

**PARTICULARS OF OFFENCE**

*Agbonmwanre Omoregie, Elizabeth Omoregie and Isoken Osawaru on or about the 22nd November, 1994 at Benin City killed one Friday Agbonghae (M) by stabbing him with a broken bottle.”*

In the course of the trial of the three accused persons, the prosecution called a total of 8 prosecution witnesses including a consultant pathologist and the Police investigators. At the close of the

case for the prosecution, the learned Counsel to the 2nd and 3rd accused persons charged along with the Appellant, made a no case submission on behalf of their clients. In her Ruling on the submission, the learned trial Judge, Omorodion J. on 10th October, 1997, while holding the view that the 2nd accused has a case to warrant her being called upon to defend herself on the charges against her, she was however of the opinion that the 3rd accused had no case to answer and accordingly discharged her. Therefore, the Appellant and his mother the 2nd accused were called upon to defend themselves on the two count charge against them for conspiracy and murder.

In addition to his two statements given to the Police under caution and one statement under caution given by his mother the 2nd accused person, both the Appellant and his mother also gave evidence on oath in their defence and also called one other witness who testified in their defence. After taking the addresses of the learned Counsel for the Appellant and his mother, the 2nd accused and the learned Counsel for the prosecution, the learned trial Judge in Her judgment found that the two count charge of conspiracy and murder, was not proved against the 2nd accused and therefore discharged and acquitted her of the charge. The Appellant was however found guilty of the offence of murder and was convicted and sentenced to death accordingly. The Appellant's conviction and sentence were again confirmed on appeal by the Court of Appeal Benin Division which dismissed his appeal on 22nd November, 2004, the 10th year anniversary of the day the offence was alleged to have been committed on 22nd November, 1994. The present appeal now in this Court, is against that judgment.

It is appropriate at this stage to state the case made up by the prosecution and the defence put up by the Appellant from the evidence on record. The case of the prosecution was that on 22nd November, 1994 in the morning between 9.00 - 10.00 a.m, Mary Igbinigie (PW.1), a sister to the deceased, Friday Agbonghae, paid a visit to his house at No. 48 Isokpan Street, Benin City. At that time Elizabeth Omoregie, the 2nd accused was plaiting her hair in front of a house opposite the house of the deceased. On seeing PW.1, the 2nd accused sent for the 3rd accused who came and confronted PW.1 with some allegations on the domestic affairs of PW.1 with her

husband, the deceased. Later there was a fight involving the 2nd and 3rd accused persons with P.W.1 which the deceased and others were trying to separate. The Appellant on receiving information that his mother, the 2nd accused was involved in a fight, rushed to the scene of the fight. He was armed with a broken bottle. The deceased and others at the scene tried to stop the Appellant and in the process the Appellant stabbed the deceased with the broken bottle in the arm pit resulting in serious injuries. The deceased was rushed to the University of Benin Teaching Hospital where he later died the same day from the injuries of the stab wound inflicted on him by the Appellant. The Appellant who decided to report himself to the Ogida Police Station Benin City was arrested thereon and made a statement under caution on 22nd November, 1994 which was recorded by the Police investigator P.W.8 and endorsed by a Superior Police Officer. When the case was transferred to the Homicide Section of the State Investigation and Intelligence Bureau (S.I.I.B) for further investigation, the Appellant again gave a second statement under caution on 28th December, 1994 which was recorded by P.W.5.

The Appellant who testified in his own defence also relied on the statements he gave under caution to the Police and the evidence of his own mother who was tried along with him as 2nd accused and the evidence of only one witness who testified as D.W.1.

According to the Appellant, on receiving information that his mother was involved in a fight, he ran to the scene where he found the deceased and P.W.1 Mary Igbinigie, fighting his mother. He held the deceased and asked him why he was fighting the Appellant's mother. A fight then ensued between the Appellant and the deceased in the course of which the deceased secured a cutlass from his house and cut the Appellant on his shoulder. On seeing this, the Appellant secured a broken bottle and stabbed the deceased in his arm pit resulting in the deceased falling to the ground. The Appellant then ran away.

The learned trial Judge after carefully considering the evidence on record including the defences raised by the Appellant, rejected the defence of the Appellant that he only acted in self defence in inflicting the injuries that caused the death of the deceased. The Appellant was accordingly convicted of the offence of murder as charged

and sentenced to death. His appeal to the Court of Appeal Benin City against his conviction and sentence was not successful either as the same was dismissed by that court after holding that the defence of self-defence, was not available to the Appellant in the circumstances of this case. Therefore the Appellant's further appeal to this court, is clearly against the concurrent findings of facts of the trial court and the Court of Appeal on questions of facts in support or otherwise of the defence of self defence being claimed by the Appellant. The question is whether or not the Appellant has succeeded in discharging the heavy burden placed on him by law in convincing this court to set aside these concurrent findings of facts.

In the brief of argument filed on behalf of the Appellant by his learned Counsel, only two issues were raised for the determination of this appeal namely:

D “(i) *whether the defence of self-defence raised by the appellant in his second statement to the police (Exhibit P.3) was belated as to justify the failure of the police to investigate same.*

E “(ii) *whether the learned justices of the Court of Appeal were right to hold that the learned trial judge properly disbelieved the appellant's evidence of self defence.*”

Similarly, the learned counsel to the State Respondent is also of the view that two issues for determination of the appeal as identified by the Appellant are the issues for determination.

F It is necessary to state here quite categorically that this appeal rested mainly on the facts and on the findings made by the trial court and affirmed by Court of Appeal on the question of *whether or not the defence of self defence was available to the Appellant having regard to the evidence on record.*

G In support of this issue, learned Counsel to the Appellant in the appellant's brief of argument referred to part of the second statement the Appellant made to the police on 28th December, 1994, part of the evidence in chief given by the Appellant in his defence before the trial Court and the evidence of the Appellant's mother H who was tried along with the Appellant as the 2nd accused and submitted strongly that from that evidence, a defence of self defence had been clearly disclosed but was not properly investigated by the police. He argued that the evidence shows that the deceased attacked



the Appellant with a cutlass on the left hand and shoulder before the Appellant reacted by stabbing the deceased with the broken bottle. Learned Counsel to the Appellant therefore maintained that the learned trial Judge was in error when she rejected that evidence of the Appellant in his defence and the court below was equally in error in affirming that decision. Learned Counsel pointed out that any defence put up by an accused person in a criminal trial, must be investigated thoroughly in order to render it false or unlikely because it is only when this happens that the trial court will be able to reject it. Cases such as *Aigbadon vs. The State* (2000) 4 S.C. (Pt.1) 1 at 11, *Opayemi vs. The State* (1985) 2 NWLR (Pt.5) 101 at 102-103, *Ihueka vs. The State* (2000) 4 S.C. (Pt.1) 203 at 231, *Onah vs. The State* (1985) 3 NWLR (Pt.12) 236 at 244 and *Bozin vs. The State* (1985) 2 NWLR (Pt.8) 465 at 481, were cited and relied upon by the learned Counsel in support of this submissions and in urging this court to allow the appeal, set aside the decisions of the two courts below and discharge and acquit the Appellant.

On his part however, learned Counsel to the Respondent in his submission in the Respondent's brief of argument had stressed that from the evidence of the first Police Investigator of the case, P.W.8 who saw the Appellant on the very day of the fight that resulted in the death of the deceased on 22nd November, 1994, and recorded the first statement under caution of the Appellant Exhibit P6 which was attested by a superior Police Officer, there was no evidence whatsoever that the deceased attacked the Appellant with a cutlass. That the evidence of P.W.8 under cross examination had categorically denied any statement from the Appellant that he was attacked with a cutlass by the deceased. Learned Counsel therefore described the story of the Appellant in his second statement under caution given on 28th December, 1994, Exhibit P.3 in which he claimed to have been cut with a cutlass by the deceased before the Appellant acted in self defence in stabbing the deceased, as a mere afterthought which was rightly rejected by the learned Judge who saw and heard the witnesses. The case of *Alii vs. The State* (1989) 1 S.C. 35 at 56 - 57, was relied upon in support of this submission while learned Counsel argued that the case of *Opayemi v. The State* (1986) 2 Q.L.R.N. page 1 cited by the learned Counsel to the Appel-

lant on the need for the investigation of defence raised by an accused person, is not applicable to the present case, as no reasonable doubt had been raised in the defence put forward by the Appellant. Concluding his argument, learned Counsel to the Respondent emphasised that having regard to the decisions in the cases of Nwede vs. The State (1985) 3 N.W.L.R. (Pt. 13) 444 and Ekpenyong vs. The State (1991) 7 N.W.L.R. (Pt. 200) 683, the Appellant having failed to show that he was in danger of death when he stabbed the deceased, the defence of self-defence was not available to him and therefore urged the Court to dismiss the appeal.

The law is trite that the defence of self-defence, if successful, is a complete defence or answer to the charge of murder or manslaughter. See Baridam vs. The State (1994) 1 N.W.L.R. (Pt. 320) 250 at 262, Kim vs. The State (1992) 4 N.W.L.R. (Pt. 233) 17 at 49 and Duru vs. The State (1993) 3 N.W.L.R. (Pt. 281) 283 at 291 - 292 where Wali JSC stated the position of the law regarding the defence of self-defence as follows -

*"In the case on hand, there was no evidence that the deceased was carrying any offensive weapon at the time he was shot to his death in cold blood by the Appellant. There was nothing in the evidence considered and accepted by the learned trial Judge that could avail the Appellant of the defence of self-defence. Where the person who was attacked used a greater degree of force than was necessary in the circumstances and thereby caused the death of his assailant, the learned trial Judge was entitled, after considering all the evidence adduced, to reject the issue of self-defence raised by the accused and to convict him of murder."*

With regard to the duty of an accused person raising the defence of self defence in his trial for the offence of murder, in the case of Baridam vs. The State (1994) 1 N.W.L.R. (Pt. 320) 250, Iguh JSC, had this to say at page 262

*"The second issue questions whether the defence of self-defence is available to the Appellant and whether the same was established by him. There can be no doubt that self-defence in an appropriate case is a complete answer to a charge of murder or manslaughter. The Appellant to avail himself of this defence, however, must show that his life was so much endangered by the act of the deceased*

*that the only option that was open to him to save his own life was to kill the deceased. He must show that he did not want to fight and that he was at all material times prepared to withdraw. See Stephen vs. The State (1986) 5 N.W.L.R. (Pt. 46) 987. The defence of self-defence will only fail if the prosecution shows beyond reasonable doubt that what the accused did was not done by way of self defence. The onus is on the prosecution to disprove the accused's defence of self-defence and not on the accused to establish his plea. See Iteshi Onwe vs. The State (1975) 9-11 S.C. 23..”*

Applying the law on the subject of self-defence to the present case where the Appellant was facing a charge of murder, **there is no doubt whatsoever that all the Appellant was required to do was to raise the defence in his plea, leaving the prosecution with the burden of showing without any reasonable doubt, that by the evidence called by it, what the Appellant did in causing the death of the deceased, completely ruled out the defence of self-defence.** In other words the prosecution has to show that the defence was not available to the Appellant having regard to the circumstances of the case. See the cases of R. vs. Onyeamaizu (1958) N.R.N.L.R. 93 and R. vs. Oshunbiyi (1961) (Pt. 4) All N.L.R. 453. The question now is, what was the nature of the facts put forward by the Appellant in raising his plea of self-defence and how did the prosecution face the issue?

According to the learned Counsel to the Appellant the Appellant's plea of self-defence is contained in his own statement given to the Police under caution on 28th December, 1994 in which the Appellant said at page 18 of the record as follows -

*“When I got there I saw Friday Agbonghae and his sister beating my mother Elizabeth and she was crying. There were other people around but I met my mother crying. I was annoyed and could not recognise any of them. Isoken was there but she was not fighting. Friday Agbonghae told me that he has been waiting for me. Both of us rushed to each other and we started fighting. Friday left me and went inside his house. I waited for him because I want to die with him. The next thing Friday came out with a cutlass. He used the cutlass to cut my left hand and shoulder. I then ran to a pit they use as dust bin and picked a bottle. I (sic) intend to stab Friday with the*

*bottle on his hand but because he pushed it off the bottle hit his armpit. When I saw that he could not fight me again I ran away."*

However in his evidence in chief in the course of his trial what he said about the deceased being armed with a cutlass with which he attacked him, reads as follows at pages 64 - 65 of the record -

B *"I held Friday and asked why he was fighting my mama. He asked me whether I want to fight for my mother. Friday rushed. He started to fight me. Two of us started fighting. He ran and left me and entered his room. I went outside and my mama dragged me to let us go home. As she dragged me to go to the house, I heard shouts of*  
C *Ebo le omu opia de meaning I should run, Friday was bringing cutlass. As I want to run he had hit me with the cutlass on my left shoulder. This is scar. When he cut me. I look for a broken bottle. As I was going to use it on Friday he raised his hands and it met him on the*  
D *arm pit. When I saw he fell, I ran away."*

The cutlass story from the side of the Appellant's mother who was the second accused at the trial, reads like this at page 68 -

*"When Friday asked the 1st accused did you come to fight for your mother? I then started to drag 1st accused. As I was doing this,*  
E *I heard people saying 1st accused should run, that Friday was bringing a cutlass and had a cutlass in his hand. So I released the 1st accused and ran away."*

On the side of the prosecution, the evidence had revealed quite clearly that the incident of the fight in the course of which the deceased, Friday Agbonghae lost his life from the injuries he received as the result of having been stabbed with a broken bottle by the Appellant, took place in broad day light after 10.00 a.m in the presence of eye witness. Some of these eye witnesses who testified for the prosecution include P.W.1 Mary Igbinigie, P.W.2 Emmanuel Igbinigie and P.W.4 Felicia Agbonghae. The relevant part of the evidence of P.W.1 at page 31 of the record states -

*"My brother came with other people and my husband. They were separating the fight. The 2nd accused asked them to call Ebo.*  
H *Ebo came with a broken bottle. My husband and others tried to block him so that he will not use it. Ebo stabbed my brother Friday Agbonghae in the arm pit left side. The 2nd and 3rd accused persons were saying that was good for me. Ebo is the 1st accused. His other*

*name is Agbonmwanre Omoregie xxx I and my brother's wife took him to U.B.T.H. later that day my brother was certified dead by the doctor."*

P.W.2 on the other hand who was also an eye witness to the event, had this to say at page 34 -

*"The 2nd accused sent for her son the 1st accused. Few minutes later i heard people shouting that Ebo was coming with a bottle I then told the woman to ran away. 1st accused came towards us and I was telling him that he was coming to fight, whether he knew what happened and who was fighting. 1st accused went straight to where Friday Agbonghae was standing. Before I could reach where they were standing 1st accused had stabbed Friday Agbonghae with the bottle he held in his hand. When the three accused persons saw the way blood was coming they ran away xxx I was given a Police woman who accompanied me to U.B.T.H. When we got to the Hospital, a few minutes later, they told us that the man was dead."*

The evidence of PW.4 who also saw the stabbing of the deceased with a broken bottle, runs like this at page 37 -

*"As 1st accused was running towards us, my husband wanted to hold him. As he raised up his hand 1st accused stabbed my husband xxx After stabbing my husband, he left with the broken bottle."*

From the evidence on record, the learned trial Judge found specifically that the evidence against the Appellant in support of the charge of, murder he was tried, was very strong. He preferred the case of the prosecution to that of defence. On the defence of self-defence raised by the Appellant, the learned trial Judge said page 97 thus -

*"On self-defence, 1st accused said that the deceased took a cutlass and wounded him on the hand. There is no evidence of the wound. The 1st accused showed a very faint scar on the hand. The Court had the opportunity of seeing the scar. I do not believe it was the cutlass wound that caused it. P.W.8 PC. Abada who was the first Police who was in charge of the case said that 1st accused did not tell him anything about the cutlass xxx I do not believe that the deceased used cutlass on him. The first accused did not in his first statement Exhibit P6 mention that the deceased used cutlass on him. I believe this is an after-thought"*

In its judgment, the court below entirely agreed with the findings and conclusion of the trial court when at page 140 of the record the Court said -

*"In my view, if that part of evidence is regarded as an afterthought by the Court it could not have created a reasonable doubt in the mind of a Court. It is beyond per adventure that if a cutlass was used on the Appellant, blood would have dropped from the wound. By the time the Appellant gave himself up to the Police the blood would have caked and consequently would be visible. I am of the opinion that in the light of the foregoing, the present case is not caught by the pronouncement of the apex Court in the case of Opayemi vs. The State."*

**I completely agree with the two Courts below that there is overwhelming evidence in support of the conviction and sentence of the Appellant for the offence of murder under Section 319(1) of the Criminal Code CAP 48 Vol. II Laws of Bendel State of Nigeria 1976 as applicable in Edo State. The fight which the Appellant joined because his mother was involved, took place on a street and in broad day light in front of eye witnesses who saw him arriving at the scene of the fight with a broken bottle which he used in stabbing the deceased Friday Agbonghae in the armpit which resulted in causing the death of the deceased the same day at the University of Benin Teaching Hospital. I must note that apart from Appellant, none of the witnesses who were at the scene of the fight that day of 22 November, 1994, saw the deceased with a cutlass not to talk of seeing the deceased attacking the Appellant with the cutlass. Even the 'Appellant's mother who talked of a cutlass in her evidence, merely said she heard people saying that the deceased was coming with a cutlass. She did not say that she saw the deceased with a cutlass before running away from the scene of the fight. Indeed if it were true that the deceased attacked the Appellant with a cutlass, cutting him on left hand and shoulder, inflicting a wound which left a scar which he showed to the trial Court, the wounds would have been first, shown to the Police at the station where he reported himself after the incident of 22nd November 1994. Failure to have done so on his part, coupled with the clear**

***evidence of P.W.8 Police Investigator who saw the Appellant on the very day of the incident without any sign of injury on him, seemed to confirm the conclusion of the two Courts below that the story of the cutlass by the Appellant, was a mere after-thought trying to hide behind a defence of self-defence which was rightly found not available to him by the two Courts below.*** B

Finally, ***the law is well settled that this Court will not normally disturb concurrent findings of the High Court and the Court of Appeal, unless there is some miscarriage of justice or a violation of some principles of law or procedure.*** See C  
Sanyaolu vs. The State (1976) 6 S.C. 37, Osayame vs. The State (1966) N.M.L.R. 388; Nwachukwu vs. The State (1986) 2 N.W.L.R. (Pt. 25) 765; Onuoha vs. The State (1988) 3 N.W.L.R. (Pt.83) 460; Wankey vs. The State (1993) 5 N.W.L.R. (Pt. 295) 542 at 552 and D  
Ugwumba vs. The State (1993) 5 N.W.L.R. (Pt. 296) 660 at 671.

***In the case at hand, there is no justification at all for interfering with the judgment of the trial Court finding the Appellant guilty of the offence of murder and sentencing him to death on the face of the affirmation of that decision by the Court below. This appeal has no merit. It is hereby dismissed. The conviction and sentence of the Appellant for murder by the trial Court as affirmed by the Court below are hereby further affirmed.*** E

F

### **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment delivered by my learned brother Mahmud Mohammed JSC in this G  
appeal. I entirely agree with it. The appeal has no merit. I also dismiss it and affirm his conviction and sentence

### **MUKHTAR JSC**

H

This appeal from the Court of Appeal Benin Division, is based on the refusal of that court to set aside the judgment of the trial court which convicted the appellant for murder, after finding him guilty as

follows:-

*“But on count 2, that is murder the prosecution has proved its case beyond all reasonable doubt, I find the 1st accused guilty on charge of murder; count 2.”*

The appellant having been charged with the murder of the deceased Friday Agbonghae by stabbing him with a broken bottle, raised the defense of self defence, which the learned trial judge found it unworthy of, as she found it unsatisfactory and did not believe the appellant. The appellant exercised his constitutional right by appealing to the Court of Appeal, which affirmed the judgment of the trial court. In its judgment, the lower court Amaizu J.C.A dealt thoroughly with the issue of self defence thus:-

*“In the case of R. v. Walfer Innes 55 C.A.R. p. 551, it was held that where an issue of self defence arise, the failure of the defendant to retreat when it was possible and safe for him to do so is simply a fact to be taken into account in deciding whether it was necessary for the defendant to use force and whether the force used by him was reasonable. In the present case, the evidence is that the appellant did not only not retreat, he launched an attack on the deceased, And the deceased died.”*

The evidence of the 2nd accused (The mother of appellant) confirms this view. Part of the evidence reads -

*“.....When Friday asked the 1st accused did you come to fight for your Mother ? I then started to drag 1st accused. As I was doing this, I heard people saying 1st accused should run that Friday was bringing a cutlass and had a cutlass in hand. So I released 1st accused and ran away, leaving 1st accused . I ran home.”*

The case of Walfer Innes Supra is very relevant and of assistance to the case at hand. It is very clear that rather than retreat when he heard of the imminent danger that may befall him, decided to wait and confront the deceased. In fact not only did he wait, he came directly armed with a broken bottle with which to attack the deceased. That is assuming the deceased was actually armed with cutlass, as none of the prosecution witnesses present at the scene gave that evidence that the deceased had cutlass in his possession. On the other hand even if the appellant’s story about the cutlass is to be believed, the self defence he has raised cannot be sustained, because he had



time to retreat immediately. This is illustrated by his evidence in court when he said inter alia:-

*“When he has cut me, I looked for the broken bottle. As I was going to use it on Friday he raised his hand and it met him on the amput.”*

Basically self defence that will have any impact on a case to favour an accused person must be such that the action taken by the accused was unavoidable. Authorities abound on when the defence of self-defence can avail an accused person, and these authorities contain the ingredients of self -defence. These ingredients are:-

*“(a) the accused must be free from fault in bringing about the encounter.*

*(b) there must be present an impending peril to life or of great bodily harm either real or so apparent as to create honest belief of an existing necessity.*

*(c) there must be no safe or reasonable mode of escape by retreat, and*

*(d) there must have been a necessity for taking life”.*

See Rtd. Captain Jairo Musel Liva v. The State 1998 2 NWLR part 538 page 397. In order to sustain the defence all the above ingredients must coexist and be established. See Kwaghsir v. State 1995 3 NWLR part 386 page 651, and Nwambe v. State 1995 3 NWLR part 384 page 385. In the instant case, it cannot be ascertained that these ingredients were established from either the evidence of the prosecution witnesses or that of the defence. As a matter of fact I regard that defence as an after thought for in his caution statement to the police, he stated inter alia thus :-

*“As they were holding me, Friday pushed me. I ran back and broke bottle as he was about holding me I used the broken bottle to stab him, when I saw that he was bleeding, I ran away to one Efe my sister’s house at Uwelu Road to report to them what I have done.”*

It is on record that the learned trial judge did consider all the defences raised by the appellant, as can be seen on pages 97 - 98 of the printed record of proceedings. There is no way the appellant’s appeal can succeed, as he had no defence whatsoever to discharge him of the offence of homicide for which he was charged and convicted. The appeal therefore fails in its entirety. I agree with the lead

judgment of my learned brother Mohammed, JSC that the appeal be dismissed and I also dismiss it and abide by the consequential orders made therein.

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**TABAI JSC**

- B I was privileged to read the lead judgment of my learned brother Muhammed JSC and I agree that the appeal be dismissed for lack of merit. I agree with the concurrent findings of the two courts below that the connection of the Appellant is amply supported by the evidence on record. The defence of self defence which the Appellant raised was rightly rejected by the two courts below. The result is that I also dismiss the appeal.

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**CHUKWUMA-ENEH JSC**

- D This appeal is from the decision of the Court of Appeal, Benin Division which on 22/11/2004 has affirmed the conviction and sentence to death passed on the accused (Appellant) by the High Court, Benin City on 2/3/1998.
- E Aggrieved by the decision the accused (Appellant) has filed a Notice of Appeal dated 25/1/2005 containing two Grounds of Appeal. In his brief of argument filed in this case he has raised two issues for determination to wit:
- F *“(i) Whether the self defence raised by the Appellant in the second statement (exhibit P3) was belated as to justify the failure of the police to investigate same?”*
- G *“(ii) Whether the learned Justices of the Court of Appeal were right to hold that the learned trial judge properly disbelieved the appellant’s evidence of self defence?”*

- H The Respondent in its brief of argument has adopted the above two issues. The facts and circumstances of this case are as elaborately set out in the Lead Judgment of my learned brother Mohammed, JSC. And I adopt the same for my short contribution. The most contested question in this case as thrown up by the facts in the case is the Appellant’s “belated” plea of self defence. Self-defence is a defence based essentially on facts of each case hence, there is no question of defining its limits. And like all criminal defences which come under

the broad umbrella of justification, there is no burden on the accused as the Appellant in this case to prove his defence of self defence. The prosecution, it is settled, has the burden throughout the case of disproving inter alia the defence of self defence otherwise the prosecution would not be said to have proved its case beyond reasonable doubt . See: GABRIEL V. THE STATE (1989) 12 SC. 129 at 132 <sup>B</sup> and AHMED V. THE STATE (1999) 7 NWLR (Pt.612) 641.

The nature and scope of this defence is further encapsulated in Section 32(4) of the Criminal Code to wit:

*“A person is not criminally responsible for an act or omission if <sup>C</sup> he does or omits to do the act when he does or omits to do the act in order to save himself from immediate death or grievous harm threatened to be inflicted upon him by some persons actually present and in a position to execute the threats, believing himself to be unable otherwise to escape the carrying out of the threats into execution.” <sup>D</sup>*

What is clear from the foregoing provision is that self-defence is a complete defence where it applies; in this wise for example in a murder case as here an accused is completely exonerated of any crime if he on reasonable grounds believes that his own life is in danger and to save it he has to kill; a defence of self-defence would <sup>E</sup> avail him in such circumstances; meaning, in other words, that the prosecution has not established its case beyond reasonable doubt. As borne out by the foregoing provision the killer has at all times to act to prevent the other person killing him. In that tight situation although <sup>F</sup> master of his passion his main concern is to save his life. In that wise, the accused is entitled to an acquittal.

In the instant case, the Appellant has killed the deceased in circumstances which have to be explored to see if the defence is available to him as he has claimed. In his first statement exhibit P6 he <sup>G</sup> has owned up killing the deceased by stabbing the deceased underneath his armpit with a broken bottle. In his second statement Exhibit P3 he has introduced the defence of self-defence by alleging that the appellant firstly cut him on the shoulder and hand with a cutlass and that he has resorted to using a broken bottle to stab the <sup>H</sup> appellant to save his life in the melee that ensued. The Appellant has complained that the police never cared to investigate his second statement particularly that aspect of it on his self defence. The prosecution

nonetheless has refuted the alleged self-defence by the evidence of P.W.1 and P.W.3, who are eyewitness of the whole incident and by the testimony of the P.W.8, the first police officer who investigated the crime and who has testified to the effect that the appellant never mentioned to him the use of a machete to inflict cuts on him.

B In Exhibit 6 which is a confessional statement and which has been attested to by a Superior Police Officer before whom the Appellant has accepted making Exhibit 6 voluntarily, there has been no mention of inflicting machete cuts on the appellant. Although, it is true that the P.W.8, the 2nd investigating police officer in this case C never investigated this aspect of Exhibit P3, the Lower Court in this regard has rightly addressed the pertinent question of whether the said defence is reasonable in the circumstances, thus making its non-investigation as fatal to the prosecution's case. The lower courts have D rightly in my view come to the conclusion that it is not. See: MUFUTAN BAKARE V. THE STATE (1987) 3 SC. 1. at 35. The soundness of this conclusion is made more evident by the fact that Exhibit 3 which has been made 5 weeks later in time than Exhibit 6 in it the Appellant has told the story of machete cuts on his shoulder and hand, whereas no E mention of machete cuts has been made in Exhibit 6 when the incident is supposed to be fresh in his mind. Both courts below have rejected the Appellant's case of self defence as an afterthought and rightly for that matter. The alleged injuries have not been mentioned F of at the earliest possible opportunity. The trial court in disbelieving the Appellant on this issue found in this regard to wit:

*"There is no evidence of the wound. The 1st Accused showed a very faint scar on the hand. The Court had the opportunity of seeing the scar. I do not believe it was the cutlass wound that caused it. P.W.8 P.C. Abada who was the first police who was in charge of the case said that 1st accused did not tell him anything about the cutlass. There was no evidence that the wound was treated. He said it was treated but he did not state where he was treated. I do not believe that the deceased used cutlass on him. The 1st accused did not in his first statement, Exhibit P6 mention that the deceased used cutlass on him. I believe this is an after thought."*

This finding cannot be faulted. On the legal evidence before the trial court the conclusion is evitable. It flows from the drift of the

evidence accepted by the trial court.

The foregoing conclusions again are supportable by the facts of the case. After all, the trial Court saw, heard and watched the demeanours of the witnesses before arriving at these conclusions. This court hasn't that opportunity and so in such instances the findings of trial courts are not easily interfered with. B

The court below rightly in my view found that once the trial court has come to the foregoing conclusion there can be no question of the accused's story creating a reasonable doubt in the mind of the trial court. This is in line with the settled principle that evidence that is not accepted by the court cannot be acted upon by the court and even then it cannot reasonably cause any doubt in the mind of the court. See: MUFUTAN BAKARE V. THE STATE (1987) 3 SC. 1 AT 35. The defence of self defence therefore collapses. And I also so hold. C D

The two concurrent findings by the lower two courts in this respect make it clear that the appellant's life has never been in any danger to warrant killing the deceased. And I, respectfully, agree. Indeed, there are no reasonable grounds to believe that the appellant's life has been in any danger as to justify killing the deceased as the only option open to him to save his own life, on the peculiar facts of this case. There is evidence that he broke off from the fray to pick a broken bottle some distance away from the scene of the crime. There is therefore a clear opportunity for the appellant to escape if he wanted but it was not taken up, that is to say, as the appellant by his own acts was the aggressor. That is to say, the evidence has not shown any inclination on the appellant's part to retreat not even when the opportunity presented itself. What I am trying to say here is to the effect that the appellant has failed to show special circumstances warranting this court to interfere with the concurrent findings of facts of the two courts below. The appellant in his statement has said he had to run to his sister's house from the scene of the crime perhaps to seek refuge and she it was who advised him to give himself up to the police. She has not been called to testify as to any wounds on the appellant nor to challenge the prosecution's case that the appellant has no matchete cuts on him. E F G H

The appellant has, therefore, not shown that the findings of

the courts below are perverse or not supported by evidence or that they have been reached by the wrong application of law or procedure. See: OGUONZEE V. THE STATE (1998) 4 SC 110 at 124 paragraphs 10-30. In the absence of such evidence, this court cannot interfere with these findings which are credible and solid.

B I am satisfied that the prosecution has discharged the burden of proof on it by showing that the deceased has been killed by the appellant using a broken bottle, a lethal object, by stabbing the deceased underneath his armpit. In this regard it has called the evidence of P.W.I to P.W.8 to establish that fact. There is evidence accepted by the trial court that the deceased died as a result of the said injury. This is as per the evidence of the Medical Doctor whose evidence the trial court also has accepted.

D There is overwhelming evidence that the appellant has intended to kill the deceased or cause him grievous bodily harm by using a broken bottle to stab the deceased. Indeed, the appellant intended the natural consequences of his dastardly act. This is a heinous crime and the appellant must take the consequences.

E The two courts below rightly in my respectful view have found the appellant guilty of the charge of murder. And I so hold. This is a most unnecessary murder. The deceased has left his place of work for home to have his food in his house before the heinous crime was committed against him; on the other hand, the appellant came to the scene of the crime on being invited to join in the melee by the mother resulting in the appellant killing the deceased in a most unfortunate circumstance.

F In the result, I agree with the judgment of my learned brother Mohammed, JSC, a draft of which I have had the privilege of reading in advance that the appeal is unmeritorious and should be dismissed. I also dismiss it in its entirety.

H