

SUPREME COURT OF NIGERIA
5TH DECEMBER, 2008. SC. 232/2006
CORAM:- N. TOBI, S. A. AKINTAN, W. S. N. ONNOGHEN,
I. T. MUHAMMAD, J. O. OGEBE, JJSC

PAUL ONYIA APPELLANT

V.

THE STATE RESPONDENT

APPEALS - Issues - Basis of - Question of the proper order to make if an appeal is allowed - Cannot properly form the basis of an issue in an appeal - It is a matter within discretion of the appellate court (H1)

CRIMINAL PROCEDURE - Interpreter - Necessity for - It is only necessary where a person charged with an offence - Does not understand the language used at the trial (H2)

FACTS

The appellant was arraigned and tried at the High Court of Imo State for the offence of murder. At the end of trial, the learned trial judge found the appellant guilty as charged and sentenced him accordingly. Aggrieved, appellant appealed to the Court of Appeal which dismissed the appeal.

Still dissatisfied, the appellant has brought this further appeal to the Supreme Court complaining for the first time about the procedure whereby the trial judge had heard the testimonies of PWs 1, 2, 3, and 4 in Igbo language and recorded same in English without recourse to the use of an interpreter.

ISSUE FOR DETERMINATION

“Whether the non-interpretation of the evidence of PW1, PW2, PW3, and PW4 rendered in Igbo, the translation of the same by the learned trial Judge suo motu culminating in its judgment and the affirmation of it by the Court of Appeal, did not violate the appellant’s right to fair hearing and nullify thereby all the findings and conclusions of guilt against the appellant”.

3960 *Onyia v. State* (2008) 12 KLR (pt. 261) p. 3959; (2008) 18 NWLR
HELD (Unanimously dismissing the appeal per **OGEBE JSC**)

APPEALS - Issues - Basis of

1. Issue two of the appellant's brief reads:

"If Issue 1 is answered in the appellant's favour, what is the proper or appropriate order to be made in the circumstances? Is it a trial de novo or an acquittal?" This issue does not arise from any ground of appeal and is totally irrelevant. The question of the proper order to make if an appeal is allowed cannot properly form the basis of an issue in an appeal. Such a matter is purely within the discretion of an appellate court. Accordingly, the second issue is incompetent and I hereby strike it out. (p. 3963 C)

CRIMINAL PROCEDURE - Interpreter - Necessity for

2. It is obvious from a perusal of the provisions quoted above that an interpreter only becomes necessary where a person charged with a criminal offence does not understand the language used at the trial. In the record of appeal, it is clear that the appellant and the witnesses who spoke in Igbo all understood the language. The appellant himself testified in Igbo language. He did not complain about the witnesses who testified in English which leads to the presumption that he also understood English. Could he therefore rightly complain that he did not understand the language used at the trial to require an interpreter as provided for in section 33(6) of the 1979 Constitution. The answer is capital No. (pp. 3964 H/3965 A)

NOTABLE POINTS OF INTEREST

TOBIJSC

1. *1979 Constitution applies, being the one in force when the appellant was charged*

As the case started in 1986, the applicable Constitution is the 1979 Constitution of the Federal Republic of Nigeria. This point is important because learned counsel for the appellant made use of both the 1979 Constitution and the 1999 Constitution. While he referred to the 1979 Constitution in the appellant's brief, he referred to the 1999 Constitution in the reply brief which he filed on 12th September, 2007. The reference or use of the 1999 Constitution, with the greatest respect, is wrong. The applicable Constitution is the 1979 Consti-

tution because the appellant was charged in 1986 when the 1979 Constitution was in existence and not the 1999 Constitution. (p. 3968 H)

2. A ratio cannot be determined outside the fact of a case

It is elementary law that cases are decided on their facts and *ratio-decidenti*, is based on the facts of the case before the court. A *ratio* cannot be determined outside the facts of the case. As the facts of Damina are quite different from those of this case, I cannot use Damina to allow this appeal. (p. 3970 G)

3. Court's bias for prosecution - Manifestations of

A trial Judge can be accused of playing the role of a prosecutor, if in the course of the proceedings, he takes over the case of the prosecution by cross - examining the witnesses with a view to convicting the accused. A trial Judge can also be so branded if he leans heavily in favour of the case of the prosecution by showing clear bias in favour of the case of the prosecution to the extent that, come rain come sunshine, the accused must be convicted. I do not see any such position taken by the learned trial Judge. (p. 3971 A)

MUHAMMAD JSC

4. Right to interpreter must be claimed timeously

Appellant's counsel was at all material time present in court. He cross-examined these witnesses. Neither he nor his client ever raised the issue of absence of an interpreter. Learned counsel for the appellant never for a while complained of lack of fair trial which led to a miscarriage of justice. I think it is too late for the appellant to raise the issue of lack of interpretation on appeal when he was represented at the trial court by a counsel who failed to raise such an issue promptly. The law has for long been settled that the Constitutional right granted to an accused to have an interpreter could not be invoked on appeal by an appellant who had been represented by counsel at the trial as a ground for setting aside a conviction unless he claimed that right at the proper time and was denied it. An accused must therefore claim his right to an interpreter at the time of his trial, not after, for the first time on appeal. (p. 3980 G)

5. Appellant failed to prove resultant failure of justice

Now even if, for the sake of argument, it is granted that the lack of interpretation as alluded to by learned counsel for the appellant, led to a miscarriage or failure of justice, the law places the burden on the appellant to show that the irregularity complained of in the proceedings led to a failure of justice. The appellant in this appeal has failed to show that he was misled in anyway. (p. 3981 E)

REPRESENTATION

Mr. G. I. Abibo for appellant
Chief Okey Amechi (A-G), U.T. Nwachukwu (OCR) I.C. Nwachukwu (Ass. Director), E. Okoro (C.S.C.) N.W. Akinola (A.C.S.C.) MOJ Abia for respondent.

CASES REFERRED TO

Godwin Anyanwu V. The State (2002) 13 NWLR (Pt. 783)107
The State V. Gwonto (1983) ALLR 109
Anthony Nwachukwu V. The State (2007) AFWLR (Pt. 390), 1380
Damina v The State (1995) 9 SCNJ 254
The State v Orji (2008) 3-4 SC 198
Ojenaabede v Esan (2001) 12 SCNJ 401
Anthony v The State (2007) All FWLR (Pt.390) at 1380
Egba v The State (1992) 8 LRNC 362
Lockman v The State (1972) 1 All NLR 498
Durwode v. The State (2000) 82 LRCN 3038
Madu v. The State (1997) 1 NWLR (Pt.482) 306

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, s. 33

LEAD JUDGEMENT BY OGEBE JSC

This is a further appeal to the Supreme Court by the appellant against the judgment of the Court of Appeal, Port Harcourt Division delivered on the 7th December, 2005 in which that Court affirmed the conviction and sentence of death passed on the appellant by Imo State High Court sitting in Umuahia on the 18th December 1987. The appellant was charged in High Court of Imo State with the murder of one Ugwuochi Amadiiegwu, contrary to section 219(1) of the

Criminal Code Cap. 30 of the laws of Eastern Nigeria 1963 applicable in Imo State. The simple fact of the case was that the appellant on the 18th December 1986 stabbed the deceased with a dagger resulting in his death. As the facts of the case are not in issue before this Court, I shall not go into any more details.

The main complaint before this Court is contained in the appellant's brief on issue 1, which reads:

"Whether the non-interpretation of the evidence of Pw1, Pw2, Pw3, and Pw4 rendered in Igbo, the translation of the same by the learned trial Judge suo motu culminating in its judgment and the affirmation of it by the Court of Appeal, did not violate the appellant's right to fair hearing and nullify thereby all the findings and conclusions of guilt against the appellant".

Issue two of the appellant's brief reads:

"If Issue 1 is answered in the appellant's favour, what is the proper or appropriate order to be made in the circumstances? This issue does not arise from any ground of appeal and is totally irrelevant. The question of the proper order to make if an appeal is allowed cannot properly form the basis of an issue in an appeal. Such a matter is purely within the discretion of an appellate court. Accordingly, the second issue is incompetent and I hereby strike it out."

It should be noted that the appellant who was represented by counsel in the High Court and in the Court of Appeal did not complain of the non-interpretation of the evidence of any of the witnesses from Igbo to English. He is raising the issue for the first time in the Supreme Court with its leave. The learned counsel for the appellant complained that Pw1, Pw2, Pw3 and Pw4 gave evidence in Igbo language but their evidence was never interpreted by a court interpreter into English. This in his submission was contrary to section 33(6) of the 1979 Constitution of Nigeria and led to a miscarriage of justice. He relied on the case of Godwin Anyanwu V. The State (2002) 13 NWLR (Pt. 783) 107.

In reply to this submission the learned Attorney-General of Abia State who appeared for the respondent submitted that although some witnesses spoke in Igbo before the trial court, there was no violation of the appellant's right under section 36(5) of the 1999 Constitution, because the appellant and his witness gave evidence

also in Igbo which showed clearly that he understood the language of the witnesses for the prosecution who testified against him. He relied heavily on the cases of *The State V. Gwonto* (1983) ALLR 109 and *Godwin Anyanwu V. The State* (supra). He urged the court to follow its previous decision that the non indication of the interpretation in proceedings does not ipso facto render the trial a nullity.

As the trial of the appellant was concluded before the coming into operation of the 1999 Constitution the applicable law is section 33(6) of the 1979 Constitution which reads.

“Every person charged with a criminal offence shall be entitled;

(a) to be informed promptly in the language that he understands and in detail of the nature of the offence,

(e) to have without payment the assistance of an interpreter if he cannot understand the language at the trial of the offence”.

In the case of *Anyanwu V. The State*. (2002) 13 NWLR (Pt. 783) 107 at pages 139 - 140, this Court had occasion to interpret section 33(6) of the 1979 Constitution where my learned brother Ejiofor JSC of blessed memory said:

“On those facts, as I have earlier observed, learned counsel for the appellant has invited this court to over-rule the decisions of this court noted above, as they are in breach of the provisions of subsections 6(a) and (e) and 7 of section 33 of the 1979 Constitution which read:

Subsections 6(a) and (e)

“Every person who is charged with a criminal offence shall be entitled to

(a) be informed promptly in the language that he understands in detail xxx

(e) have, without payment, the assistance of at interpreter if he cannot understand the language used at the trial of the offence.”

33(7) *“When any person is tried for any criminal offence the court or tribunal shall keep a record of the proceedings”*

It is obvious from a perusal of the provisions quoted above that an interpreter only becomes necessary where a person charged with a criminal offence does not understand the language used at the trial.

Also, in the recent case of this Court in *Anthony Nwachukwu*

V. The State (2007) AFWLR (Pt. 390), 1380, this Court reaffirmed its earlier view that where an accused person understands the language of the proceedings no miscarriage of justice is occasioned by the failure to provide an interpreter. ***In the record of appeal, it is clear that the appellant and the witnesses who spoke in Igbo all understood the language. The appellant himself testified in Igbo language. He did not complain about the witnesses who testified in English which leads to the presumption that he also understood English. Could he therefore rightly complain that he did not understand the language used at the trial to require an interpreter as provided for in section 33(6) of the 1979 Constitution. The answer is capital No.***

There is clear evidence that he was represented by a counsel in the two lower courts. Neither the appellant nor his counsel complained to the trial court about any difficulty in understanding the proceedings.

I am satisfied that the appellant's right to fair hearing was not in any way violated by the trial court or the Court of Appeal. This appeal has no merit whatsoever, and I hereby dismiss it and affirm the conviction for murder and sentence of death passed on the appellant by the two lower courts.

TOBI JSC

This is another murder appeal. The murder took place in the evening of 18th December, 1986 at the village square of Obizi village. Udo Ochiemu (PW.1) Nicholas Akamiro (PW.2) Ebere Arocha, Ugwochi Amadiogwu (the deceased) and the appellant, all young men of the same age group, were at the village square, idling.

While there, a girl passed by, going towards the nearby village of Eziana. Appellant was attracted to the girl. He jumped on his bicycle and pursued her. He later returned. The deceased teased the appellant. He asked the appellant whether he left them because of the girl. Appellant took offence. He demanded why the deceased asked him such a question. There was exchange of words which degenerated to a fight. The appellant poked the deceased on his lips with his finger. The fight was separated by the others.

That was not enough for the appellant. The appellant ran to

his house, which was about fifty metres from the village square. Others stayed in the village square. The appellant returned with a dagger. He asked for the deceased who was sitting. Appellant pulled out the dagger which was concealed in his dress and plunged it into the left breast of the deceased. He pulled it out and ran away. The others
 B pursued him to no avail. Appellant ran away. The deceased died on the spot.

The learned trial Judge found the appellant guilty. He convicted him for murder. An appeal to the Court of Appeal was dismissed. This is a further appeal to this court.
 C

Briefs were filed and exchanged. The appellant formulated the following two issues for determination:

“1. Whether the non-interpretation of the evidence of PW.1, PW.2, PW.3 and PW.4 rendered in Igbo, the translation of the same
 D by the learned trial Judge *suo motu* culminating in its (sic) judgment and the affirmation of it by the Court of Appeal, did not violate the appellant’s right to fair hearing and nullify thereby all the findings and conclusions of guilt against the appellant.

2. If Issue 1 is answered in the appellant’s favour, what is the
 E proper or appropriate order to be made in the circumstances? Is it a trial *do novo* or an acquittal?”

The respondent formulated the following single issue for determination:

“*Whether the absence of evidence of interpretation in the
 F records of the trial Court is sufficient in law, to impugn the conviction of the appellant*”

Arguing Issue 1, learned counsel for the appellant, Mr. G. I. Abibo, submitted that where an interpreter is provided at the commencement of a criminal trial and a record is made thereof, it is not
 G only desirable but also a constitutional obligation on the trial Judge to make a record of this fact as well on the subsequent days of the proceedings when use is made of an interpreter. Counsel conceded that where the Judge fails to record the use of the interpreter on
 H subsequent days the trial is not *ipso facto* vitiated. He however argued that where it is shown that an interpreter was not provided where one ought to have been provided as in the instant case, different considerations will hold sway as this raises the question whether such an accused person ever had a fair hearing. He submitted that in

the instant case, there was a patent non-compliance with the constitutional provision as to fair hearing under section 33 (6) (a) and (e) of the 1979 Constitution. He referred to Anyanwu v. The State (2002) 13 NWLR (Pt.783) 107; Gwonto v The State (1982) 3 NCLR 312; and Idemudia v The State (1999) 5 SC. (Pt.II) 1101.

Learned counsel contended that the learned trial Judge was wrong in interpreting Ibo language into the English language, which is not the language of the court. By his conduct, the learned trial Judge played the role of prosecutor and Judge both roles into one at the same time, a role he was not entitled to. He referred to Damina v The State (1995) 9 SCNJ 254; The State v Orji (2008) 3-4 SC 198 and Ojenaabede v Esan (2001) 12 SCNJ 401.

Learned counsel submitted on Issue 2 that as there was a miscarriage of justice this court should order a retrial. He referred again to Damina v The State, supra. He urged the court to allow the appeal.

Learned Attorney General of Abia State, Chief Okey Amechi, for the respondent, submitted on his lone issue that as English is the official language of the superior courts in Nigeria, there was nothing wrong in interpreting from Ibo to English. He referred also to Damina v The State, supra; The State v Gwonto, supra, and Anyanwu v. The State, supra.

Learned counsel argued that as the appellant understood the language, he cannot be heard to complain as the trial was conducted in a language that he understood. Where an accused person does not understand the language used at the trial, it is his duty or that of his counsel to bring that fact to the knowledge of the court. Referring to Durwode v The State (2002) 82 LRCN 3038, learned counsel submitted that as appellant or his counsel did not raise any objection, the right is lost for all time and cannot be invoked on appeal. He referred once again to The State v Gwonto, supra and also to the case of Queen v Egbuabor (1962) 1 All NLR 287. On the procedure to be followed by the court, counsel also referred to Anyanwu v. The State supra; Anthony v The State (2007) All FWLR (Pt.390) at 1380; Egba v The State (1992) 8 LRNC 362; Lockman v The State (1972) 1 All NLR 498.

Referring to the case of Edun v I.G.P. (1966) 1 All NLR 17, learned counsel submitted that as there was no violation of the

appellant's right to fair hearing, there was no miscarriage of justice. He urged the court to dismiss the appeal.

Learned counsel for the appellant in his reply brief submitted that the record that the information was read out to the accused in English language and explained in Ibo language is palpably defective and incurably flawed, as it is patent non-compliance with the express provision of section 36 (6) (a) and (b) of the 1999 Constitution. He referred to *Gaji v The State* (1975) NRNLR 98 and *R. v. Smith* 61 CAR 128.

Counsel submitted that the appropriate procedure to be adopted at the trial as stated in paragraph 4.08 of the respondent's brief was not complied with. Responding to paragraphs 4.08 to 4.10 of the respondent's brief, learned counsel argued that the fact that accused or his counsel did not observe their duty to inform the court of inability to understand the language used does not obliterate the right of the accused to fair trial as provided by the Constitution, as no amount of inadvertence or omission of accused can obliterate the requirements of the Constitution. He contended that the cases of *Durwode v. The State* (2000) 82 LRCN 3038 and *Madu v. The State* (1997) 1 NWLR (Pt.482) 306 cited by learned counsel for the respondent are not quite apposite having regard to the particular facts of the case. He pointed out that the procedure laid down in *Queen v Eguabor*, cited by counsel for the respondent was not complied with by the trial Judge.

Learned counsel submitted that the argument in paragraph 4.17 of the respondent's brief is off the mark as the right of the appellant is not merely statutory but also constitutional Referring to *Attorney General Bendel State v Attorney General of the Federation* (1981) 10 SC I and *Ariori v. Elemo* (1983) 1 SCNLR 1, learned counsel argued that while statutory rights may be waived, constitutional rights cannot be waived. The flaw in this case, counsel submitted, is fatal to the entire trial and urged the court to set aside the judgment of the Court of Appeal. He referred to *Rabiu v The State* (1980) 8-11 SC. 130.

This appeal is predicated on a very narrow area and it is the interpretation of the proceedings from the English language to Ibo. As the case started in 1986, the applicable Constitution is the 1979 Constitution of the Federal Republic of Nigeria. This point is impor-

tant because learned counsel for the appellant made use of both the 1979 Constitution and the 1999 Constitution, While he referred to the 1979 Constitution in the appellant's brief, he referred to the 1999 Constitution in the reply brief which he filed on 12th September, 2007. The reference or use of the 1999 Constitution, with the greatest respect, is wrong. The applicable Constitution is the 1979 Constitution because the appellant was charged in 1986 when the 1979 Constitution was in existence and not the 1999 Constitution. And so, I will take the provision of the 1979 Constitution, though similar to that of 1999. Section 33 (6) (e) of the 1979 Constitution provided as follows:

“Every person who is charged with a criminal offence shall be entitled to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence”

The language of all the courts enumerated in section 6 (5) of the Constitution is the English language. As the trial was before the High Court of Justice Umuahia, the relevant court, as provided in the Constitution, is in section 6 (5) (d) of the Constitution. As provided, the interpretation is made *gratis* by an interpreter. The interpretation is necessary if the accused person does not understand the English language which is the language of the court. If the accused person understands the English language, interpretation is not necessary.

Learned counsel for the appellant submitted that as the evidence of PW.1, PW.2, PW.3 and PW.4 given in Ibo was not translated in the English language by an interpreter, the constitutional provision was breached. The appellant is an Ibo. He speaks Ibo. This is clear at page 39 of the Record:

“DW.1: Sworn on Bible, states in Ibo” This is in conformity with the proceedings at page 21 of the Record:

“Court: Information is read out in English and explained in Ibo.”

The above confirms that the language the appellant speak is Ibo. That is not all. PW.1 (page 22) PW.2 (page 25) PW.3 (page 27A) and PW.4 (page 29) of the Record gave evidence in Ibo, the language understood and spoken by the appellant.

It is a common spontaneous human reaction in court for an accused person who does not understand the language used to say

so openly in court or protest that he needs an interpretation to the language that he understands. The appellant did not do so because he understood the evidence of PW.1, PW.2, PW.3 and PW.4, all given in Ibo, the language he speaks. And so why the furore of counsel, I ask?

B Learned counsel for the appellant faulted what he regarded as the involvement of the learned trial Judge in the Ibo language and contended that the court is presumed not to understand any language other than English, the official language of the court. To counsel, the learned trial Judge must have made use of his private and
C personal knowledge of Ibo to translate the evidence. I expected learned counsel to pinpoint specific areas where the learned trial Judge used his private and personal knowledge of Ibo to the disadvantage of the appellant. He did not go that far. He ought to have done so. In the
D absence of such concrete wrong use of the trial Judge's "private and personal knowledge of Ibo", this court will not undertake a wild goose chase. It is like attempting to swim ashore in an ocean. I will not do it.

Learned counsel referred copiously to the case of *Damina v the State*, *supra*. What are the facts of that case? The appellant made
E his statement in Hausa language in Exhibit 2. It was translated into the English language in Exhibit 2A. In his judgment, the learned trial Judge *suo motu* made a re-translation of Exhibit 2 A upon which he placed heavy reliance to convict the appellant and subsequently sentenced him to death. It was in the circumstances that this court held
F that the learned trial Judge lacked the competence to re-write or re-interpret Exhibit 2 as he did and in so doing he had usurped the role of the interpreter and/or a translator and therefore acted in breach of sections 241 and 242 (i) of the Criminal Procedure Code, which
G provisions are mandatory.

Where is the evidence in this appeal that the learned trial Judge did what the Judge did in *Damina*? Where is the exhibit that the learned trial Judge in this appeal "re-translated"? In other words, where is the prototype of Exhibit 2A in this appeal? It is elementary
H law that cases are decided on their facts and *ratio-decidenti*, is based on the facts of the case before the court. A *ratio* cannot be determined outside the facts of the case. As the facts of *Damina* are quite different from those of this case, I cannot use *Damina* to allow this appeal.

Learned counsel accused the learned trial Judge of playing the role of a prosecutor and a Judge. With the greatest respect, I do not agree with him. There is nothing in the record to show that the learned trial Judge played the role of prosecutor. A trial Judge can be accused of playing the role of a prosecutor, if in the course of the proceedings, he takes over the case of the prosecution by examining the witnesses with a view to convicting the accused. A trial Judge also be so branded if he leans heavily in favour of the case of the prosecution by showing clear bias in favour of the case of the prosecution to the extent that, come rain come sunshine, the accused must be convicted. I do not see any such position taken by the learned trial Judge.

Interpretation of the proceedings of a court is a desideratum when the accused does not understand the language used in the court. It is not so when the accused understands the language. In this case, 4 of the prosecution witnesses spoke in Ibo, the language of the appellant and he understood the language. He did not complain. Of course he ought not to complain, as he clearly understood Ibo.

Another issue raised by learned counsel for the appellant is that the record did not indicate that there was an interpreter. The important consideration is whether the accused person understood the proceedings. If the answer is in the affirmative, non indication that there was in fact an interpreter is not really important. The important thing is that the accused understood the proceedings, as in this case.

Counsel also submitted that the record that “the information was read out to the accused in English language and explained in Ibo language is palpably defective and incurably flawed”. In our law of evidence, the burden is on the appellant to prove the defectiveness and incurability of *the record*. *He did not prove that; rather he sounded rhetorically thus: “The information as read and explained by who? In what sequence of language was the explanation done?”* I expected counsel to go beyond the above rhetoric and deal with specifics or specificities on or in respect of the sentence he complained of. Instead of doing that, he left the matter at large and that did not help the appellant.

Let me examine some of the cases cited by learned counsel for the appellant. In Gwanto v The State only the 1st appellant spoke and understood the English language and the 2nd to 5th appellants

only Hausa and the latter made their statements and gave evidence in court in that language. It was in those circumstances that the Court of Appeal held that there was non-compliance with section 33(6) of the 1979 Constitution. In this case on appeal the appellant understood Ibo and so he had no problem with interpretation.

B The case of *Idemidia v. The State*, *supra*, did not deal with section 33(6) (e) of the 1979 Constitution. It rather dealt with section 33(6) (a) of the 1979 Constitution. While dealing with section 33(6) (a) of the 1979 Constitution, Katsina-Alu, JSC said at page 115:

C *“In the present case, however, the appellant is literate in the English Language. He pleaded to the charge in the English language and gave his evidence in the English language. He was police officer. The record discloses that he understood and appreciated fully the nature of the charge. In my judgment the aspect of the provision of*
D *S. 215 of the Criminal Procedure Law of Imo State and S.33(6) (a) of the 1979 Constitution requiring, by implication, the interpretation from English Language (used in the court) to any other language were inapplicable in the circumstance of the present case. Issue one therefore fails.”*

E How does this case help or assist the appellant? I do not see where the case helps or assists the appellant. On the contrary, it is against the appellant. In *Idemudia*, the appellant understood the English language and so this court held that the interpretation was not necessary. So too, this appeal where the appellant understands
F Ibo. The case is against the appellant and I so hold.

In *Queen v Egbiabor*, *supra*, where this court stated the procedure to be adopted in the interpretation of evidence, it was made clear that the procedure is *“invariable practice where an accused is*
G *not represented by counsel”* In this case, appellant had counsel. I do not think it should have made any difference even if he had no counsel; in the light of the fact that he clearly understood Ibo. I do not see the relevance of *Orji v The State*, *supra*. The case did not deal with the interpretation of evidence. On the contrary, it dealt mainly with
H circumstantial evidence.

I do not see any breach of the appellant’s constitutional right to fair hearing. The witnesses gave evidences in Ibo, the language the appellant speaks. He heard and understood the evidence of the witnesses. I have repeated this a number of times. It is for emphasis. His

counsel cross-examined the witnesses. There was no complaint on the part of the appellant that he did not understand the proceedings of the court. Where then lies the breach of his right to fair hearing?

This is a case where the appellant decided to take the life of a person of the same age group without cause. There was no provocation. Young men usually tease themselves in respect of such matters and they joke or laugh over them, most of the time romantically. After the tease, appellant did a distance of about 100 metres before he attacked the deceased. I see in this case, an appellant with thoroughly organized guilty mind which resulted in his guilty act of murder. And so the appellant had *mens rea* and *actus reus* in the commission of the murder. He cannot get out of it, whatever efforts counsel made in his defence. He is a very bad example of youths in the society.

It is for the above reasons and the more detailed reasons given by my learned brother, Ogebe, JSC in his judgment that I too dismiss the appeal. He must be received or welcomed by the gallows. There is no other alternative in the matter. The penalty is clear.

AKINTAN JSC

This is an appeal from the judgment of the Court of Appeal, Port Harcourt Division delivered on 7th December, 2005. The appellant had been tried on an information in which he was charged with the murder of one Ugwuochi Amadiogwu by stabbing him with a dagger at Amaibo Ubakala Village Square in the Umuahia Judicial Division of Imo State in the presence of two eye witnesses who testified at the trial as PW1 and PW2. The trial took place before Njiribeako, J. sitting at Umuahia High Court. He was found guilty as charged by the trial Judge and sentenced to death by hanging. His appeal to the court below was dismissed, hence the present appeal.

The facts of the case are not disputed in this court. The main point canvassed in this court relates to the alleged failure of the trial court to ensure that the evidence of four of the prosecution witnesses and that of the appellant given in Igbo language was not formally interpreted into English language, the language of the court, by an interpreter. The omission is said to be in breach of the provisions of section 33(6) (a) and (e) of 1979 Constitution, then in force, which

provides as follows:

“Every person charged with a criminal offence shall be entitled-

(a) To be informed promptly in the language that he understands and the nature of the offence -

B *(e) To have without payment of the assistance of an interpreter if he cannot understand the language used at the trial of the offence,”*

It is necessary to emphasize that what is envisaged in section 33(6) (a) of the 1979 Constitution is that an accused person only needs *“to be informed properly in the language that he understands,”*
 C The requirement “to have without payment of assistance of an interpreter’ provided in sub-section (e) of the said section 33(6) also only relates to instances where the accused person needs to be informed properly in the language that he understands. The requirement is
 D therefore not applicable where the accused understands the evidence given in the language he understands. Thus, the right to assistance of interpreters guaranteed by the afore-mentioned provisions of section 33(6) (a) and (e) of the 1979 Constitution could only be applicable to the accused person if any evidence was given in a language
 E which he did not understand: See *Ajayi v. Zaria N.A.* (1964) N.N.L.R. 61.

Similarly the position of the law is that an appellant must prove a failure of justice regarding failure to comply with the requirement of the provision of interpreters before a conviction can be vitiated:
 F See *Ajayi v. Zaria N.A.*, *supra*.

In the instant case, the evidence of the four witnesses complained of were given in Igbo language, the language which the appellant understood and in which he too gave his own evidence at the
 G trial. The record compiled from the trial Judge’s notes of the proceedings was not challenged as defective or not being a true record of the evidence tendered in Igbo language before the learned trial Judge. The appellant has therefore failed to prove that the provisions of the sub-sections were breached and that there was a failure of
 H justice as required of him.

In the result and for the reasons I have given above and the fuller reasons given in the lead judgment prepared by my learned brother, Ogebe, JSC. I hold that there is no merit in the appeal. I accordingly dismiss it.

ONNOGHEN JSC

The appellant was charged with the offence of murder contrary to Section 319 (1) of the Criminal Code. He was tried at the Abia State High Court, holden at Umuahia and convicted on the 18th day of December, 1987 and consequently sentenced to death. His appeal to the Court of Appeal holden at Port-Harcourt in Appeal NO.CA/PH/240/2000 was dismissed on the 7th day of December, 2005. The instant appeal is against that decision.

The facts of this case are very simple and undisputed. The appellant stabbed the deceased, Ugwochi Amadiogwu with a dagger at Amaibo Ubakala Village Square in the presence of PW1 and PW2. The appellant confessed to the crime and is not contesting the facts before this court.

However, it is on record that PW1, PW2, PW3 and PW4 testified before the trial court in Igbo language. It is also very clear that the appellant himself and his witnesses also testified in Igbo language. It is the case of the appellant, before this court that both the testimonies of the aforementioned prosecution and defence witnesses were never translated from Igbo language, being the language in which they were rendered, to English language, which is the language of the court.

The relevant issue that calls for determination in the appeal is therefore Issue 1, to wit:

(1) *“Whether the non-interpretation of the evidence of PW1 PW2, PW3 and PW4 rendered in Igbo, the translation of the same by the learned trial judge suo motu culminating in its judgment and the affirmation of it by the Court of Appeal, did not violate the appellant’s right to fair hearing and nullify thereby all the findings and conclusions of guilt against the appellant”*,

In arguing the appeal, Learned Counsel for the appellant G. I. ABIBO ESQ. referred the court to the provisions of Section 33 (6) of the Constitution of the Federal Republic of Nigeria 1979 (hereinafter referred to as the 1979 Constitution) and the case of:

(a) *Salihu M. Gwonto vs The State (1982) 3 NCLR 312 at 318 and Andrew Idemudia vs The State (1999) 5 SC (Pt.11) 110 and Others*, and submitted that the learned trial judge erred by play-

ing the role of prosecutor and judge at the same time in the same proceeding by acting as an interpreter when he *suo motu* translated the evidence of the witnesses, from Igbo language to English language and that the action of the trial judge constitutes a violation of the appellant's constitutional right to fair hearing as provided under
 B Section 33 (4) of the 1979 Constitution. Learned Counsel therefore urged the court to allow the appeal.

On his part, Learned Counsel for the respondent submitted that the non-indication of interpretation in a proceeding does not
 C *ipso facto*, render the trial a nullity or vitiate the conviction particularly as the witness and the appellant understood the language used at the trial, relying on *Gwonto vs The State* supra; that the appellant did not complain to the trial court that he did not understand what was being said particularly as he was represented by counsel who
 D equally never objected to the procedure adopted. Learned Counsel therefore urged the court to dismiss the appeal.

Section 33 (6) (a) & (e) of the 1979 Constitution provides this:

E *"Every person charged with a criminal offence shall be entitled (a) To be informed properly in the language that he understands and in detail of the nature of the offence.*

(e) To have without payment of the assistance of an interpreter if he cannot understand the language at the trial of the offence ".

F It is not disputed and it is in fact settled law that the language of the superior courts of record in Nigeria is English. Also not disputed is the fact that in Nigeria we have very many languages and dialects, which languages and dialects though may be the language of the relevant Customary or Area Courts, do not qualify as the language(s)
 G of the superior counts of record in this country.

H Historically, when the common law jurisprudence was introduced into this country by the British Colonial Masters, the administrators of the colonial judiciary lacked the requisite knowledge of the local or native or indigenous language(s) thereby making it necessary for the emergence of the practice of sworn interpreters or clerks of court or other persons with adequate knowledge of the particular native or local or indigenous language to interpret the proceedings from that language into English language for the benefit of the judge/administrative officer/magistrate so as to avoid a miscarriage of jus-

tice.

However, overtime, legal practice in this country became the prerogative of Nigerian lawyers who also preside in the courts and have in-depth knowledge of the language(s) of the people making it possible for a judge/magistrate to understand what the witness(es) is/are, saying when they testify in the local language(s) without the aid of a sworn interpreter. B

It must always be borne in mind that the need for a sworn interpreter arose from the desire to ensure that the accused person and the court understood the proceedings or what was going on at the trial so as to avoid a miscarriage of justice as both the court and the accused spoke and understood different languages. The practice is still very relevant particularly where a judge is posted/transferred to a division of a court where the language(s) of the people may be different from the ones he speaks or understands. C

In the instant case, the trial judge and the relevant witnesses both for the prosecution and defence, including the appellant, are Ibos who understood the Igbo language clearly. It is clear from the record that the appellant took his plea on the 1st day of April, 1986 and the record reads. D

“Information is read out in English and explained in Igbo “.

The record, however, did not indicate whether the explanation of the charge in Igbo language was done by a sworn interpreter. There is also no evidence of the use of sworn interpreter throughout the record of trial. E

However, it is on record that prosecution witnesses nos. 1,2,3 and 4 testified in Igbo language as well as the appellant, DW2 and DW3, It is also important to note that appellant was represented by counsel at the trial and that the said counsel, also an Ibo man, never objected to the apparent absence of interpretation of the proceedings from Igbo language to English language. It is therefore a fact that the language used at the trial by the witnesses and which was common to all and sundry was Igbo language. F

It must also be borne in mind that the provisions of Section 33 (6) (e) becomes relevant only when the accused person “cannot understand the language at the trial of the offence”. In otherwords, where an accused person, as in the instant case, understands the language at the trial of the offence an interpreter, whether sworn or G

unsworn, becomes irrelevant as the purpose or intention of the law is to ensure that an accused person understands the proceedings and that no miscarriage of justice is occasioned by the lack or absence of knowledge in the accused person of the particular language in use at the trial. See the decision of this court in *Anyanwu vs The State* (2002)

B 13 NWLR (Pt.783) 107 at 139-140.

It is very funny that in the instant case the appellant is complaining that there was no interpretation of the testimonies of the witnesses including his own, from the language they were rendered; Igbo which is the language he and the rest understand; to another language, English, which he does not understand or very conversant with!!!. He is contending that the non interpretation should render the trial and conviction a nullity, irrespective of the fact that the proceedings did not occasion a miscarriage of justice.

D If that is not doing justice according to technicality, I wonder what it is.

In conclusion, I have no hesitation whatsoever in agreeing with the reasoning and conclusion of my learned brother *OGEBE JSC* that the appeal is without merit and should be dismissed.

E I therefore dismissed same.

MUHAMMAD JSC

F My learned brother, Ogebe, JSC has afforded me a preview of the judgment just delivered by him.

I think the main issue in this appeal is the first issue captured by the appellant in his brief of argument, viz:

G *“whether the non-interpretation of the evidence of PW1, PW2, PW3 and PW4 rendered in Igbo, the translation of the same by the learned trial Judge suo motu culminating in its judgment and the affirmation of it by the Court of Appeal, did not violate the appellant’s right to fair hearing and nullify thereby all the findings and conclusions of guilt against the appellant”*

H From the uncontroverted facts of this case as contained in the printed record of appeal placed before this court, the appellant was arraigned before the High Court of Abia State holden at Umuahia for the offence of murder which he committed on the 18th of December, 1980, contrary to Section 319(1) of the Criminal Code,

Cap 30, Vol. II, Laws of Eastern Nigeria 1963. According to the trial court, the information was “read out in English and explained in Igbo”. The appellant, as an accused then, pleaded not guilty. That was on the 1st day of April, 1986, The only counsel on record on that day was one Onukogu A. M. O. a state counsel, who appeared for the state. The appellant, it appears, had no counsel on that day but he pleaded “not guilty” in English language (p 21 of the record). When trial commenced, i.e. on 12th day of June, the appellant was represented by one Kanu A. U. Two prosecution witnesses, PWs 1 & 2 testified and were both cross-examined by Mr. Kanu. The record shows that both gave their evidence in the Igbo language though it was recorded in English Language. There is no indication however, that the testimonies were interpreted from Igbo to English Language by a sworn interpreter. PW4 (who, I think should have been PW3 as there is no indication of PW3) gave his evidence in the Igbo Language. There is no indication that the testimony, rendered in English Language was done by a sworn interpreter. Mr. Kanu for the accused was present and had no questions to put for cross-examining the witness. PW5 gave his evidence in the English language. He stated in his evidence that he recorded the accused’s statement in Igbo language. PWs 6 and 7 also testified in English language. There is no indication that these pieces of evidence were interpreted in Igbo language to the appellant by a sworn interpreter.

Defence witness No.1 who was the appellant himself, gave his testimony in Igbo language. DW2, DW3 (DW3 was mother to appellant) both gave their evidence in Igbo language: The last defence witness testified but no indication as to which language he used in his testimony. All these testimonies were recorded in English Language although no indication that a sworn interpreter rendered the interpretation.

The general position of the law, both statutory and the case law, is that where an accused person in a criminal trial indicates that he does not understand the language used at the trial of the offence, or where the court realizes that the accused does not understand the official language of the court, then the court, in compliance with the provision of the Constitution, shall provide an interpreter to the accused. Section 33(6) of the Constitution of the Federal Republic of Nigeria, 1979 provides as follows:

“33.....

(6) *Every person who is charged with a criminal offence shall be entitled:-*

(a) *to be informed promptly in the language that he understands and in detail of the nature of the offence ‘*

B (e) *to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence, (underlining for emphasis)*

The main complaint of the appellant relates to sub-paragraph C [e] of the above section. A glance at Ground one of the Notice of Appeal (especially particulars 2-4) and appellant’s issue No. 1, discloses that the appellant is complaining that his right to fair hearing has been violated in that the proceedings were not interpreted from Igbo language to English Language in respect of the 1st to 4th prosecution witnesses and that his defence which was in Igbo language D was not interpreted to the learned trial Judge to English language.

The official language of our superior courts of record is the English language as held by this court in Damina v. The State (1995) 9 SCNJ 254 at page 267, lines 20 - 25. The record on the 1st day of E trial shows that the information was read out in English and explained to the appellant in Igbo. (page 21 of the record). The accused pleaded that he was not guilty. The statement of the appellant to the police was made in the Igbo language. Thus, the appellant understood Igbo F language. Three of the prosecution witnesses and three of the defence witnesses all testified in Igbo language as a language understood by the appellant. This fact alone obviates the necessity of interpreting the pieces of evidence given by these witnesses into any other language. The remaining prosecution witnesses, i.e. PWs 5, 6, 7 and G perhaps, Dw 4 testified in English language. PWs 5, 6, and 7 were police officers who conducted the investigations and through which some exhibits were tendered in evidence. Appellant’s counsel was at all material time present in court. He cross-examined these witnesses. Neither he nor his client ever raised the issue of absence of an interpreter. H Learned counsel for the appellant never for a while complained of lack of fair trial which led to a miscarriage of justice. I think it is too late for the appellant to raise the issue of lack of interpretation on appeal when he was represented at the trial court by a counsel who failed to raise such an issue promptly. The law has for long been

settled that the Constitutional right granted to an accused to have an interpreter could not be invoked on appeal by an appellant who had been represented by counsel at the trial as a ground for setting aside a conviction unless he claimed that right at the proper time and was denied it. See: State v. Gwanto (1983) 1 FNR 132.; An accused must therefore claim his right to an interpreter at the time of his trial, not after, for the first time on appeal. See: The Queen v. Eguabor (1962) 1 All NLR 28, where at the trial of the appellant, 'some of the prosecution witnesses, like in the present appeal, gave their evidence in English language which the appellant did not understand. He was represented at the trial by a counsel who made no complaint about any difficulty regarding interpretation. On appeal it was contended that the appellant had been denied right to an interpreter contrary to section 21(5)(e) of the 1960 Nigerian Constitution. The Supreme Court held that the Constitutional right to have an interpreter could not be invoked on appeal by an appellant who had been represented by counsel at the trial as a ground for setting aside a conviction unless he claimed that right at the proper time and he was denied same.

Now even if, for the sake of argument, it is granted that the lack of interpretation as alluded to by learned counsel for the appellant, led to a miscarriage or failure of justice, the law places the burden on the appellant to show that the irregularity complained of in the proceedings led to a failure of justice. See: Ajayi & Anor v. Zaria N. A. (1963) 1 All NLR 169) The appellant in this appeal has failed to show that he was misled in anyway.

I think for an effective distribution of Justice, legal technicalities should not be used to open an escape route to a criminal who has been found guilty of unjustifiable taking away of the life of an innocent human being. Retributive Justice should be allowed to take its own course.

For this and the more detailed reasons contained in the judgment of my learned brother Ogebe, JSC; I too find this appeal unmeritorious. I accordingly dismiss the appeal. I affirm the judgment of the court below.