

SUPREME COURT OF NIGERIA
5TH JUNE, 2009 SC. 239/2006
CORAM:- N. TOBI, G. A. OGUNTADE, I. F. OGBUAGU,
I. T. MUHAMMAD, J. O. OGEBE, JJSC

1. SUNDAY ANI
2. PETER ANI APPELLANTS
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Identity of accused - Recognition - Need for early mention - Though PW1 explained why he did not mention names to villagers - But DW1 insists that he also failed to mention them when he first reported to police (H1)

EVIDENCE - Evaluation - Reevaluation on appeal - Correctness - For Court of Appeal to hold that complainant gave names of appellants - At the first report - Is not borne out from the record (H2)

COURTS - Findings of fact - Misdirection - Applicability - Court of Appeal misdirected itself when it held that PW1 recognized appellants' voices - Evidence before the High Court was that he recognized them with light from bush lantern (H3)

CRIMINAL PROCEDURE - Alibi - Rebuttal - Duty of prosecution - Once alibi is raised - Burden is on prosecution to investigate and rebut such evidence - Neither of which was done in this case (H4)

FACTS

The appellants were arraigned and tried on a charge of armed robbery before the High Court of Enugu State. The case of the prosecution was that appellants and three others robbed PW1 of the sum of N300,000 with a gun and iron rod in the early hours of 29th June 1997. It was in evidence that PW1 knew appellants very well before that date. PW1 testified that he recognised appellants during the robbery with the aid of a bush lantern. He explained that he did not mention their names in the morning to the villagers so that appellants would not run away.

However, though PW1 made report to the police the next morning, the officer who made the entry in police diary, who also testified as DW1, maintains that PW1 did not mention the names of appellants during his first report to the police. It was three days later that PW1 returned to say that it was appellants that robbed him. Trial court found appellants guilty as charged. Aggrieved, appellants appealed to Court of Appeal which appeal was dismissed. Appellants have brought this further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the prosecution proved its case beyond reasonable doubt to warrant the affirmation of the conviction and sentence of the Appellants by the Court of Appeal.

2. Whether the learned Justices of the Court of Appeal misdirected themselves in their evaluation of the evidence with which they found that PW1 did not report to the police that “unknown thief or thieves” robbed him, which misdirection, in turn, led to a miscarriage of justice to the Appellants.

3. Whether the learned Justices of the Court of Appeal were right, in law, to affirm the convictions and sentences of the Appellants by the trial court even though their defence of alibi, raised at the earliest opportunity, was never investigated and there was no conclusive evidence fixing them at the scene of the crime.”

HELD (Unanimously allowing the appeal per **OGEBE JSC**)

Identity of accused - Recognition - Need for early mention

1. It is not disputed that the only eye witness to the event was P.W.1 and the robbery took place at about 4.am when it was still dark and P.W.1 testified that he recognized the appellants with the aid of a bush lantern.

He also testified that he did not mention the names of the appellants to the villagers when day broke, so that the appellants would not run away from the village. That appears to be a plausible explanation. However, on that very day of the robbery he went to Ozalla Police Station and reported that a thief or thieves broke the fence of his gate with iron rod, matchet and torch-light and ordered him to open his door which he opened and they rushed in and attacked him and stole his money worth of N300,000.00. D.W.1 inspector James Eze who made entry in the Police Dairy was sum-

moned to testify on behalf of the appellants; he insisted that the complainant did not mention any names of suspects when he made the first report. He returned 3 days later to mention the names of the appellants and led them to their village to arrest them.

The critical question is why the complainant failed to name the appellants at the first opportunity he had to report to the Police.
(p. 1469 H)

EVIDENCE - Reevaluation on appeal - Correctness

2. The lower court in affirming the convictions of the appellants reasoned at pages 192 - 193 of the record of appeal as follows: ...

Deducing from DW. 1 testimony he was unable to remember the date of the arrest of the accused persons but could however remember the accused. Moreover, that the names of those arrested are not contained in exhibit "F". Query, if exhibit "F" recorded by DW.1 stated "unknown thieves", one wonders how he was able to make the arrests of the accused as rightly argued by the respondent's counsel, and that which the witness wanted the trial court to believe.

From all indications and in my humble deductions, PW.1 must have disclosed the identity of the accused at the time he made the report to the Police Station and which was received by DW.1. There could not therefore have been a report of "unknown thief or thieves" as claimed by him at exhibit "F".

With the greatest respect to the lower, court its reasoning was entirely speculative. Inspector Eze made it very clear in his evidence that the complainant returned 3 days after the first report to give the names of the appellants and that led to their arrest. For the Court of Appeal to reason that the complainant must have given the names of the appellants at the first report is not borne out from the record.
(p. 1471 B/F)

Findings of fact - Misdirection - Applicability

3. The lower court also misdirected itself when it held at page 191 of the records that the PW.1 did recognize the appellants' voices when they spoke at the operation. The evidence before the High Court was that the complainant recognized the appellants with a light from a bush lantern. It was in the complainant's statement to the Police which was marked I.D. but was not formally admitted in evidence

that he mentioned recognizing the appellants by their voices. The Court of Appeal had no business treating that piece of evidence as proved when the statement was never admitted as evidence in the trial court. In any event that statement contradicts P.W.1's evidence before the trial court. (p. 1472 B)

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Alibi - Rebuttal - Duty of prosecution

4. The law is that once an alibi has been raised, the burden is on the prosecution to investigate and rebut such evidence.

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Without investigating the alibi of the appellants but relying on the questionable identification of the appellants by P.W.1, the Police or the prosecution cannot claim that the case for the prosecution was proved beyond reasonable doubt. (p. 1472 G/H)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Reasonable doubt must arise from evidence or lack of it

Reasonable doubt which will justify acquittal is doubt, based on reason and arising from evidence or lack of evidence, and it is doubt which a reasonable person might entertain and it is not fanciful doubt, is not imagined doubt. Reasonable doubt is such a doubt as would cause a prudent man to hesitate before acting in matters of importance to him.

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Was the guilt of the appellants proved beyond reasonable doubt? I think not. (p. 1474 A)

OGBUAGU JSC

2. Suspect's name ought to be mentioned at earliest opportunity

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The Failure of a complainant such as the PW1, to mention the name or names of an accused person or persons or suspect to the Police at the earliest opportunity, gives the impression that at the time he or they were making the complaint, he or they, did not know the person or persons who committed the alleged offence. This fact, may not add weight to the evidence but will tend to depreciate the value of the evidence in court. (p. 1481 B)

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REPRESENTATIONS

Mr. S. Fowowe for Appellants.

Mr. J.O.N. Ikeyi with Mr. C.U. Ekomaru for Respondent.

CASES REFERRED TO

- Bozin V. The State (1985)2 NWLR (pt.8) p.465
 Abudu V The State (1985)1 NWLR (pt.1) 55
 Ebre V. The State (2001) 12 NWLR (pt.728) 617 B
 Stephen Oteki V. The State (1986)4 SC 222
 Abudu V. The State (1985) 1 NWLR (pt.1) 55
 Opayemi V. The State (1965) 2 NWLR (pt.5) 101
 Obakpolor V. The State (1991) 1 NWLR (pt. 165)113 C
 Opayemi V. The State (1965) 2 NWLR (pt.5) 101
 Adeyeye v. Commissioner of Police (1959) WNLR (Pt.II 100 @ 102
 Cyril Udeh v. The State (1999) 5 SCNJ. 187
 Police v. Alao (1959) WRNLR (Pt.1) 39
 Ibori v. Agbi (2004) 2 S. C. (Pt.1) 51; (2004) 6 NWLR (Pt. 868) 78 D
 at 111
 African Petroleum Ltd. v. Owodunni (1991) 8 NWLR (Pt. 210) 391
 Ugo v. Obiekwe (1989) 2 S.C. (Pt.II) 41; (1989) 1 NWLR (Pt. 99)
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LEAD JUDGMENT BY OGEBE JSC

The appellants were tried and convicted on a charge of armed robbery contrary to section 1 (2) (a) of Robbery and Firearms (Special Provisions) Act cap. 398 LFN 1990 in the High Court of Enugu State presided over by Nosike J. F

The appellants appealed to the Court of Appeal, Enugu Division and the appeal was dismissed on the 10th of March 2003. This is a further appeal to this Court.

The respondent's case is that the appellants and 3 others robbed PW1 Chime Ugwu (hereinafter also called "the complainant") of the sum of N300,000 with a gun and iron rod in the early hours of 29th of June 1997. PW1 had known the appellants very well before as the 1st appellant was an apprentice under him and the second appellant frequently visited him. He said that he recognized the appellants with the aid of bush lantern. H

The prosecution called 3 witnesses and tendered the statements of the appellants denying any involvement with the crime. The appellants in their statements to the Police raised a defence of alibi which

was never investigated by the Police. The appellants' case was a total denial of the offence in their evidence in court. DW1 Inspector James Eze gave evidence on their behalf.

The learned counsel for the appellants in their brief formulated 3 issues for determination as follows:

B *"1. Whether the prosecution proved its case beyond reasonable doubt to warrant the affirmation of the conviction and sentence of the Appellants by the Court of Appeal.*

C *2. Whether the learned Justices of the Court of Appeal misdirected themselves in their evaluation of the evidence with which they found that PW1 did not report to the police that "unknown thief or thieves" robbed him, which misdirection, in turn, led to a miscarriage of justice to the Appellants.*

D *3. Whether the learned Justices of the Court of Appeal were right, in law, to affirm the convictions and sentences of the Appellants by the trial court even though their defence of alibi, raised at the earliest opportunity, was never investigated and there was no conclusive evidence fixing them at the scene of the crime."*

E The learned counsel for the respondent also filed a brief and formulated 3 issues for determination as follows:

"(i) Whether the trial court and the court below were right holding that the charge of armed robbery preferred against the two appellants was proved beyond reasonable doubt.

F *(ii) Whether the defence of alibi availed the appellants having regards to the peculiar facts of this case.*

(iii) Whether the evidential value ascribed to the evidence of the P.W. 1 (complainant) by the court below was a misdirection in law."

G The learned counsel for the appellants submitted that the two lower courts were wrong in convicting the appellants of the offence of robbery when the prosecution failed to prove its case beyond reasonable doubt. He said that the only evidence implicating the appellants was the evidence of P.W. 1 who claimed to have recognized the appellants with the use of bush lamp but in his first report to the Police he told the Police that unknown thieves broke into his house and stole his money. The Police report is exhibit "F" and the Police Officer who recorded exhibit "F" testified as D.W.1. He stated clearly that the report made to him was that unknown thief or thieves

broke into the house of the complainant and robbed him of his money.

The learned counsel submitted that the evidence of D.W.1 raised reasonable doubt as to the veracity of the complainant's identification of the appellants. The lower court was therefore wrong in convicting the appellants of the offence of robbery. He relied on the case of Bozin V. The State (1985) 2 NWLR (pt.8) p.465; Abudu V The State (1985) 1 NWLR (pt.1) 55; and Ebre V. The State (2001) 12 NWLR (pt.728) 617 and submitted that where a complainant failed to mention to the Police the names of suspects at the earliest opportunity, his subsequent naming of suspect should be treated with caution.

On the second issue the learned counsel for the appellants submitted that the lower court made a wrong evaluation of the evidence and came to the wrong conclusion in affirming the judgment of the High Court. He said that the Police report in exhibit "F" showed that the complainant reported that unknown thief robbed him and the maker D.W.1 gave evidence that the complainant came back 3 days later and gave the names of the appellants as his suspects. Based on that information the Police arrested the suspects with the complainant as their guide.

The learned counsel for respondents argued issues 1 and 3 together and submitted that the prosecution proved the case against the appellants beyond reasonable doubt and the Court of Appeal was right in affirming the judgment of the trial court. The learned counsel submitted that the fact of the robbery was not disputed and the P.W. 1 clearly identified the appellants as participants in the robbery, and that resolved the only issue in controversy in the appeal. He further submitted that there is no legal requirement for the sole piece of evidence of an adult like P.W.1 to be corroborated and conviction can be founded on the evidence of a single witness once it is credible and accepted by the court. He referred to the case of Stephen Oteki V. The State (1986) 4 SC 222.

The appellants were charged with the capital offence of armed robbery and were in fact convicted and sentenced to death by the 2 lower courts. ***It is not disputed that the only eye witness to the event was P.W.1 and the robbery took place at about 4.am when it was still dark and P.W.1 testified that he recognized the appellants with the aid of a bush lantern.***

He also testified that he did not mention the names of the appellants to the villagers when day broke, so that the appellants would not run away from the village. That appears to be a plausible explanation. However, on that very day of the robbery he went to Ozalla Police Station and reported
 B ***that a thief or thieves broke the fence of his gate with iron rod, matchet and torch-light and ordered him to open his door which he opened and they rushed in and attacked him and stole his money worth of N300, 000.00. D.W.1 inspector James***
 C ***Eze who made entry in the Police Diary was summoned to testify on behalf of the appellants; he insisted that the complainant did not mention any names of suspects when he made the first report. He returned 3 days later to mention the names of the appellants and led them to their village to arrest them.***

D ***The critical question is why the complainant failed to name the appellants at the first opportunity he had to report to the Police.*** He claimed that he mentioned the names of the appellants in his first report. Both the trial court and the Court of Appeal failed to consider the question of why Inspector Eze would choose
 E to tell lies against the complainant in the Police report and in his testimony in Court. There was evidence under cross-examination that as at the time of his testimony Inspector Eze had done 29 years in the Police. This showed clearly that he was a very experienced Police Officer.

F If the lower courts had adverted their minds to this serious evidence of Inspector Eze in contrast to the complainant's evidence it would have shown them that the prosecution did not establish its case beyond reasonable doubt. It should be noted that there was no
 G evidence by the Police that any expired cartridges were found in the compound of the complainant to show that there were gun shots in the night of the incident.

H In other words, there was a question mark as to whether the offence committed was actually armed robbery with a gun. In the case of Abudu V. The State (1985) 1 NWLR (pt.1) 55, there was a robbery involving several people and two of the accused persons were identified by a lady but she omitted to mention the names of the accused persons at the earliest opportunity. The High Court convicted the appellants. On appeal to the Court of Appeal two of the

Justices dismissed the appeal while Justice Omo-Eboh JCA dissented. On appeal to the Supreme Court it unanimously allowed the appeal and held that where an eye witness omits to mention at the earliest opportunity the name or names of the person or persons seen committing an offence a court must be careful in accepting his evidence implicating the person or persons charged unless a satisfactory explanation is given. See also the cases of Bozin V. The State 2 NWLR (pt.8) 465 and Ebre V. The State (2001) 12 NWLR (pt.728) 617. B

The lower court in affirming the convictions of the appellants reasoned at pages 192 - 193 of the record of appeal as follows: C

"Further still, I would now dwell on the allegation of appellants relating to the disclosure by P.W.1 at the earliest opportunity. From the record of the trial court, at pages 45 - 48 Inspector James Eze attached to the four corner Ozalla Police Station was the Police officer to whom P.W.1 first made report of the robbery. The said officer was not the investigating Police officer but gave evidence for the appellants as DW. 1 and said.

"Two persons were arrested, I cannot remember the date of arrest. The arrest were made based on the report made to me. The two persons I arrested based on the report are the accused persons. The name of those arrested are not contained in exhibit "F". Chime Ugwu P.W. 1 came back about three days later and mentioned that he suspected two persons who should be arrested.

Deducing from DW. 1 testimony he was unable to remember the date of the arrest of the accused persons but could however remember the accused. Moreover, that the names of those arrested are not contained in exhibit "F". Query, if exhibit "F" recorded by DW.1 stated "unknown thieves", one wonders how he was able to make the arrests of the accused as rightly argued by the respondent's counsel, and that which the witness wanted the trial court to believe. F G

From all indications and in my humble deductions, P.W.1 must have disclosed the identity of the accused at the time he made the report to the Police Station and which was received by DW.1. There could not therefore have been a report of "unknown thief or thieves" as claimed by him at exhibit "F". H

With the greatest respect to the lower, court its reason-

ing was entirely speculative. Inspector Eze made it very clear in his evidence that the complainant returned 3 days after the first report to give the names of the appellants and that led to their arrest. For the Court of Appeal to reason that the complainant must have given the names of the appellants at the first report is not borne out from the record. When it is noted that the prosecution chose not to call Inspector Eze to testify on its behalf as the first person to receive the complaint, it showed that it had something to hide.

The lower court also misdirected itself when it held at page 191 of the records that the PW.1 did recognize the appellants' voices when they spoke at the operation. The evidence before the High Court was that the complainant recognized the appellants with a light from a bush lantern. It was in the complainant's statement to the Police which was marked I.D. but was not formally admitted in evidence that he mentioned recognizing the appellants by their voices. The Court of Appeal had no business treating that piece of evidence as proved when the statement was never admitted as evidence in the trial court. In any event that statement contradicts P.W.1's evidence before the trial court.

For all I have said I am clearly of the view that the two lower courts were wrong in holding that the prosecution proved its case beyond reasonable doubt. As I have demonstrated, there were serious doubts in the case of the prosecution for any reasonable court to convict the appellants of an offence that carries the capital punishment.

On the 3rd issue on the plea of alibi it is quite clear that the Police made no attempt to investigate the alibi of the appellants given in their statements to the Police. ***The law is that once an alibi has been raised, the burden is on the prosecution to investigate and rebut such evidence.*** See the cases of *Opayemi V. The State* (1965) 2 NWLR (pt.5) 101, *Bozin V The State* (1985) 2 NWLR (pt.1) 465 and *Obakpolor V. The State* (1991) 1 NWLR (pt. 165) 113.

Without investigating the alibi of the appellants but relying on the questionable identification of the appellants by PW.1, the Police or the prosecution cannot claim that the case for the prosecution was proved beyond reasonable doubt.

Since I have resolved all the issues in favour of the appellants, it follows that I find the appeals meritorious. Accordingly, I allow the appeals and set aside the convictions and sentences imposed by the lower courts. In their place, I substitute a verdict of Not Guilty. The appellants are discharged and acquitted of the charge against them.

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TOBI JSC

The burden of proof of an accused person committing an offence is on the prosecution and it is beyond reasonable doubt. Section 138 of the Evidence Act provides that if the commission of a crime by a party to any proceedings is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of section 141 of the Evidence Act, on the person who asserts it, whether the commission of such act is or is not directly in issue on the act.

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In *R. v. Eka* (1945) 11 WACA 39, the West African Court of Appeal adopted the common law principle in *Woolmington v. DPP* (1935) AC 462. The court said:

“It is fundamental that in a criminal trial, the onus is upon the prosecution to prove the elements which go to make up the offence charged. If it fails to prove any of them the accused is entitled to an acquittal and if in spite of that he is convicted he is entitled to have the conviction quashed on appeal.”

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In *Kinnami v. Bauchi Native Authority* (1957) NRNLR 42, Bairamman SPJ (as he then was) re-emphasized the position thus:

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“It is not the duty of the accused to prove his innocence; it is the duty of the prosecution to prove his guilt.”

The standard of proof is beyond reasonable doubt and not beyond all shadow of any doubt. In *Miller v. Minister of Pensions* (1947) 2 All ER 373, Lord Denning, J (as he then was) said:

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“The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable the case is proved beyond reasonable doubt.”

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The expression “beyond reasonable doubt” in evidence means fully satisfied, entirely convinced. In criminal cases, the guilt of the

accused must be established beyond reasonable doubt which means that the facts proven must, by virtue of their probative force, establish guilt. Reasonable doubt which will justify acquittal is doubt based on reason and arising from evidence or lack of evidence, and it is doubt which a reasonable person might entertain and it is not fanciful doubt, is not imagined doubt. Reasonable doubt is such a doubt as would cause a prudent man to hesitate before acting in matters of importance to him. See Black's Law Dictionary, 6th edition, pages 161 and 1265.

Was the guilt of the appellants proved beyond reasonable doubt? I think not. PW1, the complainant, reported the incident to the Police on 29th June, 1997. Felix L. Dayil, Superintendent of Police and Divisional Police Officer recorded in *Exhibit F*, the Extract from Crime Diary, the following:

"BURGLARY AND STEALING"

One Chime Ugwu 'm' of Amagu Akegbe Ugwu Nkanu West L.G.A. came to Ozalla Police Station on 29-6-97 at about 1330 hrs. and reported that on 29-6-97 at about 0200 hrs. unknown thief or thieves broke the fence of his gate with iron rod, matchets and torch light and entered his compound at Amagu Akegbe Ugwu and ordered him to open the door; immediately he opened, they rushed him down, gripped him and hit him with the rod on the head and on the left leg and they stole away the sum of N300,000.00 (Three hundred thousand naira) cash from the sack bag in his house hence his report. ACTION:- Case recorded and referred to No. 179661 PO. Clifford Kimbir for investigation. Insp. James O. Ezech."

It is clear in *Exhibit F* that PW1 did not or could not identify the thief or thieves and that is the meaning of the expression "unknown thief or thieves", that is to say, a thief or thieves not known. How did PW1 come to know the unknown thief or thieves?

He purportedly said under cross-examination at page 31 of the Record:

"I saw Sunday through the aid of bush lantern when they entered my room."

He gave the above evidence on 12th October, 1999 more than two years after the alleged offence of armed robbery was committed. When the matter was fresh, that is when the alleged offence was committed on the same date of 29th June, 1997, when he re-

ported to the Police, PW1 described his attackers or assailants as “unknown thief or thieves”. He did not even know the exact number of attackers or assailants which he speculated between one or two. Did he not make use of his bush lantern? What can a court of law do with his evidence of identifying the appellants with his bush lantern?

The learned trial Judge relied heavily on the evidence of PW1. B
He said at pages 102 and 103 of the Record:

“From the evidence of PW1 when the armed robbers broke into his house he had a lantern on. It was not in evidence either that the robbers were masked. With the aid of the said lantern, the PW1 C
was able to identify the 1st and the second accused persons during the robbery operation. It is also in evidence that there was no previous dispute between the PW1 and the accused persons before the date of the incident. This is implicit in the evidence of the PW1 and the DW4. It is correct that the only witness who saw the armed robbers was the PW1. Can it be said that his identification of the accused D
persons, and his evidence of what happened is unmistakable?”

Dealing with the issue and in particular *Exhibit F*, the Court of Appeal said at page 193 of the Record:

“Query, if *Exhibit F* recorded by DW1 stated “unknown E
thieves”, one wonders how he was able to make the arrests of the accuseds as rightly argued by the respondent’s counsel, and that which the witness wanted the trial court to believe.

From all indications and in my humble deductions, PW1 must F
have disclosed the identity of the accuseds at the time he made the report to the Police Station and which was received by DW1. There could not therefore have been a report of “unknown thief or thieves” as claimed by him at *Exhibit F*”

With the greatest respect to the Court of Appeal, the assumption G
or conclusion is most dangerous and cannot in any way be supported in law. Where is the evidence to show that PW1 “must have disclosed the identity of the accuseds at the time he made the report to the Police Station and which was received by DW1.” Identification of an accused person in the commission of crime is a most serious H
exercise in the administration of criminal justice as it creates the link between the accused person and the offence. Accordingly, a court of law cannot speculate that a complainant might have or must have disclosed the person or persons who committed the offence, when

there is no evidence to draw such a conclusion.

I am unable to go along with the logic of the Court of Appeal that “if *Exhibit F* recorded by DW1 stated unknown thieves one wonders how he was able to make the arrests of the accuseds as rightly argued by respondent’s counsel...” It appears to me that both the Court of Appeal and counsel for the respondent forgot the evidence that “PW1 came back three days later and instructed the arrest of the accuseds.” This is what the Court of Appeal said at page 193 of the Record. And so, the source of the information on the identity of the appellants was not *Exhibit F* but the later information by PW1, which looks to me like an afterthought.

Another aspect of the case is the investigation of the defence of *alibi*. It is elementary law that the Police must investigate the defence of *alibi* at the earliest opportunity. That was not done in this case and the prosecution did not offer any explanation for the lapse. That is also a serious blunder on the part of the prosecution.

It is for the above reasons and the more detailed reasons given by my learned brother, Ogebe, JSC that I too allow the appeals. I also substitute a verdict of “Not Guilty”. The appellants are accordingly discharged and acquitted of the charge against them. *R.v. Eke* is a good authority on this.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Ogebe J.S.C. I agree fully with him that it could not be said that the prosecution established the guilt of the appellants beyond reasonable doubt as required by law.

The appellants had been arraigned before the trial court on the offence of armed robbery punishable with death. The undisputed evidence was that the 1st appellant was an apprentice under P.W.1 and had lived with him. The 2nd appellant, a brother to the 1st appellant had regularly visited the 1st appellant while he lived with the P.W.1. It was not the case of the prosecution that those who came to rob him and who carried guns had their faces covered. P.W.1 said he saw and recognized them.

However, when he made his report to the police in the morning of the alleged robbery he stated that unknown persons committed the robbery. D.W. 1, a Police Inspector to whom P.W. 1 made a

statement when he lodged the report confirmed that P.W.1 had reported that unknown persons robbed him.

This was a serious *lacunae* with the case of the prosecution and I am not satisfied that the guilt of the appellants could be regarded as established without a serious consideration of this patent anomaly in the case of the prosecution. B

I would also give the appellants the benefit of the doubt. I agree with the lead judgment and would discharge and acquit the appellants.

OGBUAGU JSC

This is an appeal against the Judgment of the Court of Appeal, Enugu Division (stated in the Respondent's Brief as "Enugu Judicial Division") (hereinafter called "the court below") delivered on 10th March, 2003, dismissing the Appellants' appeal to it and affirming the conviction and sentence to death of the Appellants for armed robbery by the High Court of Enugu State presided over by Nosike, J. C

Dissatisfied with the said Judgment, the Appellants have in their respective or separate Notice of Appeal, appealed to this Court on four grounds of appeal. I note that in each of the Notice of Appeal, the relief sought, is that the said conviction and sentence of each of them by the trial court and the affirmation of the same by the court below, be set aside "for being unsafe." The parties in their respective Brief, have each formulated three issues for determination. When this appeal came up for hearing on 12th March, 2009, both learned counsel for the parties, adopted their respective Brief. While the learned counsel for the Appellants - Fowowe, Esq. urged the court to allow the appeal, the leading learned counsel for the Respondent - Ikeyi, Esqr, urged the Court to dismiss the appeal and affirm the Judgment of the court below. Thereafter, Judgment was reserved till to-day. E F G

I will deal briefly, with the 1st and 2nd issues of the Appellants and the 1st and 3rd issues of the Respondent together which I respectively consider, as very crucial in the determination of these appeals. From the evidence in the Records, I note inter alia, the following facts: H

1. The P, W.1 who was the victim of the robbery, knew very

well before the date of the incident, the Appellants for about four (4) years. The 1st Appellant, was an apprentice in cow-trading under or of the PW1. He had lived with the PW1 in his house for the said number of years and during these period/years, the 2nd Appellant, was a frequent visitor to the 1st Appellant in the home/house of the PW1. Remarkably, the learned trial Judge, confirmed and acceded to this fact about the 1st Appellant at page 102 of the Records.

2. Also noted by the learned trial Judge at the same pages 102 and 103, is that there is no evidence by the PW1 and his two wives, that the robbers, wore masks - i.e. the robbers were unmasked and the evidence of the PW1 that he saw the Appellants with the aid of a bush lantern when they were attacking him. Yet and yet, when he (the PW1), made his first report at the earliest opportunity - Exhibit "F" on the same date he was attacked, he stated that he was attacked by "unknown thief or thieves". The DW1 - a Police Officer, Inspector James Eze of about twenty-nine (29) years in the Police Force, who recorded the said statement, testified at the trial and corroborated the fact that the PW1 told him, that he was attacked by persons that he the PW1, did not know. Exhibit F, is the Police Crime Report Diary containing the report of the robbery attack on the PW1.

It seems or appears to me that the DW1, was unwilling to come to court to testify or that the prosecution did not want or were unwilling to call him as a witness, but he appeared in court to testify pursuant to a subpoena issued and served on him at the instance of the defence. He testified, inter alia, at page 45 of the Records, as follows:

..... *I was served with a subpoena to come to Court to testify on 29/6/97, I was on duty at Ozalea Police Station when one Chima Ugwu of Amagu Akagbe Ugwu in Nkanu West Local Government came to the Station at about 1330, hours and reported that on 29/6/97 at about 0200 hours unknown thief or thieves broke through the fence of his gate and entered the compound. They ordered him to open his door. As he opened the door he was pushed down, and they gripped him and beat him with a rod on the head and on the left leg. The thieves stole away his N300,000.00 cash kept in a salt bag in his house. He then came to report..."*
[the underlining mine]

The DW1 under cross-examination at page 46, testified that it was after three (3) days after exhibit "F" was made, that the PW1

came back and gave the names of the Appellants for the first time. That it was on this second visit, that the PW1 mentioned that he suspected two persons who should be arrested and led them to the place where they arrested the Appellants. That the names of the Appellants are nowhere mentioned in Exhibit "F".

3. DW4 - Vincent Ant - the father of the Appellants also testified on oath, inter alia, at page 62 of the Records, as follows:

"On 29/6/97, we dismissed from the Church Service when we heard that thieves went to the house of PW1. I then went to his house as I got home from service to sympathise with him. The P. W. 1 told me that the five thieves visited his house. While they were knocking on the door, the P. W. 1 asked if it was his son Ngene that used to accompany him to the market that was knocking. On opening the door, the invaders gripped him, threw him down and one of them hit him on the head, while another hit him on his leg. The others took away the money he had kept for going to the market with. I then advised to call on his children to take him to the Police Station to make a report. I told him to tell the Police if he knew the names of the thieves, he should go and tell the Police. PW1 told me when I visited him that he did not know those who visited his house and robbed him. I went home after the visit. Two weeks later the P. W. 1 came and got the 1st accused arrested, in my absence. When I returned, I went to ask the P. W. 1 why. The 2nd accused was also arrested and taken along with the 1st to the Police Station.....".
[the underlining mine]

It could be seen that the evidence of the DW4, is substantially what the PW1 had reported to the Police as recorded in Exhibit "F".

4. In Exhibit "B" at page 110 of the Records, one of the wives of the PW1 - Mgbeke Chime in her Statement to the Police, stated inter alia:

"I cannot recognise the thieves because they have started running away when I came out".

She had stated that she was sleeping.

The other wife PW2 - Nneani Ugwu in her own Statement to the Police at page 10 of the Records, stated inter alia, as follows:

"..... I did not recognise any of the thieves because there was no light and I just got up from sleep. I do not suspect anybody.....".

I or one naturally will think or believe that if the PW1 knew the

Appellants as one of the armed robbers, he should have immediately and there and then, told his two wives that the Appellants are/were one of the robbers as soon as they came out after hearing his cries according to him. As could be seen or deduced from their said State-
 B bers. Any evidence to the contrary, should and ought to be treated by the two lower courts, as an after-thought and therefore, unreliable. Their said statements also show unequivocally, that the PW1 did not know the identity of whoever allegedly attacked him. I have used
 C the word “allegedly”, because the Medical report, if any, said to be issued to the PW1, was never produced or tendered in evidence at least to show or confirm that the PW1 was ever injured and eventually, treated by a Medical Doctor in any hospital. My conclusion or inference with respect, is that there was no such injury or treatment.
 D I say so because, the DW1 testified under cross-examination at page 48 of the Records, that,

“My opinion in the instant circumstances is that, it is a case of burglary and stealing”.

The name calling and castigation of the DW1 in paragraphs
 E 4.23 and 4.34 of the Respondent’s Brief with respect, is unfortunate and not justified.

My perusal of Exhibit “F” at page 119 of the Records, shows in fact and indeed, that when the report of the incident was made, in the case file opened by the Police, it was regarded as an offence of
 F Burglary and Stealing. This accounts for the eventual granting of bail to the Appellants by the Police. It is noted, by me that at the time the PW1 made his report, he did not show the Police or DW1, any injury or bleeding on his body. There is no evidence in the Records, to
 G show that the PW1, was rushed in any vehicle, to the Police Station and then subsequently, to any hospital. The whole thing looks to me, a fairy tale or cock and bull story by the PW1. From the said evidence of the DW4, there is no evidence that the PW1, showed him DW4, any injury on his head or leg or that he the DW4, observed any
 H injury on the body of the PW1.

From the foregoing, I now come to the law. It is settled law and now firmly established that where an eye witness (as in the instant case - the PW1), omits to mention at the earliest opportunity, the name or names of the person or persons whom he allegedly saw

committing the offence, a court, must be careful in accepting his evidence given later and implicating the person or persons charged, unless a satisfactory explanation is given. See the case of Commissioner of Police v. Tijani Alao & ors. (1959-60) WRNLR 39 referred to in the case of Zekeri Abudu v. The State (1985) 1 NWLR (pt.1) 55 @ 58, 59, 62, - per Coker, JSC. B

In other words, the failure of a complainant such as the PW1, to mention , the name or names of an accused person or persons or suspect to the Police at the earliest opportunity, gives the impression that at the time he or they were making the complaint, he or they, C did not know the person or persons who committed the alleged offence. This fact, may not add weight to the evidence but will tend to depreciate the value of the evidence in court. See the case of Adeyeye v. Commissioner of Police (1959) WNLR (Pt.II) 100@ 102; and Cyril Udeh v. The State (1999) 5 SCNJ. 187 - per Ayoola, JSC and page D 202 - per Iguh, JSC.

In other words again, such failure, will or would detract from whatever credibility the trial court may wish to ascribe to his evidence if he is shown (as was the case in the instant case leading to this appeal), to have known the suspect or accused person by name at E the time of the incident. With this fact or evidence before the trial court, in my respectful but firm view, that should have been the end of the prosecution's case. The learned trial Judge, should have exercised great caution in convicting the Appellants. It is even noted by F me, surprisingly and regrettably, that the learned trial Judge, did not consider at all Exhibit "F" which he had admitted after overruling the objection as to its admissibility and turned in his Judgment, to rely on what he described as its probative value. See page 105 of the Records.

Iguh, JSC at pages 202 - 203 in the case of Udeh v. The State G (*supra*) stated inter alia, as follows:

"Without doubt, if a complainant or an eye witness to a crime know the accused persons before the commission of a crime and had omitted to mention their names to the police when he made his complaint or written statement to the police, failure by the trial court to H take that omission into consideration before deciding whether the evidence of such a complainant or witness against the accused persons was true or not would amount to a non-direction on material evidence in favour of such accused persons which non-direction would

have necessarily occasioned a miscarriage of justice and an accused person would under such circumstance be entitled to an acquittal and discharge. See Yekini Adeyeye v. Police (1959) WRNLR 100 @ 102 and Police v. Alao (1959) WRNLR (Pt.1) 39”.

[the underlining mine]

B On the above, I rest these appeals. With the greatest respect, the court below, was in grave error to have affirmed the conviction and sentence of the Appellants by the trial court in the face of the overwhelming evidence in their favour as demonstrated by me in this Judgment that raised a lot of doubt in my mind. There are a lot more evidence in favour of the Appellants such as the PW1 and PW2 one of his wives, being tainted witnesses and having their own purpose to serve and the failure of the trial court, to warn itself about the danger of relying on their evidence. In fact, I note that the trial court, D ignored the weighty evidence of the DW4. With respect, the holding of the court below at page 193 of the Records that the

“ *PW1 must have disclosed the identity of the accused at the time he made the report to the Police Station and which was received by the DW1. There could not therefore have been a report of “unknown thief or thieves” as claimed by him at Exhibit ‘F’* “
E *[the underlining mine]*

amounts to me, a mere speculation.

In conclusion, it is from the foregoing and the reasons and conclusions contained in the lead Judgment of my learned brother, F Ogebe, JSC just delivered which I had the privilege of reading before now and with which I agree, that I too, give the benefit of my doubt, in favour of the Appellants. I too, allow the appeals and I abide by the consequential orders in the said lead judgment.

G

MUHAMMAD JSC

I read before now, the judgment of my learned brother, Ogebe, JSC, just delivered. I agree with him in his reasoning and conclusion. I have nothing more to add.

H

NOTE:

OVERRULED COURT OF APPEAL JUDGMENT IS REPORTED IN (2007) 10-12 KLR (pt. 245) 4039 CA