

SUPREME COURT OF NIGERIA
13TH JANUARY, 2012. SC. 187/2007
CORAM: - **I. T. MUHAMMAD, S. GALADIMA,**
B. RHODES-VIVOUR, N. S. NGWUTA,
M. U. PETER-ODILI, JJSC

ANTHONY OKORO APPELLANT
V.
THE STATE RESPONDENT

COURTS - Criminal procedure - Need for interpreter - By 1999 constitution s. 36 (6) (e) - Anyone charged with a criminal offence - Is entitled to an interpreter - If he does not understand the language of the court (H1)

CRIMINAL PROCEDURE - Interpreter - Failure to supply - Effect - The failure is treated as a matter of procedure - And a conviction stands - Except where the judge is satisfied that such failure led to miscarriage of justice (H2)

CRIMINAL PROCEDURE - Interpreter - Non provision of - When to raise objection - Where accused is represented by counsel - Objection must be taken at the trial not on appeal (H3)

COURTS - Criminal procedure - Presence of interpreter - Failure to record - Effect - There is an irrebuttable presumption of the presence of an interpreter - And failure to so record by the judge - Is an omission that can be waived aside as mere irregularity (H4)

EVIDENCE - Dying declaration - Admissibility - The statement is admissible where cause of death is in issue - And it must be made by a deceased - Who believed he was in danger of approaching death (H5)

CROSS EXAMINATION - Objective - Crime - It is to test the correctness of testimony of plaintiff and his witness - Hence failure of appellant to cross examine PW1 on her testimony - Is deemed an acceptance of same (H6)

MURDER - Proof - Prosecution must prove beyond reasonable doubt - Not only that it was the act of appellant that resulted in death of the deceased - But also that death occurred in circumstances intended in CC s. 316 (H7)

CRIMINAL PROCEDURE - Discharge of accused - Effect on co-accused - Ebri v State - Where two or more are charged with an offence - With similar evidence adduced against them - Discharge of one must affect the discharge of the others (H8)

CRIMINAL PROCEDURE - Acquittal - Murder - Discharge and acquittal of 2nd & 3rd accused - Are correct because the evidence - Adduced against them and appellant are not similar (H9)

MURDER - Proof - Ingredients - Prosecution must prove that deceased died - And that death occurred as a result of injury - Caused by the act of accused person (H10)

ORDERS OF COURT - Prejudice - Order made without jurisdiction - It is advisable but not mandatory for court to set such order aside - But it is better ignored where no one is prejudiced by same (H11)

CRIMINAL PROCEDURE - Proof - Standard of - Criminal trial is proved beyond reasonable doubt - And a conviction would not be upset on appeal - If the charge was proved based on the standard (H12)

EVIDENCE - Murder - Circumstantial evidence - Conviction is justified where the circumstances are cogent - And directly points to accused - As the person that killed deceased (H13)

FACTS

Every morning at about 5 a.m the deceased - Obediah Ofoegbu, before his death takes a short walk from his house to the village church to ring the bell to summon the villagers for morning prayers. On the 13th of October 1987, on his way back from the church he was shot. Immediately, he repeatedly shouted "*Anthony*

Okoro has shot me.” His wife heard the gunshot and ran to her dying husband. She met him holding his neck which at the time was bleeding profusely. The deceased was crying and saying that 1st accused/appellant shot him. A few people came to the scene and conveyed the deceased to a nearby hospital and then to the Okigwe General Hospital. On his dying bed the deceased wrote a statement in the presence of the Investigating Police Officer - PW7. That statement was admitted as Exhibit B. In exhibit B he said Anthony Okoro (i.e. appellant) shot him, and when PW1 - his wife visited him he told her that appellant shot him.

He died the next day and according to the Medical Doctor - PW6 who performed the post mortem examination, the deceased died from wounds consistent with gun shots. Consequently, appellant was charged and arraigned with three other persons on a one count charge of murder contrary to section 319 (1) of the Criminal Code. Cap. 30 Vol. 11, Laws of the Eastern Nigeria 1963 (as applicable to Imo State of Nigeria). They were arraigned before the High court of Imo State, Okigwe judicial division. Ten witnesses testified for prosecution/respondent. One of the accused persons - Godwin Okoro was subsequently withdrawn from the charge and discharged. The remaining three accused persons gave evidence in their defence. A fourth witness also testified for the accused persons. Thirteen exhibits were received in evidence. At the end of the trial, the judge discharged and acquitted 2nd and 3rd accused persons. However, appellant was found guilty of murder. He was thus convicted and sentenced to death. Dissatisfied, appellant filed an appeal at the Court of Appeal, Port Harcourt division. The court confirmed the judgment of trial court. Aggrieved further, appellant has appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the lower court was right when it upheld the judgment of the trial court when the appellant did not have a fair hearing in the trial court.

2. Whether the lower court was right when it relied on the evidence of pw1, pw3, pw6, Pw7 and Exhibit B in upholding the finding of the trial court that it was the appellant that shot and or killed the deceased.

3. Whether the lower court was right when it upheld the conviction and sentence of the appellant to death for murder by the trial

court, after the trial court, based on the same evidence discharged and acquitted the 2nd and 3rd accused persons.

4. Whether the lower court rightly upheld the conviction and sentence of the appellant to death for murder by the High Court, when the charge and the entire proceedings before the trial High Court were incompetent.

5. Whether the prosecution proved its case against the Appellant beyond reasonable doubt to warrant the lower court to have sustained or upheld the conviction and sentence of the appellant to death for murder by the trial court."

HELD (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

Criminal procedure - Need for interpreter

1. Section 33 (6) of the 1979 Constitution, and/or Section 36 (6) (e) of the 1999 Constitution ensures that anyone charged with a criminal offence is entitled to have as of right an interpreter in court if he does not understand the language of the court. That is to say there must be proper interpretation to the accused person of the proceedings. And it is mandatory that the court supplies an interpreter in cases where one is needed. The impression of a reasonable person who was present at the trial is the true test of fair hearing. Justice cannot be said to have been done if an accused person who does not understand the English language (the language of the court) is denied the services of an interpreter. The entire proceedings would be strange to him and a grave miscarriage of justice would have occurred amounting to a failure of justice. (p. 350 C)

CRIMINAL PROCEDURE - Interpreter - Failure to supply

2. If the accused person and his counsel did not ask for an interpreter during trial the failure to supply one is treated as a matter of procedure and a conviction stands except the trial judge is satisfied that the failure to supply an interpreter led to miscarriage of justice. (p 350 F)

CRIMINAL PROCEDURE - Interpreter - Non provision of

3. Where an accused person is represented by counsel, objection to failure to provide an interpreter must be taken at the trial and not on appeal. The reasoning is simple. Once an accused person and his

counsel acquiesced to an irregular procedure and there is no miscarriage of justice he cannot be heard to complain of the procedure on appeal.

There was no objection to the non provision of an interpreter at the trial court by the appellant or his counsel, neither was there objection at the Court of Appeal. The issue comes up for the first time in this court. Once an accused person or his counsel fails to object to the non provision of an interpreter at trial their right to so object is lost forever. Such a right cannot be invoked on appeal. I am in the circumstance satisfied that the appellant had a fair trial. (pp. 350 G/351 F) B
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Criminal procedure - Presence of interpreter

4. The record further shows that an interpreter was available when the following witnesses gave evidence, PW2, 4, 6, 7, 8, 9 but the learned trial judge failed to record that there was an interpreter when PW1, 3, 5, 10, the appellant and his witness gave evidence. My lords notwithstanding the instances where the learned trial judge failed to record that there was an interpreter, there is an irrebuttable presumption that an interpreter was present in court and interpreted the entire proceedings to the satisfaction of the appellant. This is so because at the commencement of the trial an interpreter was present and interpreted the plea to the accused person, and no where in the Record of Appeal is it shown that the accused person/appellant or his counsel objected to the non provision of an interpreter and they never said that they objected. The instances where the learned trial Judge failed to record the presence of an interpreter is an omission that can be waved aside as a mere irregularity. (p. 351 B) D
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Dying declaration - Admissibility

5. The learned trial judge held that Exhibit B is a dying declaration of the deceased. His lordship said:

“I must say that the belief envisaged by section 33(1) (a) of the Evidence Act is the belief of the deceased and not the opinion of any other person as to what that belief is. It is from the statement of the deceased that the belief must be garnered and not from the view held by other person. The deceased by himself may believe that he would die while a bystander believes he would not die.” G
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The Court of Appeal agreed with the above. I am in complete agreement with the above also. To qualify as a dying declaration the statement must be made by a person when he is dying or believes he is approaching death as a result of the injury which caused his death and such statements are admissible against anyone in situations where the cause of death is in issue. At the time of making the statement the deceased must believe he is in danger of approaching death. Belief in this context is subjective and not objective.

When the deceased was shot, bleeding profusely and was rushed to hospital and on his hospital bed makes a statement saying, *"If I die you caused it."* To my mind that it is a statement made by the deceased in imminent fear of death and believing at the time he made the statement that he was going to die. Being in hospital gives anyone hope of recovery but that does not mean the deceased did not believe he was going to die. Exhibit B is a dying declaration and it was properly admitted in evidence by the trial court and affirmed by the Court of Appeal. The Court of Appeal found and I agree with the finding that the statements and evidence adduced by the prosecution witnesses PW1, PW3, PW6 and PW7 as well as Exhibit B were all consistent and that it was actually the appellant that used the fatal weapon who shot him. (pp. 353 F/ 354 E)

CROSS EXAMINATION - Objective

6. The above are very material facts that ought to have been subjected to cross examination but they were not challenged by cross examination. I must state that examination in chief is an opportunity to state the facts of his case by the plaintiff and his witnesses. Cross examination is to test the correctness of the testimony of the plaintiff and his witnesses, while re-examination is another chance to clarify facts but not an opportunity to restate the testimony given in evidence in chief all over again. So where a witness, PW1 testifies on a material fact in controversy (i.e. who killed her husband) the other party should if he does not accept PW1's testimony as true, cross-examine her on that fact or show that he does not accept the evidence as true. In the absence of cross-examination the court is at liberty to interpret his silence as an acceptance that the appellant does not dispute the material fact stated by PW1. (p. 355 A)

MURDER - Proof

7. PW3 conveyed the deceased from the first hospital to the second hospital and on oath said that at the first hospital that he saw the deceased at the hospital with blood gushing out from his left chin and in the presence of Dr. Dan Igwe and the Nurses said that if he died from the injuries we should realize that it was Anthony Okoro who shot him. PW 6 is a medical doctor. It was he who performed the post mortem examination on the deceased and found that the deceased died from wounds consistent with gunshot. PW 7 is the investigating police officer, and it was he who went to the deceased on his dying bed and obtained Exhibit B.

To succeed the respondent has a duty to establish to the satisfaction of the court, who shot the deceased. To do this the respondent must prove beyond reasonable doubt, not only that it was the act of the appellant that resulted in the death of the deceased but also that death occurred in circumstances under one or more of the intents in section 316 of the Criminal Code.

My lords, the statement of the deceased, (his dying declaration, Exhibit B) was corroborated by the testimonies of PW1, PW3, PW6 and PW7. They all point clearly to the fact that it was the appellant who killed the deceased by shooting him with a gun. The act of shooting with a gun falls within the warm embrace of Section 316 (1) of the criminal code. Concurrent findings by the Courts below that the appellant shot and killed the deceased and is guilty of murder is correct. (pp. 355 D/ 356 E)

Criminal procedure - Discharge of accused - Effect on co accused

8. Ebri v. State 2004 11 NWLR Pt. 885 p 589 is authority for the position of the Law that where two or more persons are charged with the commission of an offence, and the evidence against all the accused persons is the same or similar, the discharge of one must as a matter of Law, affect the discharge of the others. The reasoning being that if one or more of the accused persons is discharged for want of convincing evidence that must automatically affect all the others in the light of the fact that the evidence against all the accused persons is tied together. (p. 357 G)

CRIMINAL PROCEDURE - Acquittal

9. The question to be answered is whether the evidence is in all material respects the same. The appellant and the 2nd and 3rd accused persons stood trial for murder.

B The 2nd and 3rd accused persons were found not guilty of murder because there was doubt in the evidence linking them with the death of the deceased. The Court of Appeal agreed with the learned trial judge concluding that the appellant was responsible for the death of the deceased.

C The deceased and the vital witnesses never said that the 2nd and 3rd accused persons were the persons who shot and killed the deceased. What they said is that they were in company of the appellant when the appellant shot the deceased. What then is the doubt? There is no

D evidence linking the 2nd and 3rd accused persons with the offence of murder, and it would be most unsafe to convict them in the absence of such evidence. There is extra evidence which makes the role of the appellant different from that of the 2nd and 3rd accused Persons.

E It is clear that on the evidence available it was the appellant who shot the deceased, an act which resulted in his death. No one said that the 2nd and 3rd accused persons shot the deceased, and so the evidence used in convicting the appellant is not the same neither is it similar with the evidence against the 2nd and 3rd accused persons.

F If on the other hand the appellant and the 2nd and 3rd accused persons were charged with conspiracy to commit murder and the appellant was convicted on that count, while the 2nd and 3rd accused persons were acquitted, then an appeal court would acquit

G the appellant because the evidence for conspiracy is the same or interwoven around the appellant and the 2nd and 3rd accused persons. In this case there is no charge for conspiracy, only Murder. The trial court was thus correct to convict the appellant for Murder and acquit the 2nd and 3rd respondents because the evidence used in

H convicting the appellant was not the same or similar with the evidence available against the 2nd and 3rd accused persons for a charge of Murder.

The doubt expressed by the learned trial judge relates to a conviction for murder on the evidence available. He concluded quite

rightly in my view that the 2nd and 3rd accused persons cannot be convicted for murder on the evidence before the court. (pp. 358 A/ F/ 359 B)

MURDER - Proof - Ingredients

10. To establish a case of murder the prosecution has to prove the following: B

- (a) that the deceased died;
- (b) that the death was not natural;
- (c) that the act of the accused person caused the death of the deceased, or/and; C
- (d) that the deceased died as a result of injury caused by the accused person. (p. 358 B)

Order made without jurisdiction

11. When a judge makes a null order or one without jurisdiction it is advisable but not mandatory to go to court to set it aside. The only reason for going to court is to have it put on record that it has been set aside. Where on the other hand a null order, such as the one under review does not affect anyone, and no one is prejudiced by it, neither was there a miscarriage of justice by it, it is better ignored. (p. 361 A) D

CRIMINAL PROCEDURE - Proof - Standard of

12. The standard of proof in criminal trials is proof beyond reasonable doubt. A conviction would not be upset on appeal if the charge was proved by the prosecution beyond reasonable doubt. (p. 362 D) F

Murder - Circumstantial evidence

13. The case against the appellant rests on circumstantial evidence. Before an accused person can be convicted on such evidence it must be shown that: G

- 1. The circumstances from which an inference of guilt is arrived at must be cogently and firmly established; H
- 2. The circumstances must point towards the guilt of the accused person and no one else.

That is to say a conviction for murder based on circumstantial evidence would be justified only where the circumstances are such as

to lead to no other conclusion, but that the accused killed the deceased. Circumstantial evidence would sustain a conviction where it is consistent with the guilt of the accused person but inconsistent with his innocence. The evidence of PW1, PW3, PW6, PW7 and the contents of Exhibit B (the deceased dying declaration) are compelling and conclusive evidence which to my mind is positive and unequivocal that the appellant was the one who shot the deceased. Both courts below were correct to find the appellant guilty of the offence of Murder. (p. 364 C)

NOTABLE POINT OF INTEREST
MUHAMMAD JSC

1. Arraignment must be conducted in open court

It is a further requirement that arraignment shall be conducted in open court except where the court directs otherwise for public interest or in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen [18] years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstance in which publicity would be contrary to the interest of justice. These are what are regarded as safe-guards to a fair trial in criminal proceedings. They are fundamental constitutional rights breach thereof vitiates the trial court's proceedings and renders same null and void. (p. 367 A)

REPRESENTATION

K. Wodu, for the Appellant

N. A. Nnawuchi, for the Respondent

CASES REFERRED TO

Damina v. State (1995) 8 NWLR (Pt.415) 513

Ogunye v. State (1999) 5 NWLR (Pt. 604) 548

Uwaekweghinya v. State (2005) ALL FWLR (Pt. 259) 1911

Udosen v. State (2007) 4 NWLR (Pt. 1023) 125

State v. Gwonto (1983) 1 SCNLR P 142

Egbedi v. State (1981) 11-12 SC 98

Akinfe v. The State (1988) 2 NSCC (Pt. 1) 313

R v. Ogbuewu (1949) 12 WACA 483

Ogba v. State (1990) 3 NWLR (Pt. 139) 505

Dokubo-Asari v. FRN (2007) 12 NWLR (Pt. 1048) 320

Akpan v. State (1992) 5 NWLR (Pt. 248) 439

Ebri v. State (2004) 11 NWLR (Pt. 885) 589

Umani v. State (1988) 1 NWLR (Pt. 70) 274

Orji v. State (2008) 10 NWLR (Pt. 1094) 31

Adele v State (1995) 2 NWLR (Pt. 377) 269

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STATUTES REFERRED TO

Criminal Code Cap. 30 Vol. 11 Laws of the Eastern Nigeria, 1963
(as applicable to Imo State), s. 319(1)

C

Constitution of Federal Republic of Nigeria 1999, s. 33 (6) and 36(6)
(e)

Evidence Act, s. 33 (1) (a)

Criminal Code, s. 316 (1)

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High Court Laws Cap. 61 Laws of Eastern Nigeria 1963, s. 47 (1)

BOOK REFERRED TO

East's Pleas of the Gown vol. 1 p. 357

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LEAD JUDGMENT BY RHODES-VIVOUR JSC

The appellant was charged and arraigned with three other persons on a one count charge which read as follows:

STATEMENT OF OFFENCE:

Murder contrary to Section 319 (1) of the Criminal Code. Cap. 30 Vol. 11, Laws of the Eastern Nigeria 1963 as applicable to Imo State of Nigeria.

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PARTICULARS OF OFFENCE

Anthony Okoro, Mbadiwe Okoro, Friday Okoro and Godwin Okoro on 14th day of October, 1987 at Umulolo in the Okigwe Judicial Division murdered Obediah Ofoegbe. Trial commenced on the 26th of October, 1993 in a High Court at Iho, Imo State, Onumajulu J presided. Ten witnesses testified for the prosecution. Godwin Okoro was subsequently withdrawn from the charge and discharged. The remaining three accused persons gave evidence in their defence. A fourth witness also testified for the accused persons. Thirteen exhibits were received in evidence.

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In a considered judgment delivered on the 17th of November,

1997 the learned trial judge acquitted and discharged Mbadiwe Okoro and Friday Okoro, found the 1st accused person, Anthony Okoro guilty of murder and sentenced him to death. Anthony Okoro filed an appeal. It was heard by the Court of Appeal Port Harcourt Division. That Court confirmed the judgment of the trial court. The concluding paragraph of the judgment read thus:

"In conclusion, convicts appeal has no merit and is dismissed. I affirm the conviction and sentence of the appellant as found and declared at the trial court".

This appeal is against that judgment. In accordance with Rules of this Court, briefs of argument were filed and exchanged.

Learned counsel for the appellant formulated six issues for determination from his nine grounds of appeal. They are:

"1. Whether the lower court was right when it upheld the judgment of the trial court when the appellant did not have a fair hearing in the trial court.

2. Whether the lower court was right when it relied on the evidence of pw1, pw3, pw6, Pw7 and Exhibit B in upholding the finding of the trial court that it was the appellant that shot and or killed the deceased.

3. Whether the lower court was right when it upheld the conviction and sentence of the appellant to death for murder by the trial court, after the trial court, based on the same evidence discharged and acquitted the 2nd and 3rd accused persons.

4. Whether the lower court rightly upheld the conviction and sentence of the appellant to death for murder by the High Court, when the charge and the entire proceedings before the trial High Court were incompetent.

5. Whether the prosecution proved its case against the Appellant beyond reasonable doubt to warrant the lower court to have sustained or upheld the conviction and sentence of the appellant to death for murder by the trial court."

And for the respondent, learned counsel formulated three issues, which are:

1. Whether the appellant was given a fair hearing.

2. Whether there was evidence sufficient enough to warrant the conviction for murder and sentence to death of the appellant by the trial court.

3. Whether the proceeding in the trial court was a nullity.

I am satisfied that the five issues produced by learned counsel for the appellant are adequate for the purpose of this appeal.

At the hearing of the appeal on the 20th of October, 2011 learned counsel for the appellant K. Wodu Esq. adopted his appellant's brief deemed duly filed on the 30th September, 2010 and a Reply brief filed on the 24th January 2011. Learned Counsel for the Respondent, N.A. Nnawuchi Esq. adopted his brief filed on the 11th of November 2010 and in amplification of his brief referred us to the case of: *Anyanwu v State* 2002 13 NWLR Pt. 783 p. 107 on the doctrine of presumption of regularity and urged us to dismiss the appeal.

The facts are these: Every morning at about 5 a.m the deceased, Obediah Ofoegbu, before his death takes a short walk from his house to the village church to ring the bell to summon the villagers for morning prayers. On the 13th of October 1987 on his way back from the church he was shot. He immediately started shouting, saying "*Anthony Okoro has shot me.*" His wife heard the gunshot and ran to her dying husband. She met him holding his neck which at the time was bleeding profusely. The deceased was crying and saying that the appellant shot him. A few people came to the scene and arranged to convey, and did convey the deceased to a nearby hospital and then to the Okigwe General Hospital. On his dying bed the deceased wrote a statement in the presence of the investigating police Officer PW7. That statement was admitted as Exhibit B. In exhibit B he said Anthony Okoro shot him, and when PW1, his wife visited him he told her that the appellant shot him. He died the next day and according to the Medical Doctor who performed the Post mortem examination, - PW6 stated that the deceased died from wounds consistent with gun shots.

ISSUE 1.

Learned Counsel for the appellant submitted that the appellant's right to fair hearing was grossly violated in the proceedings in the trial court since he was not heard in his defence. He observed that the appellant and DW4, his only witness, both testified in Igbo language, but their testimony was not translated to English language. He urged the court to hold that there was no interpretation as there was no record of such in the Record of Appeal. Relying on: *Damina*

v. State 1995 8 NWLR Pt. 415 p. 513, Ogunye v. State 1999 5 NWLR Pt. 604 p. 548. He concluded that the issue should be resolved in favour of the appellant.

Learned Counsel for the Respondent submitted that the issue of interpretation of proceedings in the trial court cannot be raised on appeal if it was not raised in the trial court. Reliance was placed on: Uwaekweghinya v. State 2005 ALL FWLR PT 259 p. 1911, Udosen v. State 2007 4 NWLR Pt 1023 p. 125. He urged this court to resolve this issue in favour of the respondent.

Section 33 (6) of the 1979 Constitution, and/or Section 36 (6) (e) of the 1999 Constitution ensures that anyone charged with a criminal offence is entitled to have as of right an interpreter in court if he does not understand the language of the court. That is to say there must be proper interpretation to the accused person of the proceedings. See: State v. Gwonto 1983 1 SCNLR P 142. And it is mandatory that the court supplies an interpreter in cases where one is needed. The impression of a reasonable person who was present at the trial is the true test of fair hearing. Justice cannot be said to have been done if an accused person who does not understand the English language (the language of the court) is denied the services of an interpreter. The entire proceedings would be strange to him and a grave miscarriage of justice would have occurred amounting to a failure of justice.

If the accused person and his counsel did not ask for an interpreter during trial the failure to supply one is treated as a matter of procedure and a conviction stands except the trial judge is satisfied that the failure to supply an interpreter led to miscarriage of justice.

Where an accused person is represented by counsel, objection to failure to provide an interpreter must be taken at the trial and not on appeal. The reasoning is simple. Once an accused person and his counsel acquiesced to an irregular procedure and there is no miscarriage of justice he cannot be heard to complain of the procedure on appeal. See: Egbedi v. State 1981 11-12 SC p. 98.

Page 86 of the record of Appeal shows what occurred on the day the plea was taken it reads: PLEA: The single count of the charge

as contained in the information is read to the accused person in English language and interpreted and explained to each of them in Igbo language to the satisfaction of the court and each of the accused persons appeared perfectly to understand same before each pleads not guilty to the charge.

The record further shows that an interpreter was available when the following witnesses gave evidence, PW2, 4, 6, 7, 8, 9 but the learned trial judge failed to record that there was an interpreter when PW1, 3, 5, 10 the appellant and his witness gave evidence. My lords notwithstanding the instances where the learned trial judge failed to record that there was an interpreter, there is an irrebuttable presumption that an interpreter was present in court and interpreted the entire proceedings to the satisfaction of the appellant. This is so because at the commencement of the trial an interpreter was present and interpreted the plea to the accused person, and no where in the Record of Appeal is it shown that the accused person/appellant or his counsel objected to the non provision of an interpreter and they never said that they objected. The instances where the learned trial Judge failed to record the presence of an interpreter is an omission that can be waved aside as a mere irregularity.

Furthermore the appellant's statement to the Police was recorded by Sgt. Peter-Ikonne in English language. His testimony on oath in court was given in Igbo language. What the appellant said in his statement is not different from his evidence in court. It has thus not been shown that failure to interpret has occasioned a failure of justice. ***There was no objection to the non provision of an interpreter at the trial court by the appellant or his counsel, neither was there objection at the Court of Appeal. The issue comes up for the first time in this court. Once an accused person or his counsel fails to object to the non provision of an interpreter at trial their right to so object is lost forever. Such a right cannot be invoked on appeal. I am in the circumstance satisfied that the appellant had a fair trial.***

ISSUE 2

Learned counsel for the appellant observed that the learned trial judge relied on the evidence of PW1, PW3, PW6, PW7 and

Exhibit B to find and hold that it was the appellant who shot and, killed the deceased. He further observed that the evidence of PW1 and PW3 are inadmissible because the said evidence was rendered in Igbo language and same was not translated into the English language by an interpreter. He adopted his argument canvassed for issue No.1; B and urged this court to expunge from the records the evidence of PW1 and PW3.

Learned counsel observed that PW6, the Medical Doctor's evidence is irrelevant as he never said that it was the appellant that C shot the deceased. He urged us to hold that the court below was wrong to rely on evidence of PW6 to conclude that it was the appellant that shot the deceased.

Learned counsel observed that PW7, the investigating Police officer obtained Exhibit B the alleged written dying declaration made D by the deceased, contending that there is nothing in his evidence that it was the appellant that shot the deceased. He urged us to so hold.

He submitted that exhibit B does not qualify as a dying declaration as the prosecution failed to prove that the deceased who allegedly made it believed that he was in danger of approaching death, E observing that PW7 who obtained Exhibit B from the deceased said that the deceased did not believe that he was about to die. Referring to section 33 (1) (a) of the Evidence Act. *Akinfe v. The State* 1988 2 NSCC Pt 1 p 313, *R v. Ogbuewu* 1949 12 WACA p. 483, *Ogba v. State* 1990 3 NWLR Pt 139 p. 505. F

Learned counsel submitted that Exhibit B does not qualify as a dying declaration because it has not been shown that the deceased made it at a time he believed that he was in danger of approaching death. Concluding learned counsel submitted that without the evidence of PW1, PW3, PW6, PW7 and Exhibit B there was nothing G before the court of Appeal to uphold the finding of the trial court that the appellant shot and killed the deceased. He urged this court to resolve the issue in favour of the appellant.

Learned counsel for the respondent observed that concurrent H findings were made by the courts below:

(a) That the deceased shouted repeatedly that the appellant had shot him.

(b) That as at the time the deceased was making Exhibit B he believed himself of being in danger of dying

(c) That the said statement was made contemporaneously with the fact of shooting such that it formed part of the same transaction and that they should not be disturbed since they are not perverse. Reference was made to: Udosen v. State 2007 4 NWLR Pt 1023 p.125, Dokubo-Asari v. Federal Republic of Nigeria 2007 12 NWLR Pt 1048 p. 320. B

He observed that Exhibit B fulfilled all the ingredients of a dying declaration and that even if it was expunged the evidence of PW1 is enough to ground a conviction as it was unchallenged in cross examination. He urged this court to resolve this issue in favour of the respondent and hold that there was sufficient evidence to warrant the conviction and the sentences to death of the appellant by the trial court. C

Section 33 (1) (a) of the Evidence Act states that:

“Statements, written or verbal, or relevant facts made by a person who is dead are themselves relevant facts in the following cases:-

(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person’s death comes into question; such statements are relevant only in trials for murder or manslaughter of the deceased person and only when such person at the time of making such declaration believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery.” F

The learned trial judge held that Exhibit B is a dying declaration of the deceased. His lordship said:

“I must say that the belief envisaged by section 33(1) (a) of the Evidence Act is the belief of the deceased and not the opinion of any other person as to what that belief is. It is from the statement of the deceased that the belief must be garnered and not from the view held by other person. The deceased by himself may believe that he would die while a bystander believes he would not die.” H

The Court of Appeal agreed with the above. I am in complete agreement with the above also. To qualify as a dying declaration the statement must be made by a person when he is dying or believes he is approaching death as a result of the

injury which caused his death and such statements are admissible against anyone in situations where the cause of death is in issue. At the time of making the statement the deceased must believe he is in danger of approaching death. Belief in this context is subjective and not objective.

B Relevant extracts from Exhibit B runs thus:

“...I left my house to ring our bell for Morning Prayer as usual after ringing the bell, on my way back home to get prepared for the morning service, I saw Anthony Okoro jumped out from his hiding place opposite my house with gun. I flashed my touch light on him and called him by his name when he shot me with the gun on my head. I held my mind (sic) and flashed my touch light again and saw him with two of his brothers Mbadiwe Okoro and Friday Okoro accompanying him, what I said to him is if I die you caused it and my life is in your hand, they took to their feet. (sic)...”

D In Akpan v. State 1992 5 NWLR Pt 248 p. 439, this Court held:

“that it is well established in our Law of evidence that a statement made by a person in imminent fear of death, and believing at the time it was made that he was going to die is admissible as a dying declaration.”

When the deceased was shot, bleeding profusely and was rushed to hospital and on his hospital bed makes a statement saying, “If I die you caused it.” To my mind that it is a statement made by the deceased in imminent fear of death and believing at the time he made the statement that he was going to die. Being in hospital gives anyone hope of recovery but that does not mean the deceased did not believe he was going to die. Exhibit B is a dying declaration and it was properly admitted in evidence by the trial court and affirmed by the Court of Appeal. The Court of Appeal found and I agree with the finding that the statements and evidence adduced by the prosecution witnesses. PW1, PW3, PW6 and PW7 as well as Exhibit B were all consistent and that it was actually the appellant that used the fatal weapon who shot him.

PW1 is the wife of the deceased. In her evidence in chief she said:

“...I heard the sound of gunshot and my husband’s voice “cry-

ing Anthony Okoro has shot me". And that the deceased on his hospital bed told her that should he die PW1 should realize that it was Anthony Okoro that killed Him".

The above are very material facts that ought to have been subjected to cross examination but they were not challenged by cross examination. I must state that examination in chief is an opportunity to state the facts of his case by the plaintiff and his witnesses. Cross examination is to test the correctness of the testimony of the plaintiff and his witnesses, while re-examination is another chance to clarify facts but not an opportunity to restate the testimony given in evidence in chief all over again. So where a witness, PW 1 testifies on a material fact in controversy (i.e. who killed her husband) the other party should if he does not accept PW1's testimony as true, cross-examine her on that fact or show that he does not accept the evidence as true. In the absence of cross-examination the court is at liberty to interpret his silence as an acceptance that the appellant does not dispute the material fact stated by PW 1.

PW3 conveyed the deceased from the first hospital to the second hospital and on oath said that at the first hospital that he saw the deceased at the hospital with blood gushing out from his left chin and in the presence of Dr Dan Igwe and the Nurses said that if he died from the injuries we should realize that it was Anthony Okoro who shot him. PW 6 is a medical doctor. It was he who performed the post mortem examination on the deceased and found that the deceased died from wounds consistent with gunshot. PW 7 is the investigating police officer, and it was he who went to the deceased on his dying bed and obtained Exhibit B.

To succeed the respondent has a duty to establish to the satisfaction of the court, who shot the deceased. To do this the respondent must prove beyond reasonable doubt, not only that it was the act of the appellant that resulted in the death of the deceased but also that death occurred in circumstances under one or more of the intents in section 316 of the Criminal Code. See: State v. Aibangbee 1988 2 NWLR Pt 84 p. 548, State v. Oka 1975 9-11 SC p. 17. Section 316 of the Criminal Code states that:

“316 Except as hereinafter set forth, a Person who unlawfully kills another under any of the following circumstances, that is to say:-

(1) if the offender intends to cause the death of the person killed, of that of some other person;

(2) if the offender intends to do to the person killed or to some other person some grievous harm;

(3) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life;

(4) if the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;

(5) if death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid;

(6) if death is caused by wilfully stopping the breath of any person for either of such purposes; is guilty of murder.”

In the second case it is immaterial that the offender did not intend to hurt the particular person who is killed. In the third case it is immaterial that the offender did not intend to hurt any Person.

In the three last cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

My lords, the statement of the deceased, (his dying declaration, Exhibit B) was corroborated by the testimonies of PW1, PW3, PW6, and PW7. They all point clearly to the fact that it was the appellant who killed the deceased by shooting him with a gun. The act of shooting with a gun falls within the warm embrace of Section 316 (1) of the criminal code. Concurrent findings by the Courts below that the appellant shot and killed the deceased and is guilty of murder is correct.

ISSUE 3

This issue asks the question whether a court can convict a co-accused and discharge another co-accused on same or similar evidence. Learned counsel for the appellant submitted that where several persons are jointly charged for the commission of a criminal offence and based on the same or similar evidence, some are discharged, then all the others must also be discharged as some cannot be dis-

charged and others convicted based on the same or similar evidence. Reliance was placed on: *Ebri v. State* 2004 11 NWLR Pt. 885 p. 589. He observed that the appellant was convicted on Exhibit B, and the same Exhibit B formed the foundation for the acquittal and discharge of the 2nd and 3rd accused persons, further observing that the evidence against the appellant and the 2nd and 3rd accused persons are the same. He argued that there are doubts in Exhibit B and that the courts have held that when doubt has been cast on the evidence by the acquittal of some of the accused persons such piece of evidence should not be used as a basis to convict another accused person. Reference was made to: *Umani v. State* 1988 1 NWLR Pt. 70 p. 274, *Orji v State* 2008 10 NWLR Pt 1094 P. 31. He urged this court to hold that the lower court was wrong when it upheld the conviction and sentence of the appellant to death for murder by the trial court, after the trial court based on the same evidence acquitted the 2nd and 3rd accused persons.

Learned counsel for the respondent observed that when evidence against two or more accused persons in a criminal case in all material respects are the same and a doubt is resolved by the trial judge in favour of one of the accused persons, the same doubt should be resolved in favour of the others. Reliance was placed on: *Akpan v. State* 2002 F.W.L.R. P 1845. He observed that in this case the evidence is not in all material respect the same, contending that the evidence against the appellant is different from the evidence against the other accused persons. He observed that PW1 said that it was the name of the appellant the deceased said shot him, and in Exhibit B, the deceased said the appellant shot him, and at the time of the shooting the appellant was in the company of the other accused persons. Concluding he observed that the learned trial judge was right in finding that the case against the appellant is different from the case against the other accused persons.

***Ebri v. State* 2004 11 NWLR Pt 885 p 589 is authority for the position of the Law that where two or more persons are charged with the commission of an offence, and the evidence against all the accused persons is the same or similar, the discharge of one must as a matter of Law, affect the discharge of the others. The reasoning being that if one or more of the accused persons is discharged for want of convincing**

evidence that must automatically affect all the others in the light of the fact that the evidence against all the accused persons is tied together. See on the above also: *Adele v State* 1995 2 NWLR Pt 377 P. 269, *Kalu v State* 1988 4 NWLR Pt 90 P. 503. **The question to be answered is whether the evidence is in all material respects the same. The appellant and the 2nd and 3rd accused persons stood trial for murder.**

To establish a case of murder the prosecution has to prove the following:

- (a) that the deceased died;**
- (b) that the death was not natural;**
- (c) that the act of the accused person caused the death of the deceased, or/and;**
- (d) that the deceased died as a result of injury caused by the accused person.** See: *Bwashi v. State* 1872 6 SC P. 93, *Rex v. Abengowe* 1935 3 WACA P. 85.

In acquitting and discharging the 2nd and 3rd accused persons the learned trial judge reasoned as follows:

“...The evidence of PW1 as to what the deceased told her appears to limit the incident to 1st accused. Although PW1 had under cross-examination stated that the 2nd and 3rd accused persons were also mentioned to her by the deceased, she did not state in what circumstances. This doubt which I entertain in respect the role played by the 2nd and 3rd accused persons must be resolved in their favour...”

The 2nd and 3rd accused persons were found not guilty of murder because there was doubt in the evidence linking them with the death of the deceased. The Court of Appeal agreed with the learned trial judge concluding that the appellant was responsible for the death of the deceased. That court said:

“...evidence of PW1, PW3, and PW6 has shown that the deceased was positive, unequivocal and irresistible in his statement, Exhibit B being his dying declaration that it was the appellant who shot and killed him. Deceased statement to his wife, the Police investigator and even in the presence of the other people who came to the scene and latter at the Community Hospital and General Hospital, Okigwe as testified before the trial court are sufficient proofs of

circumstantial evidence that it was the appellant who shot him.”

Relevant extracts from Exhibit B (the dying declaration of the deceased) runs as follows:

“...I saw Anthony Okoro jumped out from his hiding place opposite my house with gun. I flashed my touch light on him and called him by his name when he shot me with the gun ...I flashed my touch light again and saw him with two of his brother Mbadiwe Okoro and Friday Okoro accompanying him...”

The deceased and the vital witnesses never said that the 2nd and 3rd accused persons were the persons who shot and killed the deceased. What they said is that they were in company of the appellant when the appellant shot the deceased. What then is the doubt? There is no evidence linking the 2nd and 3rd accused persons with the offence of murder, and it would be most unsafe to convict them in the absence of such evidence. There is extra evidence which makes the role of the appellant different from that of the 2nd and 3rd accused Persons.

It is clear that on the evidence available it was the appellant who shot the deceased, an act which resulted in his death. No one said that the 2nd and 3rd accused persons shot the deceased, and so the evidence used in convicting the appellant is not the same neither is it similar with the evidence against the 2nd and 3rd accused persons. If on the other hand the appellant and the 2nd and 3rd accused persons were charged with conspiracy to commit murder and the appellant was convicted on that count, while the 2nd and 3rd accused persons were acquitted, then an appeal court would acquit the appellant because the evidence for conspiracy is the same or interwoven around the appellant and the 2nd and 3rd accused persons. In this case there is no charge for conspiracy, only Murder. The trial court was thus correct to convict the appellant for Murder and acquit the 2nd and 3rd respondents because the evidence used in convicting the appellant was not the same or similar with the evidence available against the 2nd and 3rd accused persons for a charge of Murder.

The doubt expressed by the learned trial judge relates to a conviction for murder on the evidence available. He con-

cluded quite rightly in my view that the 2nd and 3rd accused persons cannot be convicted for murder on the evidence before the court.

ISSUE 4

Learned counsel for the appellant observed that this case was originally before Ononuju J. of the Imo State High Court, Okigwe Judicial Division, and that the Chief Judge of Imo State ordered that the case be transferred to an Owerri High court where Onumajulu J. presided. He submitted that on the 7th of June 1993 Ononuju J. struck out the case, but Onumajulu J. proceeded to hear the case as if it had not been struck out contending that where a criminal charge has been struck out it ceases to exist in the court. Reference was made to: *James v Nigerian Airforce* 2000 13 NWLR Pt 519 p. 513. He further observed that the order of Ononuju J. striking out the case was made without jurisdiction but such an order remains in force and must be obeyed until set aside. Reliance as placed on: *Rossek v. A.C.B. Ltd* 1993 8 NWLR Pt 312 p. 382, *Mobil Oil (Nig) Ltd. V. Assan* 1995 8 NWLR Pt 412 p. 109. He submitted that since the judge failed to set aside the order, the order striking out the suit is still in force, contending that the case came to an end when Ononuju J. struck it out, and so the proceedings before Onumajulu J. culminating in the death sentence passed on the appellant is null and void.

Learned counsel for the respondent argued that the right approach for this court to take would be to ignore the order and regard it as a non-event. He further argued that this court can invoke its powers under section 22 of the Supreme Court Act and do what the trial court failed to do, contending that the appellant would not be prejudiced if this court sets aside the null order made by Ononuju J. as no miscarriage of justice will occur. He urged this court to resolve the issue in favour of the respondent and hold that the proceedings in the trial court were competent.

On the 26th of April 1993 the Chief Judge of Imo State Ojiako C.J. pursuant to section 47(1) of the High Court Law cap 61 Laws of Eastern Nigeria, 1963 transferred this case from an Okigwe High court presided over by Ononuju J. to an Owerri High Court presided over by Onumajulu J. (see instrument of transfer on page 57 of the Record of Appeal) On the 7th of June 1993 Ononuju J. struck out the case. As at the 26th day of April 1993 when the case was trans-

ferred by the Chief Judge vide instrument of transfer, Ononuju J. no longer had jurisdiction over the case and so striking out the case on the 7th of June 1993 over two months after it was transferred amounts to striking out no case as no case was before him. It was a null order.

When a judge makes a null order or one without jurisdiction it is advisable but not mandatory to go to court to set it aside. The only reason for going to court is to have it put on record that it has been set aside. Where on the other hand a null order, such as the one under review does not affect anyone, and no one is prejudiced by it, neither was there a miscarriage of justice by it, it is better ignored.

It was made by Ononuju J. for the purpose of tidying his Records, a very harmless act by the learned trial judge.

ISSUE 5:

Learned counsel for the appellant observed that there are grave doubts in the case against the appellant and the trial court ought to have resolved the doubts in favour of the appellant. He observed that the lower court discredited portions of Exhibit B casts grave doubts as to the veracity of the said Exhibit B in that there is no longer any certainty about the correctness of the statements contained therein. He then asked the question, if the trial court had found portions of the statements relating to the 2nd and 3rd accused persons as being untrue what is the guarantee that the rest of the statements implicating the appellant in the commission of the alleged crime is true, arguing that there is a grave possibility that the allegation against the appellant in Exhibit B is not true.

Highlighting another doubt learned counsel referred to the non interpretation of the evidence of PW1 and PW3 and observed that the doubt created in Exhibit B runs through the said dying declarations as narrated by PW1 and PW3. He urged this ought to so hold.

Learned counsel observed that before an accused person can be convicted for murder on circumstantial evidence the accused person must have been seen with the weapon he used to kill the deceased shortly after commission of the offence or the weapon must have been recovered from the accused person. Reliance was placed on State V. Ogbubunjo 2001 2 NWLR pt 698 p. 576; Ukorah v. State 1977 NSCC Vol.11 p. 218.

He further observed that there are grave doubts in respect of

the identification of the appellant as the one who shot the deceased, and the fact that the gun allegedly used in shooting the deceased was never recovered. Finally he observed that there is a fundamental conflict in the case of the prosecution that in the information the prosecution alleged that the appellant and the other accused person
 B murdered the deceased on 14/10/87 while PW1 said the deceased died on 13/10/87 and the other prosecution witnesses said he died on 14/10/87. He submitted that conflict in respect of date of commission of criminal offence is fundamental particularly where the ac-
 C cused/appellant is consistently denying involvement in the commission of the offence.

He urged this court to resolve all these doubts in favour of the appellant and allow the appeal. This issue was not responded to by the respondent's learned counsel in the respondent's brief. A response
 D is unnecessary because in criminal appeals, after considering the issues in detail there is not much difficulty deciding if the case was proved beyond reasonable doubt.

The standard of proof in criminal trials is proof beyond reasonable doubt. A conviction would not be upset on appeal
 E ***if the charge was proved by the prosecution beyond reasonable doubt.*** In *Miller v. Minister of pensions* 1947 2 ALL ER p. 372 it was stated that:

"Proof beyond reasonable doubt does not mean proof be-
 F *yond the shadow of doubt. The Law would fail to protect the community if it admitted to fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as leaves 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*
 G *proved beyond reasonable doubt, but nothing short of that will suffice."*

See on this: *Lori v. State* 1980 8-11 SC p. 81

The submissions of learned counsel for the appellant rest on what he termed "grave doubts" in the prosecution's case. According
 H to learned counsel if these doubts are resolved in favour of the appellant he would be entitled to an acquittal. The grave doubts are:

1. That the learned trial judge discredited portions of Exhibit B in that if the portions of the statement relating to the 2nd and 3rd accused persons are untrue the portion implicating the appellant

should also be untrue.

The portion that refers to the 2nd and 3rd accused persons in Exhibit B reads thus:

“...I hold my mind (sic) and flashed my touch light again and saw him with two of his brother Mbadiwe Okoro and Friday Okoro accompanying him...” B

The portion that refers to the appellant in Exhibit B is:

“...I saw Anthony Okoro jumped out from his hiding place opposite my house with gun. I flashed my touch light on him and called him by his name when he shot (sic) me with gun on my head...” C

The Learned trial judge did not find portions of Exhibit B relating to the 2nd and 3rd accused persons untrue neither was any portion of Exhibit B discredited by the learned trial judge. Rather he found that those portions could not sustain a charge of Murder against the 2nd and 3rd accused persons, moreso as the deceased and none of the witnesses said the 2nd and 3rd accused persons killed the deceased. D

2. On the non interpretation of the evidence of PW1 and PW3. If there was non interpretation of the evidence of PW1 and PW3 it was the duty of the appellant and/or his counsel to object during the trial and not on appeal. The failure to provide an interpreter has always been treated as a matter of procedure and a conviction would not be disturbed on appeal except it can be shown that the failure to provide an interpreter led to miscarriage of justice. The appellant has failed to show how his assertion that there was no interpretation of the evidence of PW1 and PW3 led to miscarriage of justice. E F

3. On conviction of the accused person on circumstantial evidence. That is to say the accused person must have been seen with the weapon used to kill the deceased shortly after commission of the offence or the weapon must have been recovered from the accused person. G

4. On identification of the appellant as the one who shot the deceased.

Immediately after the deceased was shot he started shouting, *“Anthony Okoro shot me”* He said it to the hearing of the crowd and PW1, PW3, and PW7. The deceased had a good view of the appellant after he pointed his touch light in the direction of the appellant at the time he was shot. On his dying bed he made a statement, Exhibit H

B in the presence of PW7 wherein he said again that it was the appellant who shot him. I am in the circumstances satisfied that it was the appellant who shot and killed the deceased.

5. On conflict in the case of the prosecution as regards the date of death.

B The charge reads that the deceased was murdered on 14/10/87. PW1, his wife said he died on 13/10/87 while all the other prosecution witnesses said he died on 14/10/87. If all the witnesses say the deceased died on 14/10/87 it may lead to suspicion that they were all tutored, moreso as they are villagers. PW1 said that her husband died on 13/10/87 and not a day later, 14/10/87 is to my mind a minor discrepancy that amounts to a non issue.

C ***The case against the appellant rests on circumstantial evidence. Before an accused person can be convicted on such evidence it must be shown that:***

D ***1. The circumstances from which an inference of guilt is arrived at must be cogently and firmly established;***

2. The circumstances must point towards the guilt of the accused person and no one else. See: Ukorah v. State 1977 4 SC P.167, Adie v. State 1980 1 - 2 SC P. 116, Gabriel v. State 1989 5 NWLR pt.122 p. 430.

F ***That is to say a conviction for murder based on circumstantial evidence would be justified only where the circumstances are such as to lead to no other conclusion, but that the accused killed the deceased. Circumstantial evidence would sustain a conviction where it is consistent with the guilt of the accused person but inconsistent with his innocence. The evidence of PW1, PW3, PW6, PW7 and the contents of Exhibit B (the deceased dying declaration) are compelling and conclusive evidence which to my mind is positive and unequivocal that the appellant was the one who shot the deceased. Both courts below were correct to find the appellant guilty of the offence of Murder.***

H The appeal is hereby dismissed.

MUHAMMAD JSC

The facts giving rise to this appeal were clearly stated in the leading judgment of my learned brother, Rhodes-Vivour, JSC. I need not repeat same. The challenges before this court as contained in the appellant's brief of argument are as follows:

"[i] Whether the lower court was right when it upheld the judgment of the trial court when the appellant did not have a fair hearing in the trial court.

[ii] Whether the lower court was right when it relied on the evidence of the PW1, PW3, PW6, PW7 and Exhibit 'B' in upholding the finding of the trial court that it was the appellant that shot or killed the deceased.

[iii] Whether the lower court was right when it upheld the conviction and sentence of the appellant to death for murder by the trial court based on the same evidence discharged and acquitted the 2nd and 3rd accused persons.

[iv] Whether the lower court rightly upheld the conviction and sentence of the appellant to death for murder by the trial High Court, when the charge and the entire proceedings before the trial High Court were incompetent.

[v] Whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant the lower court to have sustained or upheld the conviction and sentence of the appellant to death for murder by the trial court."

The learned counsel for the respondent distilled the following three issues for our determination:

(a) Whether the appellant was given a fair hearing.

(b) Whether there was evidence sufficient to warrant the conviction for murder and sentence to death of the appellant by the trial court.

(c) Whether the proceeding in the trial court was a nullity.

I prefer the issues formulated by the learned counsel for the respondent as they appear more concise, apt and relevant to the appeal on hand.

In a criminal trial, the Constitution of the Federal Republic of Nigeria, 1999 [as amended] and other statutory laws which make provisions for the conduct of criminal trials in our courts, are all agreed and in very clear terms that in order to afford a fair trial to a person

accused of committing a criminal offence, the following requirements must be satisfied that is:

- (i) that the accused person should be informed promptly language he understands and in details of the nature offence he is alleged to have committed,
- B (ii) that he shall be placed before the court unfettered ,
- (iii) that the charge or ‘information’ shall be read and explained to him by the registrar or other officer[s] of the court, to the satisfaction of the court,
- C (iv) that he shall be called upon to plead instantly thereto,
- (v) he must be given adequate time and facilities for the preparation of his defence,
- (vi) he has right to defend himself in person or by legal practitioners of his choice,
- D (vii) he has right to examine in person or by his legal practitioners, the witnesses called by the prosecution,
- (viii) he has right to testify on his own behalf and or call witnesses to testify in his favour,
- (ix) he shall not be compelled to give evidence at the trial,
- E (x) he shall have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence.
- (xi) he shall not be subjected to any form of trial for any act or omission that did not constitute an offence at the time it took place
- F (retrospectively).
- (xii) he shall not be subjected to double jeopardy/trial on same offence where he has shown that he has been tried by a court of competent jurisdiction for that same criminal offence, save upon the
- G order of a superior court.
- (xiii) he shall be entitled to a copy of the judgment in which his guilt or innocence has been pronounced by the court within seven days of delivery thereof. See: Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 [as amended]; section 255 of the
- H Criminal procedure Act, Cap 80 LFN, 1990; AKPIRI V. THE STATE (1992) 7 SCNR (part 1) 59; KAJUBO v. THE STATE (1998) 1 NWLR [part 73] 721; ALAKE V. THE STATE [1991] 8 NWLR [part 205] 567; OKON V. THE STATE [1991] 8 NWLR (part 201) 424; KOROMO V. THE STATE [1979] 6 - 7 SC 3.

It is a further requirement that arraignment shall be conducted in open court except where the court directs otherwise for public interest or in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen [18] years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstance in which publicity would be contrary to the interest of justice. These are what are regarded as safe-guards to a fair trial in criminal proceedings. They are fundamental constitutional rights breach thereof vitiates the trial court's proceedings and renders same null and void. OKAFOR V. ATTORNEY- GENERAL OF ANAMBRA STATE [1991] 6 NWLR [part 200] 569. The submission of learned counsel for the appellant is that the appellant's right to fair hearing was grossly violated in the proceedings before the trial court as the appellant was not heard in his defence. Learned counsel argued further that the appellant testified as DW1 in the Igbo language. The said testimony was not translated into the English language from the Igbo language for the benefit of the court. Further, the only defence witness [DW4] also testified in the Igbo language. His evidence was not interpreted to the trial court in the English language which is the language of the court. The trial court, he further argued, does not understand Igbo language unless same is interpreted to the court in the English language, by an interpreter who understands the Igbo and English languages respectively. He cited the case of DAMINA V. THE STATE [1995] 8 NWLR [part 415] 513 at page 534. The interpreter must be sworn. His identity and name must be disclosed in the record. The evidence of the said witnesses was not interpreted to the trial court from the Igbo language to the English language. Further, assuming that the Judge understood the Igbo language which learned counsel did not concede, he cannot play the role of both a judge and an interpreter. He cited and relied on OJENGBADE V. ESAN [2001] 18 NWLR (part 746) 771 at page 790. Learned counsel submitted that the appellant was not heard in his defence. He argued this court to resolve this issue in favour of the appellant.

In order to see whether there was a fair trial of this case, it is pertinent to trace the step by step taken by the trial court up to the delivery of Judgment:

(1) As at 7th day of June, 1993, the bail granted to the [4]

four accused persons then, pending trial, was revoked by the trial court holden at Iho of Owerri Judicial Division of the Imo State High Court as the accused and their sureties did not turn-up for their trial to commence although served with hearing notices. Bench and detention warrants were ordered against the accused persons and bench warrants against their sureties to show cause.

(2) An objection on venue of trial was made by the learned counsel for the accused. The objection was overruled by trial court.

(3) Accused persons were once more apprehended and put under prison custody from where they were putting appearance to the trial court.

(4) On the 22nd of July, 1993, the single count charge was read to the accused persons in English language and interpreted and explained to each of them in Igbo language to the satisfaction of the court and each of the accused persons appeared perfectly to understand same before each pleaded not guilty to the charge (page 86 of the printed record of appeal).

(5) On the 26th of October, 1993, hearing commenced and was completed, including addresses by learned counsel to the parties, on the 24th of June, 1997.

(6) On the 17th of November, 1997, the trial court delivered its judgment - the subject matter of the present appeal.

It is apparent from the record of appeal that the issue of fair hearing was not raised at the court below. Now, therefore, the issue is being raised for the first time before this court. This issue is No.1 from the appellant's issue. It is distilled from ground No. 1 of the appellant's grounds of appeal. Although it is a fresh issue which requires the leave of this court (which has not been shown to have been sought and granted). I will close my eyes, in the interest of justice and fairness, to consider for whatever worth the issue stands. The main grouse of the appellant, I think, is ventilated by his counsel in his brief of argument as follows:

"4.12 we submitted that in this case, the appellant's right to fair hearing was grossly violated in the proceedings before the trial court as the appellant was not heard in his defence. It is instructive to note that the Appellant in the trial court testified as the DW1 in the Igbo language. The said testimony of the Appellant as the DW1, was not translated to the English language from the Igbo language in

which same was rendered, for the benefit of the trial court... the only defence witness called by the Appellant (DW4) also testified in the trial court in the Igbo language. His evidence was also not interpreted to the trial court in the English language.” (Underlining supplied for emphasis). Thus, the issue is on non-interpretation of the evidence of the appellant [himself] as DW1 and that of the DW4 from the Igbo language to the English language for the benefit of the court. It is clear that it is not true as contended by the learned counsel for the appellant that the appellant was not heard in his defence. The learned counsel contradicted himself when he said:

“It is instructive to note that the appellant in the trial court testified as the DW1 in the Igbo language”.

This, to my mind, is quite different from not being heard at all. It is totally a different thing to give testimony in a language foreign to the court as against none at all. Secondly, the prosecution witnesses that is, PWs 1, 3, 4, 5 testified in the Igbo language. PWs 7 and 9 were Police Officers. PW6 was the Medical expert. PWs 2, 8 and 9 were Assistant Chief Registrar, a retired civil servant and a teacher, respectively. The Police, the Medical expert, the Assistant Chief Registrar, the retired Civil Servant and the teacher all testified in the English language and their testimonies were interpreted by the Court Clerk into the Igbo language for the benefit of the appellant. Thirdly, the appellant was throughout the trial at the trial court represented by a counsel of his own choice. Fourthly, there was no objection by the learned counsel for the appellant at any point in time during the hearing at the trial court against the receiving of evidence of all those who testified in the Igbo language from the prosecution’s side when same was not rendered into the English language. The issue was not raised even at the court below, I wonder whether it is not too late to raise it [informally though] at this level. The law is trite, and I think I am comfortably supported by Musdapher, JSC, [as he then was], when he stated, in the case of *UWAEKWEGHINYA V. THE STATE*. [2005] All FWLR [part 259] 1911 at page 1923 - 1924 that:

“The former Supreme Court in the case of QUEEN V. IMADEBHOR EGUABOR [1962] 1 ALL NLR 287, stated that if the accused does not ask for an interpreter, the failure to supply one would be treated as a matter of procedure and a conviction may only be set aside if the failure to supply an interpreter had led to a

miscarriage of justice and that if the accused is represented by a counsel, the objection must be taken at the trial in the first instance, and not on appeal. There is a distinction between a matter of procedure that affects substantial justice in the trial of a case and a matter of procedure which in no way affects the justice of the trial of a case.

^B *See; Egbedi V. The State [1981] 11- 12 SC 98.*

It is settled law that an accused person who acquiesced to an irregular procedure that did not lead to miscarriage of justice cannot complain of the procedure on appeal. In the case of Ajayi v. Zaria N. A. [No.2] [1964] NNLR 61, this court allowing the appeal, held that an appellant discharges the burden of showing that a failure of justice has taken place for want of interpretation or adequate interpretation by showing “that a reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the appellant a fair trial”.

^D Although it is a constitutional requirement that there shall be adequate and free interpretation to the accused of anything said in a language, which he does not understand, it may however be dispensed with where the accused so wishes and the trial Judge is of the opinion that the accused does not require any interpretation of the proceedings. The right of the accused to an interpreter cannot however be raised on appeal, unless he claimed the right during his trial and was denied it. *See Queen V. Eguabor [supra].*

^F Further, when an accused person is represented by a counsel, the objection must be taken at the trial court in the first instance and not on appeal. *See: UDOSEN V. THE STATE (2007) 4 NWLR (part 1023) 125 at page 166 D - E; QUEEN V. EGUEBOR (1962) ALL NLR 288; STATE V. GWONTO [2000] FWLR [part 30] 2583.* ^G Another important point is that where there is such a complaint of non-interpretation, it is the duty of the accused/appellant to show that such non-interpretation has caused him miscarriage of justice *See: UWAEKWEGHINYA V. THE STATE [supra]; QUEEN V. EGUABOR [supra].*

^H It is thus, my view that all the safeguards to assure a fair trial have been complied with by the trial court. There is no cogent reason whatsoever, why the proceedings of the trial court should be disturbed. I agree it is irregular for a judge to rely on his understanding or proficiency of the language in which evidence is given which is

foreign to his court, and same not interpreted to the court or the accused in the language each understands, that has to be objected to by the accused or his counsel from the outset. Otherwise he will be deemed to have waived his right and has acquiesced to the irregular procedure adopted. That is what happened in this case, coupled with the fact that the appellant has failed to show what injustice he suffered as a result of the non-interpretation to the trial court. Reliance on such a point may appear to be more on the technical side of the law which all courts of law ran away from. B

For this and the more detailed reasons given in the lead judgment of my learned brother, Rhodes-Vivour, JSC, I, too, find no merit in this appeal and same is dismissed by me. I endorse all consequential orders made in the lead judgment. C

GALADIMA JSC

I have had the opportunity of reading in draft the leading judgment of my learned brother RHODES-VIVOUR, JSC. I agree with him that the Appellant's appeal lacks merit and ought to be dismissed. The background facts giving rise to the appeal have been carefully ventilated in the leading judgment. The 3 issues formulated by the Respondent are quite apt. These call for my consideration of the appeal. The issues are: E

- (a) Whether the appellant was given a fair hearing.
- (b) Whether there was evidence sufficient to warrant the conviction for murder and sentence of the appellant by the trial court.
- (c) Whether the proceeding in the trial court was nullity. F

Firstly, the issue of fair hearing, it would appear from the Record of Appeal, was never raised at the court below. It is being raised for the first time in this court as fresh issue. Leave of this court has not been shown to have been sought and granted. However, this is a criminal appeal. It is a matter of life and death for the Appellant. In the circumstance I must accord him the opportunity of being heard. This grouse as couched by his counsel in paragraph 4.12 of the brief is as follows: G

"4.12. We submitted that in this case, the appellant's right to fair hearing was grossly violated in the proceedings before the trial court as the appellant was not heard in his defence. It is instructive to H

note that the Appellant in the trial court testified as the DW1 in the Igbo language. The said testimony of the Appellant as the DW1 was not translated to the English language from the Igbo language in which same was rendered; for the benefit of the trial court ...the only defence witness called the Appellant (DW4) also testified in the trial court in the Igbo Language, this evidence was also not interpreted to the trial court in the Igbo language."

The Appellant's evidence (as DW1) and that of the DW4 were not interpreted from the Igbo language to the English language. It is not in dispute that the Appellant testified at all in Igbo language. He did. This is different from saying that he was not afforded a hearing. Besides, PW1, PW3, PW4 and PW5 all testified in the Igbo language. PW2 (Assistant Chief Registrar) PW8 (a retired Civil Servant) PW9 (a teacher) respectively all testified in the English language. Their testimonies were interpreted by the court clerk into Igbo language to the understanding of the Appellant. What is most important is the fact that the appellant was represented by counsel of his choice throughout his trial. There was no objection by the learned counsel for the appellant at any point in time at the trial court against the receiving of evidence of all the prosecution witnesses who testified in the Igbo language when same was not interpreted into English Language. It has been settled law in the case of *QUEEN v. IMADEBHOR EGUABOR* (1962) 1 ALL NLR 287 that if the accused does not ask for an interpreter, the failure to supply one would be treated as a matter of procedure and a conviction may only be set aside if the failure to provide an interpreter had led to a miscarriage of justice. If, however, the accused is represented by a counsel, the right time to take an objection, in the first instance is at the trial and not on appeal. See also *UWAEKWEGHINYA v. THE STATE* (2005) ALL FWLR (pt.259) 1911 at pp. 1923-1924. The law has been further expounded in the case of *AJAYI v. ZARIA N-A.* (No.2) 1964 NNLR 61 to the effect that an appellant discharges the burden of showing that a failure of justice has taken place for want of interpretation or adequate interpretation by showing that a reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the appellant a fair trial.

The Appellant has failed to show what injustice he has suffered as a result of the non-interpretation of the testimonies of himself and

other prosecution as aforementioned. Accordingly the judgment of the court below cannot be disturbed on this point. The Respondent's issues (b) and (c) complain essentially on whether there was sufficient evidence to warrant the conviction for murder and sentence to death of the Appellant.

It is instructive to note that the Appellant herein and the 2nd and 3rd accused persons stood trial for murder. The settled principles of law are that for proof of the offence of murder or aide the prosecution must establish with credible evidence:-

- (i) the death of the deceased
- (ii) that such death was caused by the accused person and
- (iii) that the act was done with intention of causing death or that death would be a probable consequence of the act, and all the three ingredient must be proved. See *BWASHI v. STATE* (1972) 6 SC 93; *R v. ABENGOWE* (1936) 3 WACA, 85. The learned trial judge found that the 2nd and 3rd accused persons were not guilty of murder. They were therefore discharged and acquitted. The court below also agreed with the learned trial judge that the appellant was responsible for the death of the deceased. It held thus:

"... evidence of PW1, PW3 and PW6 have shown that the deceased was positive, unequivocal and irresistible in his statement, exhibit B being his dying declaration that it was the appellant who shot and killed him. Deceased statement to his wife, the police investigation and even and the presence of other people who came to the scene and latter at the community Hospital and General Hospital Okigwe as testified before the trial court are sufficient proofs of circumstantial evidence that it was the appellant who shot him."

The relevant extracts from Exhibit B read thus:

"... I saw Anthony Okoro jumped out from his hiding place opposite my house with gun. I flashed my touch light on him and called him by his name when he shot me with the gun ... I flashed my touch light again and saw him with two of his brothers Mbadiwe Okoro and Friday Okoro accompanying him..."

The deceased and the key witnesses never said that the 2nd and 3rd accused persons were the persons who shot and killed him. They said that they were in company of the appellant when he shot the deceased. There was no direct, positive and unequivocal evidence linking the 2nd and 3rd accused persons with the murder of

the deceased. Clearly the evidence which the trial court relied and used in convicting the appellant is not the same neither is it similar to the evidence against the 2nd and 3rd accused persons. The appellant and the 2nd and 3rd accused persons were not charged with the offence of conspiracy to murder the deceased. If they had been so charged, the court could not have singled out the appellant for conviction, because the evidence used in convicting the appellant was not the same with the evidence available against the 2nd and 3rd accused persons for a charge of murder. The learned trial judge rightly concluded that the 2nd and 3rd accused persons cannot be convicted for murder based on the evidence before him.

In view of the foregoing and the more detailed reasons given by my brother RHODES-VIVOUR, JSC in the lead judgment I too, shall dismiss this appeal for lacking in merit. The conviction and sentence of the appellant is accordingly affirmed.

NGWUTA JSC

Appellant Anthony Okoro was charged along with three other Okoros (his brothers) with the murder of one Obediah Ofoegbe contrary to section 319(1) of the Criminal Code Cap 30 Vol. II Laws of Eastern Nigeria 1963 as applicable to Imo State of Nigeria. Appellant and his co-accused persons were initially arraigned before Ononuju, J. sitting at the High court of Imo State, Okigwe Judicial Division. On the order of the chief Judge of Imo State, Ojiako, CJ the matter was transferred to the High Court, Owerri, presided over by Onumajulu, J. on 26/4/93. Trial commenced on 26/01/93. One of the accused persons Godwin Okoro was earlier withdrawn, and subsequently discharged, from the case. Of the remaining three accused persons, only the appellant was convicted of murder and sentenced to death. The trial court, in judgment delivered on 17th November 1997 discharged and acquitted the other two accused persons - Mbadiwe Okoro and Friday Okoro.

Appellant appealed his conviction and sentence of death to the Court of Appeal, Port Harcourt Division. The lower Court in its judgment affirmed the conviction of, and sentence of death passed upon the appellant by the trial Court. The appellant further appealed to this Court on nine grounds of appeal from which the five (5) issues

reproduced hereunder were formulated for determination:

“1. Whether the lower Court was right when it upheld the judgment of the trial Court when the appellant did not have a fair hearing in the trial Court.

2. Whether the lower Court was right when it relied in the evidence of PW1, PW3, PW6, PW7 and Exhibit B in upholding the finding of the trial Court that it was the appellant that shot and or killed the deceased.

3. Whether the lower Court was right when it upheld the conviction and sentence of the appellant to death for murder by the trial Court after the trial Court based on the same evidence discharged and acquitted the 2nd and 3rd accused persons.

4. Whether the lower Court rightly upheld the conviction and sentence of the appellant to death for murder by the High Court, when the charge and the entire proceeding before the trial High Court were incompetent.

5. Whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant the lower Court to have sustained or upheld the conviction and sentence of the appellant to death for murder by the trial Court.”

The Respondent distilled three issues for determination. The three issues are hereunder reproduced:

“1. Whether the appellant was given a fair hearing.

2. Whether there was evidence enough to warrant conviction for murder and sentence to death of the appellant by the trial Court.

3. Whether the proceeding in the trial Court was a nullity.”

My Lords, my learned brother, Rhodes-Vivour, JSC has painstakingly and exhaustively discussed and resolved all the five issues raised by the appellant. Obviously, the three issues raised in the respondent’s brief were subsumed in the appellant’s five issues.

I wish to add my voice to the judgment so well reasoned and articulated, not by way of addition but by way of support and emphasis. I will restrain my comments, however, to the issues of dying declaration and the nullity vel non of the entire proceedings, inclusive of the judgment of the trial Court.

Section 33(1) (a) of the Evidence Act states thus:

“S.31 (1) (a): Statements, written or verbal, or relevant facts made by a person who is dead are themselves relevant facts in the

following cases.”

(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person’s death comes into question; such statements are relevant only in trials for murder or manslaughter of the deceased person and only when such person at the time of making such declaration believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of (sic)

In my humble view, this is one area where the law appears esoteric and its application seems to be beyond the realm of common sense. In one of the cases relied on by the respondent, *R. v. Ogbuewu* (1949) 12 WACA 483, the deceased was in hospital as a result of injury inflicted on him. The investigating Police Constable asked him if he could speak and he answered in the positive. He asked him whether he thought he was going to die and he replied that he did not know whether he was going to die. Three days later he died of his injuries. Ames, J. said that there was no proof that the deceased believed himself in danger of approaching death. In the old English case of *R v. Woodcock* (1789) 168 E.R. 353, it was stated that:

“A dying declaration is an exception to hearsay rule. The exception can only take effect on the principle that it is a declaration made in extremity. When the party is at the point of death and every hope of life is gone so that motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth.”

See also *Orshior Kuse v. The State* (1969) NMLR 153. In the case of *Grace Akinfe v. The State* (1988) 7 SC NJ (pt. 1) 226 at 237, this Court, per Nnaemeka-Agu, JSC (May his soul find favour in eternity) held that in absence of proof of a settled hopeless expectation of death such a statement is hearsay and inadmissible. There is uncontroverted evidence that the deceased, from the moment he was shot, was consistent in his statement that it was the appellant who shot him. See Exhibit B and the evidence of the PW1, the deceased’s widow. She swore, inter alia, that the deceased on his hospital bed told her that should he die PW1 should realize that it was Anthony Okoro that killed him.

I do not think that the law requires an affidavit deposed to by the deceased before the Holy Sea to prove that the deceased is in a hopeless expectation of imminent death as a result of injuries inflicted on him. In order to actualize the dual aims of our criminal justice delivery system of ensuring that neither the guilty escapes punishment nor the innocent suffers each case must be decided on its own peculiar facts and circumstances. B

In this respect, the nature and gravity of the injury and the part of the body on which it is inflicted ought to be considered in determining whether what the deceased said in relation to the cause of his injury from, which he died later was dying declaration or not. It should not be necessary to prove by expression of the deceased, that he made the statement in fear of impending death. It could be inferred from the nature of the word or cause of death without further express evidence that the deceased believed he was dying. See East's D Pleas of the Gown Vol. 1 page 357. C

In *R v. Bonner* 6 C & P 380, Patterson J. held it was - not necessary to prove by expression of the deceased that he was in apprehension of immediate death in order to admit his statement as dying declaration. The claim that the proceeding leading to, and including the conviction of, and sentence passed upon, the appellant was a nullity was predicated on the transfer of the case from Okigwe Judicial Division to the Owerri Judicial Division of the High Court of Imo State. The order was made on 26/4/93. The proceeding in the matter commenced on 26/10/93. Between the date the matter was transferred from Okigwe to Owerri, 26/4/93, and the date trial commenced in Owerri, 26/10/93, Ononuju, J, purported to strike-out the case. F

I used the word "*purported*" because from 26/4/93 there was nothing before the High Court, Okigwe, to strike out. Beyond the argument that the order striking out the matter was made without jurisdiction, the order was as good as not having been made. There was nothing to strike out. If the need arises, the order could be declared a nullity. It cannot be set aside because it never existed in law. H The order purporting to strike out the case on 2/6/92 has no effect on the case that was transferred from Okigwe to Owerri on 26/4/93.

Based on the above and the fuller reasons in the lead judgment which I had the privilege of reading in draft, I agree that the

appeal lacks merit. I also dismiss it and adopt the order in the lead judgment.

PETER-ODILI JSC

B This is an appeal against the judgment of the court of Appeal,
Port Harcourt Division wherein the learned justices affirmed the con-
viction and sentence of the appellant by the High court of Imo State
presided over by P.C. Onumajulu J. (as he then was). Being dissatis-
C fied with the said judgment the appellant filed 9 grounds of appeal to
this court challenging the said judgment. The appellant also sought
and obtained the leave of this court to raise five fresh issues.

The facts briefly stated are as follows: The appellant herein was
sentenced to death by the High Court of Imo State for the murder of
D one Obediah Ofoegbu. The deceased in his life time was the bellman
of his church at Umuoloché Umulolo Okigwe, Imo State. On the
early hours of 13/10/87, he went to that church which was close to
his compound to ring the bell for morning prayers; and after ringing
the bell, there was sound of a gunshot and the deceased raised his
E voice saying “Anthony Okoro (i.e. appellant) has shot me”. The PW1,
the wife of the deceased, gave this evidence. She said that she was
still in bed when she heard this shouting. However she recognized
the voice as her husband’s voice. On hearing that, she rushed to the
F scene where she saw her husband stooping and holding his neck,
which was bleeding profusely. The deceased continued talking and
crying that the appellant had killed him. Based on the above facts,
local members of the community came to the scene of the shooting
and saw the condition of the deceased. The deceased was later taken
G to a nearby hospital and subsequently to Okigwe General Hospital.
At the General Hospital the deceased continued repeating that it was
the appellant that shot him. He repeated this same story in the pres-
ence of the Investigating Police Officer (PW7) and even wrote it down
in his statement which he made from his death bed. The said state-
H ment was admitted at the trial as Exhibit “B”.

At the close of trial, the learned trial judge found the appellant
guilty of murder and sentenced him to death. The appellant brought
an appeal against the conviction and sentence at the Court of Ap-
peal, Port Harcourt Division. At the conclusion of the hearing of the

appeal, the Court of Appeal affirmed the verdict of the trial judge. Hence, this appeal. The appellant through learned counsel, Mr. K. Wodu settled appellant's brief filed on 2/6/2010 in which were distilled five issues which are as follows:

1. Whether the lower court was right when it upheld the judgment of the trial court when the appellant did not have a fair hearing in the trial court. B

2. Whether the lower court was right when it relied on the evidence of PW1, PW3, PW6, PW7 and Exhibit B in upholding the finding of the trial court that it was the appellant that shot and or killed the deceased? C

3. Whether the lower court was right when it upheld the conviction and sentence of the appellant to death for murder by the trial court, after the trial court based on the same evidence discharged and acquitted the 2nd & 3rd accused persons? D

4. Whether the lower court rightly upheld the conviction and sentence of the appellant to death for murder by the trial High court, when the charge and the entire proceedings before the trial High court were incompetent.

5. Whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant the lower court to have sustained or upheld the conviction and sentence of the appellant to death for murder by the trial court? E

On the 24/1/2011 the appellant also filed an appellant's reply brief. The respondent had settled their brief filed on 11/11/2010 in which they formulated three issues which are viz: F

(a) Whether the appellant was given a fair hearing.

(b) Whether there was evidence sufficient enough to warrant conviction for murder and sentence to death of appellant by the trial court? G

(c) Whether the proceeding at the trial court was a nullity.

On the matter whether or not the accused/appellant, charged with a criminal offence was given his right of fair hearing to put across his defence before his conviction, learned counsel on his behalf said his right of fair hearing was infringed upon. He stated that the principle as enshrined in section 36 of the Constitution of the Federal Republic of Nigeria, 1999 is sacrosanct and whenever there is any breach of that principle, the entire, proceedings are rendered null and void. H

He cited: *Edet v. State* (2008) 14 NWLR (pt.110 6) 52; *Shekete v. N. A. F* (2007) 14 NWLR (Pt.1053) 159 at 190; *Ika Local Government Area v. Mba* (2007) 12 NWLR (pt.1049) 676; *Anyakora v. Obiakor* (2005) 5 NWLR (pt.919) 507; *Bamgboye v. University of Ilorin* (1999)10 NWLR (pt. 622) 270 at 333; *Okafor v. A. G. Anambra State* (1991) 6 NWLR (pt. 200) 659 at 678. Learned counsel for the appellant stated that the appellant's right to fair hearing was grossly violated in the proceedings when his testimony as DW1 in Igbo language was not translated to the English Language in which same was rendered, for benefit of the trial court. That apart from the testimonies of the witnesses that testified in the Igbo Language before the trial court, it was only the evidence of the PW4 that was interpreted to the trial court in the English Language by the clerk of the court, the language of the court. He cited: *Ogunye v. State* (1999) 5 NWLR (pt.604) 548 at 566; *Udeh v. State* (1999) 7 NWLR (pt.609) 1 at 23; *Idemodia v State* (1999) 7 NWLR. (pt.610) 202 at 226; *Damina v. State* (1995) 8 NWLR (pt. 415) 513 at 534. That the only conclusion or inference that can be logically drawn is that the evidence of the said witnesses was not interpreted to the trial court from the Igbo Language to the English Language. That assuming but without conceding that the trial Judge understood the Igbo Language allegedly spoken by the appellant and the DW1, he cannot play the role of both a judge and an interpreter. That for the court to make use of the said evidence, an interpreter must be used to translate the evidence to the English Language. He cited *Ojenebede v. Esan* (2001) 18 NWLR (Pt.746) 771 at 790; *A.C.B. Plc v. N. T. S. (Nig.) Limited* (2007) 1 NWLR (Pt. 1016) 596 at 628. That the consequence of this infraction of the fair hearing guaranteed for the accused/appellant has rendered the entire trial, conviction and sentence of the appellant by the trial court null and void.

In response, learned counsel for the respondent said the case of *Damina v. State* (supra) was not applicable as the facts are not apposite. That the circumstantial requirement that there shall be adequate and free interpretation to the accused of anything said in a language which the accused did not understand has been held to be capable of being dispensed with where the accused so wishes and the trial judge is of the opinion that the accused did not require any interpretation of the proceedings. He said the accused cannot raise

this on appeal when it was not raised in the court of trial. He cited *Uwaekweghinya v. State* (2005) ALL FWLR (Pt.259) 1911; *Udosen v. State* (2007) 4 NWLR (pt. 1023) 125 at 166; *Queen v. Eguabor* (1962) ALL NLR 285. For the respondent it was further submitted that it is the duty of the accused especially where represented by counsel to inform the court of the need for an interpreter. That the accused person was represented by counsel throughout the whole trial and that counsel had no complaint on lack of interpretation and so complaint was not made at the court of Appeal only to raise it for the first time in this court which is too late in the day. That the appellant has not shown the injustice he suffered by the alleged lack of proper interpretation. He cited *Uwakweghinya v. State* (supra). Learned counsel for the respondent went on to contend that the stance of the appellant in this matter amounts to challenging the records. That on the day of arraignment the court recorded the presence of an interpreter and so there is a presumption of regularity that the interpreter was present on subsequent day(s) even though not recorded. He referred to *Anyanwu v. State* (2002) 13 NWLR (pt. 783) 107 at 237.

In reply on point of law, learned counsel for the appellant said that the non-interpretation of the evidence of the appellant and his witness to the trial court has caused grave miscarriage of justice leading to the resolution of doubts against the accused/appellant by the trial court. He cited: *Idakwo v. Ejiga* (2002) 13 NWLR (pt.783) 156 at 167; *Eke v. Ministry Administrator, Imo State* (2007) 13 NWLR (Pt.1052) 531 at 564. The appellant through counsel has made a hue and cry over the issue of the denial of his right to fair hearing, a grouse anchored on the learned trial judge's failure to state that when he testified an interpretation was made available to him from Igbo to English and vice versa. Notably there was stated by the learned trial judge that interpretation was made to the accused/appellant at the charge reading and plea taking. Also stated in the course of the testimonies for the prosecution was the fact that the clerk of court acted as interpreter. The same applied when other defence witnesses testified except for the period when appellant as DW1 and the evidence of DW4 were taken. Again of note is the fact that throughout the proceedings, learned counsel on behalf of the appellant was present. No complaint came up at the trial and at the Court of Appeal. It is at

this stage that the issue of a miscarriage of justice based on that omission of stating that an interpreter was part of the proceedings at the time the appellant and DW4 testified.

It is not a matter of debate or dispute that at all times in a trial process should the accused be in doubt of his full right to fair hearing and this presupposes that he would be made aware of what was going on and what were being said at all times, so that at no point is he kept in the dark. However learned counsel seems at this final stage of accused trial and appeals to propound a theory of how that fair hearing should be preserved in favour of the accused/appellant. Unfortunately for the appellant while the law has insisted that the right to fair hearing cannot be compromised, it has laid down certain conditions if in place would meet the requirements of that fair hearing prescribed by section 36 of the 1999 Constitution of the Federal Republic of Nigeria. It is for that reason that it has been held that it is within the right of the accused to dispense with being interpreted to and have what he is saying interpreted to others in the course of the proceedings. Again to be noted is that if by any chance the court and its officials failed to have interpretation done and the accused did not complain at the trial he is foreclosed and cannot raise it on appeal. This is all the more poignant where as in this case the accused/appellant was represented by counsel. This situation was, captured and dealt with in the case of *State V. Gwonto & Ors* (2002) FWLR (Pt.30) 2583 at 2596 as follows;

"There is nothing in the records of the High Court and no further evidence was led on the issue in the Court of Appeal to show that the respondents or counsel on their behalf requested for an interpreter and that request was rejected. Nor is there any indication that there was any objection at lack of interpretation or any proper interpretation at the High Court."

Also apposite and for our purpose here is the case of *Uwakweghinya v. State* (supra) a judgment of this court well articulated by Musdapher JSC (as he then was) said at page 125 paras A - C thus:

"In any event, it has not been shown that the non- interpretation has occasioned a failure of justice."

In the case in hand, the appellant has not shown how a miscarriage of justice to his detriment has been occasioned particularly

when on the day he was arraigned the record showed what took place in the presence of an interpreter. See pages 25 - 32 of the records. In fact from the records the presumption of regularity operates for the court to take as done that interpretation throughout was in place and due to human error, an omission to record same at only the instance which DW1 and DW4 testified. It is curious if not doubtful that an accused person represented by counsel would have sat alongside his lawyer while proceedings are going on in a language the accused did not understand and not once was the attention of the court called in that regard. To further compound the emptiness of this late consciousness was the fact that the appellant's testimony in court was not different from his statement to the police, Exhibit "F". Also well tallied is the evidence of DW4 to his statement to the police tendered and admitted as Exhibit "L". It is therefore not far fetched for me to say that the earlier cases of this court namely, *Uwakweghinya* (supra) and *Anyanwu v. State* (2002) 13 NWLR (Pt.783) 107 at 237 have settled the questions raised in the case in hand effectively, those cases having presented similar scenarios. I would however not by-pass a quotation from *Anyanwu v. State* (supra) per Ogundare JSC at p.237 where he said:

"In the case on hand, an interpreter was provided in court on 4/6/84 when the defendants were arraigned and their pleas taken. This much the appellant conceded. It must be presumed in the absence of evidence to the contrary, that the interpreter who was in this case, the clerk of court was present throughout the trial of the defendants and did in fact interpret Igbo language into English Language and vice versa as occasion required."

For a fact in the prevailing circumstances this issue as raised by the appellant has no peg to stand on and it has not been difficult just as in the lead judgment and other fuller reasons of my Lord, Bode Rhodes-Vivour JSC, this appeal fails woefully and is hereby dismissed.

I abide by the consequential orders in the lead judgment.