

**SUPREME COURT OF NIGERIA**  
20TH JANUARY, 2012. SC. 66/2009  
CORAM: - **W. S. N. ONNOGHEN, J. A. FABIYI, S.**  
**GALADIMA, N. S. NGWUTA, M. U. PETER-ODILI, JJSC**

THE STATE ..... APPELLANT  
V.  
NATHANIEL OKPALA ..... RESPONDENT

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CRIMINAL PROCEDURE - Murder - Failure to prove - Effect - Accused is discharged and acquitted - Since prosecution has not proved the offence beyond reasonable doubt - As required by Evidence Act s. 138 (H1)

WORDS & PHRASES - “Shall” - Meaning - Under Criminal Procedure Act s. 246 - It connotes a command - And denotes of no other meaning than the command must be obeyed (H2)

CRIMINAL PROCEDURE - Appeals - Murder - Finding of not guilty - Proper order to make - By Criminal Procedure Act s. 246 - Court of Appeal was duty bound - To discharge and acquit the accused (H3)

**FACTS**

Accused/respondent/cross-appellant and one Chidozie Okpala (2<sup>nd</sup> accused) were arraigned before the High Court of Anambra State sitting at Ekwulobia. They were charged with murder of one Nkasiobi Ononamadu on 6<sup>th</sup> January 2001 contrary to s. 274(1) of the Criminal Code Cap. 36 Vol. 11 Laws of Anambra State 1991. Prosecution/appellant/cross-respondent called six witnesses including PW2 - Charles Ononamadu and PW6 - Sgt. Livinus Ofiaelu both of whose hearsay testimonies the court relied on to convict respondent. The substance of PW2’s evidence was that the father of respondent one Okpalalisinkwo told him (PW2) that respondent and 2<sup>nd</sup> accused “murdered” the deceased and that the said Okpalalisinkwo offered to atone for the murder of the deceased in accordance with their custom. On his own part, PW6 testified that in the course of his investigation, he obtained statements from Okpalalisinkwo and PW4 to the effect that respondent and 2<sup>nd</sup> accused killed the deceased.

The said Okpalalisinkwo was not called as a witness at the trial and PW4 denied on oath her extra-judicial statements to the police. PW6 tendered the statements made by respondent and 2nd accused to the police as Exhibits “E” and “F”. The case for prosecution was thus closed.

Respondent and 2nd accused testified on their respective behalf and called no witness. Thereafter, the court discharged and acquitted 2nd accused of the charge but convicted respondent of manslaughter. Respondent was thus sentenced to life imprisonment with hard labour by virtue of the mandatory provisions of section 279 of the Criminal Code, Cap 36 Vol. 11 Laws of Anambra State, 1991. Being dissatisfied, respondent appealed to the Court of Appeal, Enugu Division. The court found that prosecution has not proved the offence charged beyond reasonable doubt. However, rather than discharging and acquitting respondent by virtue of section 246 of the Criminal Procedure Act, the court merely discharged him. Aggrieved, appellant appealed to Supreme Court. Respondent has also cross-appealed against the order of the court that merely discharged him of the offence.

### **ISSUES FOR DETERMINATION**

#### **MAIN APPEAL**

*“Whether the learned Justices of the Court of Appeal were right to set aside the conviction and sentence of the respondent and discharged him on the ground that evidence relied upon by the trial court was hearsay evidence and the guilt of the respondent not proved beyond reasonable doubt.”*

#### **CROSS-APPEAL**

*“Whether having held that no offence was proved against the respondent/cross-appellant and that the prosecution has failed to prove the offence against the respondent/cross-appellant beyond reasonable doubt the proper order the Court of Appeal ought to have made was an order discharging and acquitting the respondent/cross-appellant?”*

**HELD** (Unanimously dismissing the main appeal and allowing the cross-appeal per **PETER-ODILI JSC**)

#### ***Murder - Failure to prove - Effect***

1. The Court of Appeal after reviewing what the trial court did, came

to the following conclusion:

*“Clearly the Police investigation of the case is less than adequate .....My lords, in the respondent’s brief, presumably of murder, in earlier case and in both cases the prosecution failed to prove the offence against the accused person of manslaughter and of the offence of murder. That the accused was charged with unlawful homicide is a sui generis which covers the offence of murder and or manslaughter. To secure a conviction in both cases the offence must be proved beyond reasonable doubt.... It sometimes happens that the cause of an action in a death resulting in murder is commuted to manslaughter when it is found that no intention to kill or mens res can be proved. In both cases of murder and manslaughter prosecution (sic) made in such proof is conclusion... I have written above that the only cogent evidence before the court for the offence of murder is hearsay. It is not admissible to prove the offence consequently no offence is proved against the appellant. I am left in no doubt whatsoever that no offence should have been imposed to prove the offence against the accused beyond reasonable doubt. The accused person is discharged, but not acquitted.”*

From what I have stated above there was no strong base upon which the trial Judge came to his conclusion of manslaughter and proceeded with the punishment and so the Court of Appeal was right in its own finding that whether the offence of murder or possible manslaughter, the prosecution has not proved either beyond reasonable doubt as required by section 138 Evidence Act, Cap. E14 Laws of the Federation 2004. Also lacking was the circumstantial evidence which could lead irresistibly with the compelling and cogency to no other conclusion than that accused was responsible for the death of the deceased. This is because there were too many loose ends that could not just be ignored and there existed some other circumstances which did indeed weaken or destroyed the inference which unfortunately the learned trial Judge relied on.

From the foregoing and except for the rather bizarre order of *“discharge, but not acquitted”* of the Court of Appeal, I dismiss this appeal and I uphold the finding and decision of that court. I also set aside the order of *“discharge but not acquitted”* of the court below and replace it with an order of discharge and acquittal of the respondent. (p. 445 D)

***“Shall” - Meaning***

2. This cross-appeal has no contest any way since it is a question on what the position should be if indeed the accused is found not guilty what the proper order should be as in the case in hand. I would have  
 B recourse to section 246 of the Criminal Procedure Act, Cap 43, Laws of the Federation, 2004 which provides as follows:

*“If the court finds the accused not guilty, the accused shall forthwith be discharged and an order of acquittal recorded.”*

C                      This court has had no difficulty in interpreting the word “shall” as provided for in statutes as in the present case to connote a mandate, a command that brook no watering down or denoting of any other meaning than that the command must be obeyed. (p. 447 C)

***D Murder - Finding of not guilty - Proper order to make***

3. Therefore when the Court of Appeal found and decided that the accused/cross-appellant was not guilty, it was duty bound to order and record that he was discharged and acquitted and not do what it did by saying discharged but not acquitted. It was not for that court  
 E to merely order a discharge and the accused not acquitted. The law, section 246 of the Criminal Procedure Act said the accused should be discharged forthwith and an order of acquittal recorded. Nothing less than that would suffice. That order or mandate or command of the law should have been carried out without dilution.  
 F (p. 447 F)

**REPRESENTATION**

Sylva Ogwemoh Esq. with Muhammed Enesi Usman Esq., Alexander  
 G Ikhane Esq. for the Appellant  
 Emeka Etiaba Esq., with Ifeyinwa Nwabueze (Miss) for the Respondent

**CASES REFERRED TO**

Nasiru v State (1999) 1 SCNJ 83 at 99  
 H Igabele v State (2006) 6 NWLR (Pt. 975) 100  
 Adeniji v The State (2001) 5 SCNJ 371  
 Aigbadion v State (2000) 7 NWLR (Pt.666) 686  
 Tepper v Queen (1952) AC 480  
 Lori & Anor v The State (1980) 8 - 11 SC 52

Godwin Igabele v State (2006) 5 NWLR (Pt.975) 100

Nweke v State (2001) 4 NWLR (Pt.704) 588

Bamaiyi v A G. Fed (2001) 12 NWLR (Pt.727) 468

Achineku v Ishagba (1988) 4 NWLR (Pt. 89) 411

D.PP v. Woolmington (1935) AC 485

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### **STATUTES REFERRED TO**

Criminal Code Cap. 36 Vol. 11 Laws of Anambra State 1991, s. 274(1)

Evidence Act Cap E14 LFN 1990, ss. 138(1), 139, 141 and 143

Criminal Procedure Act, Cap 43, Laws of the Federation 2004, ss. 243A (2)(d) and 246

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### **LEAD JUDGMENT BY PETER-ODILI JSC**

This is an appeal by the State now appellant against the decision of the Court of Appeal, Enugu Division which on the 7th day of July, 2008 allowed the respondent's appeal against his conviction and sentence to life imprisonment and discharged him by setting aside the judgment of the trial High court coram: Ijem Onwuamaegbu J. sitting at Aguata. It is against that judgment of the Court of Appeal, Enugu that the appellant has by a notice and grounds of appeal filed on 6th October, 2008 come before this court. The respondent cross-appealed on the ground that the Court of Appeal had erroneously only discharged him instead of making an order of discharge and acquittal. That this court should dismiss the appeal and order a discharge and acquittal in favour of the respondent/cross-appellant.

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The facts as briefly stated in this appeal are as follows: After the initial trial was aborted as a result of the transfer of the trial Judge to another Judicial Division, the respondent/cross-appellant and his son, Chidozie Okpala were on 5/11/2003 arraigned before the Honourable Justice Ijem M. Onwuamaegbu of the High Court of Anambra State sitting at Ekwulobia for the murder of one Nkasiobi Ononamadu on 6/1/2001 contrary to section 274(1) of the Criminal Code Cap 36, Vol. 11, Laws of Anambra State, 1991. The respondent/cross appellant and the 2nd accused "Not guilty" and their trial commenced. The prosecution's case was rendered through six witnesses including PW2 - Charles Ononamadu and PW6 - Sgt. Livinus Ofiaelu both of whose hearsay testimonies the trial court relied on to convict the respon-

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dent/cross-appellant. The substance of the PW2's evidence was that the father of the respondent/cross-appellant one Okpalalisinkwo told him (PW2) that respondent/cross-appellant and 2nd accused person "Murdered" the deceased and that the said Okpalalisinkwo offered to atone for the murder of the deceased in accordance with their custom.

On his own part, PW6 testified that in the course of his investigation, he obtained statements from Okpalalisinkwo and PW4 to the effect that the respondent/cross-appellant and 2nd accused person killed the deceased. Okpalalisinkwo was not called as a witness at the trial and PW4 denied on oath her extra-judicial statements to the police. PW6 tendered the statements of the respondent/cross-appellant and the 2nd accused person to the police as Exhibit "E" and "F" and the prosecution closed its case. The respondent/cross-appellant and the 2nd accused person testified on their respective behalf and called no other witnesses. After counsel's final address, on 14/12/2005, the trial court discharged and acquitted the 2nd accused person but convicted the respondent/cross-appellant of manslaughter and imposed the maximum sentence for the offence on the basis that the provisions of section 279 of the Criminal Code, Cap 36 Vol. 11 Laws of Anambra State, 1991, are mandatory. Being dissatisfied and aggrieved by the conviction and sentence, the respondent/cross-appellant appealed to the Court of Appeal within time on five grounds of appeal. In a unanimous decision, the Court of Appeal allowed the appeal but in doing so, the said Court of Appeal merely discharged the respondent/cross-appellant rather than discharging and acquitting him despite holding that the prosecution had failed to prove the offence against the respondent/cross-appellant beyond reasonable doubt. The appellant through counsel, Chief G. Oseloka Osuigwe settled the appellant's brief of argument filed on 2/6/10 and a cross respondents brief filed on 24/10/2011. Emeka Etiaba Esq. had the respondent's brief and that of cross-appellant filed on 5/10/2010 settled on his behalf.

The appellant framed a single issue for determination which is as follows:

*"Whether the learned Justices of the Court of Appeal were right to set aside the conviction and sentence of the respondent and discharged him on the ground that evidence relied upon by the trial*

*court was hearsay evidence and the guilt of the respondent not proved beyond reasonable doubt.”*

The respondent couched a sole issue too but differently and that is thus:

*“Whether the learned justices of the Court of Appeal were wrong to have set aside the conviction and sentence of the respondent based on a thorough appreciation of the evidence adduced at the trial court.”*

In my view each of the issues is the same side of a coin being similar though stated in different forms, the bottom line being the rightness or not of the decision of the Court of Appeal in the light of the evidence proffered before the court below. On the 27th day of October, 2011 date of hearing, learned counsel for the appellant adopted the briefs and argued that there was evidence before the trial court that the deceased was healthy when he came to the house of the respondent and he died in the compound of the respondent and was the last person to see him alive. That the PW3, Dr. Nwannedi Wilfred who performed the autopsy on the body of the deceased had testified and stated thus:

*“The findings were swelling on the right side of the neck. The testes on the left side of his scrotum were found to be crushed and discoloured and there was blood in his scrotum. There was also caked blood on the right angle of the mouth, also on the left groin and the left scrotum. In my opinion the cause of death must have been shock as a result of trauma (sic) something that hit him on the scrotum must have caused shock and death.”*

Learned counsel for the appellant stated on that since the respondent claimed in his evidence that he was the only person present when the deceased allegedly jumped up, fell down and died, he owed an explanation on how the deceased sustained the injuries of the magnitude described by the PW3, the doctor and which injuries led to his death. That the doctor’s evidence remained unchallenged and uncontradicted. He stated on that though it is trite that the burden of proving a charge against an accused person rested on the prosecution by virtue of sections 138(1) and 139 of the Evidence Act, that burden shifted in this instance to the accused person by virtue of sections 138(3) 139, 141 and 143 of the Evidence Act. He referred to the case of Nasiru v State (1999) 1 SCNJ 83 at 99.

It was again submitted for the appellant that the doctrine of last seen applied to this case and the inability of the respondent to proffer the needed explanation led to the irresistible conclusion that he was responsible. He cited the cases of *Godwin Igabele v State* (2006) 6 NWLR (Pt. 975) 100 at 105; *Adeniji v The State* (2001) 5 SCNJ 371 at 375. For the respondent learned counsel on his behalf said the Court of Appeal was right in holding that the evidence relied upon by the trial judge to convict the respondent were mere hearsay which were inadmissible and could not ground a conviction in law. That as regarding to the time, place and cause of death of the deceased beyond the hearsay evidence adduced, every other evidence was mere speculation and conjecture. He said the pieces of evidence as to the time of death from the prosecution are in conflict and the lower court was right in resolving the doubt in favour of the respondent. That there was also a conflict as to where the deceased died and the matter of the cause of death left a lot to question. That the prosecution witnesses gave contradictory evidence on the time, place and cause of death and these contradictions were devastating to their case. He cited *Aigbadion v State* (2000) 7 NWLR (Pt.666) 686 at 699. Learned counsel for the respondent said that reliance on circumstantial evidence cannot be without considering other co-existing circumstances that could weaken or destroy the inference. He cited *Tepper v Queen* (1952) AC 480 at 489; *Lori and Anor v The State* (1980) 8 - 11 SC 52 at 55; *Godwin Igabele v State* (2006) 5 NWLR (Pt.975) 100 at page 105; *Adeniji v The state* (2001) 5 SCNJ 371 at 375; *Nweke v State* (2001) 4 NWLR (Pt.704) 588 at 603.

The learned trial judge had held:

*“The crucial question now is whether it is the act(s) or commission (sic) of the accused persons that caused the unnatural death of the deceased. In other words are the accused persons responsible for the injuries on the body of the deceased as stated by PW3 and shown in Exhibit A - the Medical Report. As stated earlier there is no direct evidence available to this court on how the deceased ended up with the injuries described by PW3 and contained in Exhibit A.... I am of the view that if Okpalalisinkwo the father of the accused person did not know that his children (the accused persons) were responsible for the death of deceased he would not have offered to atone for it and certainly would not have provided the items for atone-*

ment. I therefore infer from this uncontroverted evidence and have no doubt whatsoever that the accused person (s) were responsible for the injuries found on the corpse of the deceased by PW3, which injuries caused the death of the deceased... From the evidence before me I am satisfied that the acts of the 1st accused in inflicting injuries on the deceased caused the death of the deceased and I hold that the prosecution has proved this arm of this crime beyond reasonable doubts. However there is nothing before me to show that the 1st accused had the necessary mens rea (intent) therefore I find the 1st accused can be convicted of, even though he was not specifically charged with it.

...It is lesser offence than the offence of murder for which the 1st accused is charged and it is punishable under S.279 of the Criminal Code. It carries a term of Life Imprisonment. In the light of the foregoing I find the 1st accused guilty of the offence of manslaughter contrary to S.279 of the Criminal Code Cap.36 Laws of Anambra State. I find the 2nd accused not guilty. The 2nd accused is therefore discharged and acquitted."

**The Court of Appeal after reviewing what the trial court did, came to the following conclusion:**

**"Clearly the Police investigation of the case is less than adequate .....My lords, in the respondent's brief, presumably of murder, in earlier case and in both cases the prosecution failed to prove the offence against the accused person of manslaughter and of the offence of murder. That the accused was charged with unlawful homicide is a sui generis which covers the offence of murder and or manslaughter. To secure a conviction in both cases the offence must be proved beyond reasonable doubt.... It sometimes happens that the cause of an action in a death resulting in murder is commuted to manslaughter when it is found that no intention to kill or mens res can be proved. In both cases of murder and manslaughter prosecution (sic) made in such proof is conclusion... I have written above that the only cogent evidence before the court for the offence of murder is hearsay. It is not admissible to prove the offence consequently no offence is proved against the appellant. I am left in no doubt whatsoever that no offence should have been imposed to prove the offence against the**

***accused beyond reasonable doubt. The accused person is discharged, but not acquitted.”***

***From what I have stated above there was no strong base upon which the trial Judge came to his conclusion of manslaughter and proceeded with the punishment and so the Court of Appeal was right in its own finding that whether the offence of murder or possible manslaughter, the prosecution has not proved either beyond reasonable doubt as required by section 138 Evidence Act, Cap. E14 Laws of the Federation 2004. Also lacking was the circumstantial evidence which could lead irresistibly with the compelling and cogency to no other conclusion than that accused was responsible for the death of the deceased. This is because there were too many loose ends that could not just be ignored and there existed some other circumstances which did indeed weaken or destroyed the inference which unfortunately the learned trial Judge relied on.*** See *Lori and Anor v The State* (1980) 8 - 11 SC 52 at 55; *Godwin Igabele v State* (2006) 6 NWLR (Pt.975) 100 at page 105; *Adeniji v The State* (2001) 5 SCNJ 371 at 375.

***From the foregoing and except for the rather bizarre order of “discharge, but not acquitted” of the Court of Appeal, I dismiss this appeal and I uphold the finding and decision of that court. I also set aside the order of “discharge but not acquitted” of the court below and replace it with an order of discharge and acquittal of the respondent.***

### **CROSS-APPEAL**

The respondent/cross appellant couched a single issue for the cross-appeal and that is:

***“Whether having held that no offence was proved against the respondent/cross-appellant and that the prosecution has failed to prove the offence against the respondent/cross-appellant beyond reasonable doubt the proper order the Court of Appeal ought to have made was an order discharging and acquitting the respondent/cross-appellant?”***

The sole issue was adopted by the appellant/cross-respondent.

For the cross-appellant was contended that on the Court of Appeal finding that the cross-appellant was not guilty of the offence charged the resultant order should have been a discharge and acquittal

and not a mere discharge as that court had ordered. He referred to section 246 of the Criminal Procedure Act, Cap 43, Laws of the Federation, 2004, *Bamaiyi v A G. Federation* (2001) 12 NWLR (Pt.727) 468 at 497; *Achineku v Ishagba* (1988) 4 NWLR (Pt. 89) 411; section 36(9) of the 1999 Constitution of the Federal Republic of Nigeria. B

In the cross-respondent's response, it was put forward a support for the view of the cross-appellant that if the court found the offence not proved beyond reasonable doubt, the proper order should be a discharge and acquittal and not a mere discharge as the Court of Appeal did. He cited section 246 of the Criminal Procedure Act and section 243A(2)(a) of the same Criminal Procedure Act Cap.41 Laws of the Federation, 2004. C

***This cross-appeal has no contest any way since it is a question on what the position should be if indeed the accused is found not guilty what the proper order should be as in the case in hand. I would have recourse to section 246 of the Criminal Procedure Act, Cap 43, Laws of the Federation, 2004 which provides as follows:*** D

***"If the court finds the accused not guilty, the accused shall forthwith be discharged and an order of acquittal recorded."*** E

***This court has had no difficulty in interpreting the word "shall" as provided for in statutes as in the present case to connote a mandate, a command that brook no watering down or denoting of any other meaning than that the command must be obeyed.*** F

***Therefore when the Court of Appeal found and decided that the accused/cross-appellant was not guilty, it was duty bound to order and record that he was discharged and acquitted and not do what it did by saying discharged but not acquitted. It was not for that court to merely order a discharge and the accused not acquitted. The law, section 246 of the Criminal Procedure Act said the accused should be discharged forthwith and an order of acquittal recorded. Nothing less than that would suffice. That order or mandate or command of the law should have been carried out without dilution.*** See *Bamaiyi v A - G. Federation* (2001) 12 NWLR (Pt.727) 468 at 497; *Achineku v Ishagba* H

In the circumstances therefore the cross-appeal is allowed and it is hereby ordered that the respondent/cross-appellant is discharged and acquitted forthwith of the charge against him.

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**ONNOGHEN JSC**

C I have had the benefit of reading in draft, the lead judgment of my learned brother PETER-ODILI, JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and ought to be dismissed while the cross-appeal is meritorious and ought to be allowed. I therefore order accordingly.

Appeal dismissed and cross appeal allowed.

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**FABIYI JSC**

E I have read before now the judgment just delivered by my learned brother - Peter-Odili, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the main appeal should be dismissed while the cross-appeal deserves to be allowed.

F The respondent/cross-appellant was arraigned along with another accused person before the trial High Court for the offence of murder contrary to section 274(1) of the Criminal Code Cap. 36, Vol. 11 Laws of Anambra State, 1991. At the end of the trial, he was convicted on a lesser count of manslaughter and sentenced to life imprisonment. He felt dissatisfied and appealed to the Court of Appeal, Enugu Division ("the court below" for short). The court below heard the appeal and in a unanimous judgment handed out on 7th July, 2008, the respondent/cross-appellant was discharged but not acquitted. This precipitated the appeal by the State and the cross-appeal by the respondent/cross-appellant to this court.

**MAIN APPEAL**

H In this court, briefs of argument were filed and exchanged. When the appeal was heard on 27 -10-2011, learned counsel on each side adopted and relied on the brief of argument filed on behalf of his client.

The lone issue distilled for determination on behalf of the appellant reads as follows:-

*“Whether the learned justices of the Court of Appeal were right to set aside the conviction and sentence of the respondent and discharged him on the ground that evidence relied upon by the trial court was hearsay evidence and the guilt of the respondent not proved beyond reasonable doubt.”*

The respondent also formulated one (1) issue for determination. B  
It reads as follows:-

*“Whether the learned justices of the Court of Appeal were wrong to have set aside the conviction and sentence of the respondent based on a thorough appreciation of the evidence adduced at the C trial court.”*

On behalf of the State, it was submitted that the court below, after treating the evidence of P.W.2 as hearsay, ought not to stop there but should have considered the ‘last seen doctrine’ as the respondent was last seen with the deceased. Learned counsel cited D the cases of Godwin Igabele v. The State (2006) 6 NWLR (Pt. 975) 100 at 104; Adeniji v. The State (2001) 4 SCNJ 371.

On behalf of the respondent, it was submitted by counsel that with respect to the time and place of death of the deceased, the evidence of P.W.1 was to the effect that the deceased died before he E got to the respondent’s compound. He did not know the time, place and cause of death of the deceased. He further submitted that the ‘last seen doctrine’ introduced by the appellant equates with a mirage as it is totally unsupported by evidence. He felt that the suggested F circumstantial evidence by the State was weak and same destroyed the inference that could be drawn therefrom. He cited *Tepper v. Queen* (1952) AC 480 at 489, *Lori & Anr v. The State* (1980) 8 - 11 SC 52 at 55.

Learned counsel finally, on the point, submitted that the cases G of Godwin Igabele v. The State (supra) and Adeniji v. The State (supra) do not apply as in the cases, the accused persons were clearly established by credible evidence as the ones last seen with the deceased persons.

For circumstantial evidence to be invoked, it must always be H narrowly examined as evidence of this kind may be fabricated to cast suspicion on another. Other co-existing circumstance that could weaken the inference to be drawn must be considered. In this matter, from the evidence of P.W.1, the time, place and how the deceased

died have not been clearly established. PW.1 felt that the deceased died before he got to the respondent’s compound. In effect the decisions in *Igabele v. The State* (supra) and *Adeniji v. The State* (supra) is not of moment herein.

To sustain a conviction in a criminal trial, circumstantial evidence must be cogent, complete and unequivocal. See: *R. v. Taylor & ors.* (1928) 21 CAR 21; *Nweke v. The State* (2001) 4 NWLR (Pt. 704) 588 at 603. This is not the case in this matter. As lingering doubts abound herein, it cannot be said with force that the State proved its case against the respondent beyond reasonable doubt as dictated in the case of *D.P.P v. Woolmington* (1935) AC. 485.

In short, the main appeal is hereby dismissed as same lacks merit.

CROSS-APPEAL

On behalf of the respondent/cross-appellant one issue was formulated for the determination of the cross-appeal. It reads as follows:-

*“Whether having held that no offence was proved against the respondent/cross-appellant and that the prosecution has failed to prove the offence against the respondent/cross-appellant beyond reasonable doubt the proper order the Court of Appeal ought to have made was an order discharging and acquitting the respondent/cross-appellant.”*

The above issue was adopted by the appellant/cross-respondent. The State had nothing concrete to offer in respect of the cross-appeal. This is so, as section 246 of the Criminal Procedure Act, Cap 43, Laws of the Federation, 2004 provides that -

*“If the court finds the accused not guilty, the accused shall forthwith be discharged and an order of acquittal recorded.”*

The court below found the respondent not guilty but merely discharged him and failed to record an order of acquittal in his favour. The court below declined to carry out its mandatory duty as imposed by the law. With due diffidence to the court below, it was erroneous of it to have shirked its responsibility which by so doing could expose the respondent to incidence of double jeopardy. The order as mandated by the law should have been pronounced by the court below without much ado. See: *Achineku v. Ishagba* (1988) 4 NWLR (Pt. 89) 411. As the court below, by act of omission, failed to make

the requisite order of acquittal of the respondent/cross-appellant, this court will not allow same to hang in the air, as it were. Acting in tandem with the provision of Section 22 of the Supreme Court Act, it is hereby ordered that the respondent/cross-appellant is discharged and an order of acquittal is hereby entered in his favour. The cross-appeal is allowed. B

For the above reasons and those carefully adumbrated in the lead judgment, I too hereby dismiss the main appeal and allow the cross-appeal.

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### **GALADIMA JSC**

I have had the privilege of reading in draft the lead judgment of my brother PETER-ODILI, JSC just delivered. I agree with his reasoning and conclusion that the main appeal be dismissed, while the cross-appeal is meritorious and should be allowed. D

The main issue in the main appeal is whether the court below was right to have set aside the conviction and sentence of the respondent. The complaint of the Respondent in his Cross-Appeal is that he should have been discharged and acquitted not merely discharged as held by the Court below. E

Having carefully reviewed the evidence of prosecution witnesses and some other circumstantial evidence, I have come to the conclusion that the court below was right to have ordered the discharge of the appellant but should have in addition to that made an order for his acquittal. F

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### **NGWUTA JSC**

The Respondent/Cross-Appellant (hereinafter referred to as the Respondent) and one Chidozie Okpala, were arraigned before the High Court of Anambra State sitting at Aguata, Anambra State, presided over by Ijem Onwuamaegbu, J. They were charged with murder contrary to s.274(1) of the Criminal Code Cap. 36 Vol. II Laws of Anambra State, 1991. The trial Court found the 2nd accused not guilty and discharged and acquitted him accordingly. The Court found the Respondent guilty of manslaughter and sentenced him to the maximum term of life imprisonment with hard labour. Aggrieved G

by the said judgment, the Respondent appealed to the Court of Appeal Enugu Division. Though the lower Court allowed the appeal, it merely discharged the respondent and did not acquit him, though the lower Court found and held that the Appellant/Cross-Respondent failed to prove its case against the respondent beyond reasonable doubt. The  
 B appellant was aggrieved and appealed to this Court against the judgment of the Court below. The respondent also filed a Cross-appeal against the order of the Court below discharging the respondent on the charge upon which he was tried, convicted and  
 C jailed. The appellant presented the following lone issue for determination of the main appeal:

*“Whether the learned Justices of the Court of Appeal were right to have set aside the conviction and sentence of the Respondent and discharged him on the ground that evidence relied upon by the  
 D trial Court was hearsay evidence and the guilt of the respondent not proved beyond reasonable doubt.”*

The Respondent also framed one issue, thus:

*“Whether the learned Justices of the Court of Appeal were wrong to have set aside the conviction and sentence of the respondent  
 E based on a thorough appreciation of the evidence adduced at the trial Court.”*

The two issues appear to be the same in substance. However, while the appellant limited itself to the finding of the lower Court that the evidence relied on by the trial Court in convicting the respondent  
 F was hearsay, the respondent’s issues involve a consideration of the veracity of the evidence adduced at the trial, including the alleged hearsay evidence. It is therefore more appropriate to determine the appeal on the issue framed by the respondents.

G What is the evidence before the trial Court upon which the respondent was convicted of manslaughter and upon which the lower Court set aside the judgment of the trial Court? I have looked at the record for the evidence of the six (6) witnesses called by the prosecution. PW1 identified the body of the deceased. PW2 claimed  
 H the father of the deceased and members of his family came to tell him that the deceased was murdered by the 1st and 2nd accused, described how the deceased sustained the injuries in the fight between him and the 2nd accused. Neither the father of the accused nor his family members who were alleged to have told the PW2 that the 1st

and 2nd accused persons murdered the deceased and described the fight in which the deceased sustained injuries testified to that effect at the trial. In that regards, the evidence of PW2 is hearsay evidence within the meaning of s.37 of the Evidence Act. It is inadmissible hearsay evidence. See s.38 of the Evidence Act. PW3 tendered the Medical Report and described what he observed on the body of the deceased. He stated the cause of death. He described himself as “a medical practitioner attached to the General Hospital, Ekwulobia”. In my view, his testimony lacks probative value in that he is not a Registered Medical Practitioner. PW4 denied telling the Police that the 2nd accused and the deceased fought. She denied having told the Police anything. She was not at the scene where the deceased died. PW5 merely took photographs of the body which he could not identify nor did he know when he took the photographs at the instance of the Police. PW6 said he was not present when the deceased was beaten to death. He could have been told how the deceased was beaten to death but he did not say he was told and or who told him. He said his testimony was what he obtained from eye witness. The eye witness was not named or called as a witness. His evidence is not only hearsay but inadmissible hearsay evidence.

In the rest of his testimony, he gave the trial Court the benefit of his “observations”. However, there is no way he could have observed what took place at the scene of the incident as he described; having said he was not present when the deceased was beaten to death. What he claimed to have observed was related to him in the course of his investigation but he chose not to say who told him what. It is another piece of inadmissible hearsay evidence. Above is the summary of the evidence adduced by the appellant at the trial Court. In its judgment, the trial Court held inter alia at page 102 of the record:

*“From the evidence before me I am satisfied that the acts of the 1st accused in inflicting injuries on the deceased caused the death of the deceased and I hold that the prosecution has proved this arm of this crime beyond reasonable doubt. . .”*

In my view, whatever the father of the accused persons said or did with respect to the death of the deceased cannot constitute proof beyond reasonable doubt of murder or manslaughter against the respondent. The cause of death is a medical question to be estab-

lished on the evidence of a registered medical practitioner as a general rule. I have said that PW3 is not a registered medical practitioner. The manner of death is a question to be ascertained from the evidence of witnesses. No witness gave evidence that the injuries found on the body of the deceased could not have been self-inflicted. Most  
 B importantly, even if the injuries could not have been self-inflicted, there is no credible evidence linking the respondent with the physical injuries on the body of the deceased, nor is there any piece of circumstantial evidence pointing exclusively to the respondent as the  
 C one who caused the injuries.

I endorse the decision of the lower court that “the prosecution has failed to prove the offence against the accused beyond reasonable doubt.” see page 192 of the record.

#### CROSS-APPEAL

D         The cross-appellant submitted the issue below for determination:  
               *“Whether having held that no offence was proved against the Cross-Appellant beyond reasonable doubt the proper order the Court of Appeal ought to have made was an order discharging and acquitting the Cross-Appellant.”*

E         The Cross-Respondent in its brief of argument, adopted the issue raised by the cross-appellant. It is the case of the cross-respondent as the appellant in the main appeal, that the case against the appellant was proved beyond reasonable doubt if only the lower court had considered all relevant evidence. It is commendable, and I do hereby  
 F commend learned counsel for the Cross-Respondent, for conceding the point made by learned counsel for the Cross-Appellant that the lower court, having found that the prosecution failed to prove its case against the accused beyond reasonable doubt, the lower court  
 G was bound as a matter of law, to discharge and acquit the cross-appellant. See Ss.246 and 243A(2)(d) of the Criminal Procedure Act, Cap C43 Laws of the Federation 2004 relied on by learned counsel for the cross-respondent. It is appropriate to reproduce in full the relevant portion of the judgment of the Court below:

H         *“My Lords, I have written above that the only cogent evidence before the Court for the offence of murder charge is inadmissible evidence of hearsay. It is not admissible to prove the offence consequently no offence is proved against the appellant. I am left in no doubt whatsoever that no sentence should have been imposed as*

*the prosecution has failed to prove the offence against the accused beyond reasonable doubt. The accused is discharged “but not acquitted.” See page 192 of the record.”*

My Lords, one would have thought that the words “... and acquitted” were left out in error, but for the fact that the Court clearly state “... but not acquitted”. I do not see any reason in law, procedure or fact for the phrase “but not acquitted” after the lower Court had found that the case against the appellant was not proved beyond reasonable doubt as required by law. Any Court, trial or appellate Court, having reached the above conclusion, has a legal and moral duty not only to discharge but to discharge and acquit the accused at the trial Court or appellant before the appellate Court.

The Court has no choice or discretion in the matter. Should there be a subsequent proceedings on the same facts the cross-appellant cannot raise or rely on a plea of autrefois acquit on a mere order of discharge.

Based on the above, I agree with the lead judgment of my learned brother, Peter-Odili, JSC which lead judgment I had the privilege of reading in draft. Consequently, I also dismiss the main appeal and allow the cross-appeal. I adopt the consequential order in the lead judgment.

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