

SUPREME COURT OF NIGERIA

1ST JUNE, 2012. SC. 12/2009

**CORAM:- W. S. N. ONNOGHEN, I. T. MUHAMMAD,
O. O. ADEKEYE, M. U. PETER-ODILI,
O. ARIWOOLA, JJSC**

SABINA CHIKAODI MADU APPELLANT
V
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Arraignment - Requirements - CPL s.215
- Accused must be brought to court unfettered - And charge is read
and explained to him - With his plea taken thereupon (H1)

CHARGES - Language used - Objection to - Failure to raise - Effect
- Accused is deemed to have understood the language - And has no
cause to complain (H2)

MURDER - Ingredients - Proof - Prosecution must prove that de-
ceased died - And the death was caused - By intentional act of ac-
cused (H3)

MURDER - Doctrine of last seen - Presumption - It is presumed that
person last seen with deceased - Bears full responsibility - For the
death (H4)

FACTS

1st accused/appellant, 2nd accused (now deceased) and the
deceased - Nnenna Nwosu lived as street neighbours in Aba, Abia
State. 2nd accused was the boyfriend of deceased. The deceased was
discovered dead inside a septic tank within the premises where ap-
pellant and 2nd accused resided. Appellant and 2nd accused were
subsequently arrested in connection with the murder of deceased.
They were arraigned before the High Court of Abia State, Aba on
two counts charge of conspiracy and murder contrary to sections
324 and 319(1) of the Criminal Code Cap 30 Vol. II Law of Eastern
Nigeria 1963 (as applicable to Abia State), respectively. The charge
was read to both in English language. They pleaded to the charge in

Igbo language. There was no record of translation of the language used from Igbo to English and vice versa. Nevertheless, appellant and 2nd accused did not raise any objection to same. At the trial, prosecution relied on testimonies of witnesses it called, especially PW2 and the post mortem examination carried on deceased by a medical doctor. PW2 gave testimony that the deceased was last seen with appellant and 2nd accused. In conclusion, the court found appellant and 2nd accused guilty as charged. Both were convicted and sentenced to death. Being dissatisfied, appellant appealed to the Court of Appeal, Port Harcourt. The court dismissed the appeal and affirmed the conviction and sentence passed by the trial court. Appellant has gone on a further appeal to Supreme Court.

ISSUES FOR DETERMINATION

1. *Whether the lower court was right when it upheld the conviction and sentence of the Appellant by the trial High Court, when the arraignment of the Appellant did not comply with the mandatory provisions of Section 36(6)(a) of the Constitution of the Federal Republic of Nigeria 1999 and section 215 of the criminal Procedure Laws of Eastern Nigeria 1963 as applicable to Abia state.*

2. *Whether the lower court was right when it relied on the evidence of the PW1, PW2, DW1 and DW2 in affirming the judgment of the trial court convicting and sentencing the Appellant to death for the alleged murder of the deceased.*

3. *Whether the Appellant was given fair hearing*

4. *Whether the lower court was right when in affirming the conviction and sentence of the Appellant to death by the trial court, it relied on the alleged piece of evidence that the Appellant was the person with whom the deceased was last seen alive.*

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 the Murder of the deceased Nnenna Nwosu.*

HELD (Unanimously dismissing the appeal per

ARIWOOLA JSC)

Arraignment - Requirements

1. In compliance with Section 215 of the Criminal Procedure Law, for the arraignment of an accused person to be valid, the following three essential requirements must be met:-

(a) The accused must be placed before the court unfettered unless the court shall see cause otherwise to order

(b) The charge or information shall be read over and explained to the Accused to the satisfaction of the court by the Registrar or other officer of the court; and

(c) The accused shall then be called upon to plead thereto unless of course, there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has in fact not been duly served therewith. (p. 2106 E)

CHARGES - Language used - Objection to - Failure to raise

2. It is therefore unfortunate for the appellant's counsel to have submitted that "the non statement of the language that the charge or information was read and interpreted to the appellant in the trial court clearly shows that the charge or information was not read to the appellant and interpreted in Igbo language which the appellant understands and spoke in the trial court." There was no sincerity in the statement of the counsel and the argument lacks merit. It is clear from the record and the appellant did not complain that she did not understand the charge or information. Furthermore, it is clear on record, that the appellant and DW2 testified in court in Igbo language. In the same vein, PW1 and PW2 also testified in Igbo language, same language spoken and understood by the appellant. It is note worthy that throughout the hearing, the appellant was present in court and was represented by counsel of her choice who dutifully cross examined the prosecution witnesses. It is the duty of the appellant and counsel to raise the Issue before the trial court, that she did not understand the language being spoken by the prosecution witnesses. If after such objection was raised the court overruled it and yet proceeded with the case, the story would have been different. Not having stated that an objection or complaint was

raised or made, it is safe in my view, to assume that the appellant had no cause to complain. (p. 2107 D)

MURDER - Ingredients - Proof

3. According to the Criminal Code, an offence of Murder is committed when a person unlawfully kills another under any of the following circumstances, that is to say:

- **If the offender intends to cause the death of the person killed, or that of some other person;**
- **If the offender intends to do to the person killed, or to some other person some grievous harm;**
- **If death is caused by means of an act done in the prosecution of an unlawful purpose, which act of such a nature as to be likely to endanger human life;**
- **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 such an offence.**
- **If death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid;**
- **If death is caused by willfully stopping the breath of any person for either of such purposes.**

In the second case above, 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. It is trite law, that in a charge of murder, the burden is on the prosecution to prove that the deceased died, that the death was caused by the accused; that the accused intended to either kill the victim or grievously harm him. In other words, in a murder charge, prosecution owes it a duty to discharge by proving the death of victim, responsibility of accused by act or omission, intentional act or omission of the accused with knowledge that it could cause grievous bodily harm or death. The prosecution must

prove that the act or omission caused death but not that it could have caused death. (p. 2109 A)

MURDER - Doctrine of last seen - Presumption

4. The issue in contest bothers on the doctrine of “Last Seen”. That is, if a person who was last seen alive in the company of another is found dead, that other in whose company the deceased was last seen alive in law is presumed to bear full responsibility of the death of the deceased. There is no doubt that in this case, there was no direct eye witness to the murder of the deceased by the appellant. What the trial court relied on was circumstantial pieces of evidence after having duly warned himself on the danger in basing the court’s decision on circumstantial evidence in the absence of any eye witness. In the instant case as I stated earlier, the prosecution established that the deceased actually died as a result of an illegal abortion performed or assisted in performing on the deceased by the Appellant. It is a misconception and misleading, to say the least for the learned counsel to the appellant to come to the conclusion that the doctrine of “last seen” is rooted only in common sense but not law therefore urging this court to overrule itself on the previous decisions based on the doctrine. This doctrine is indeed of global application. (pp. 2110 A/2113 B)

REPRESENTATION

K. Wodu Esq., for the Appellant

Chief Umeh Kalu Esq (A-G Abia State) for respondent with Val Offia Esq, N. N. Akinola (Mrs.) (Asst. Dir. C. L. Min. of Justice), Omokwe I. C. (Mrs.) (C. S. C. Ministry Of Justice, Abia State)

CASES REFERRED TO

Akpan v. State (2001) FWLR (Pt. 56) 735

Ubani & Ors v. State (2004) FWLR (Pt. 191) 1533

Godwin Igabele v. The State (2005) 3 SCM 143

Alewo Abogede v. State (1996) 5 NWLR (Pt. 448) 270

Ubanatu v. Commissioner of police (1999) 7 NWLR (Pt. 611) 512

Adeyemi v. State (1991) 5 NWLR (Pt. 195) 1

Asake v. Nigerian Army Council (2007) 1 NWLR (Pt. 1015) 408

Omosodo v. State (1981) NSCC Vol . 12 p. 119

Ahmed v. State (1999) 7 NWLR (Pt. 612) 641

Ajisopun v. State (1998) 13 NWLR (pt. 581) 236

Onyejiaka v. State (1997) 11 NWLR (pt. 530) 645

B State v. Ogbubunjo (2001) 2 NWLR (Pt. 598) 576

Okafor v. State (1990) 1 NWLR (Pt. 128) 614

Emeka v. The State (2001) 14 NWLR (Pt. 34) 668

Igabele v. State (2006) 6 NWLR (Pt. 975) 100

C **STATUTES REFERRED TO**

Criminal Code Cap 30 Vol. II Laws of Eastern Nigeria 1963, ss. 324, 319(1)

D Constitution of the Federal Republic of Nigeria 1999, s. 35, 36(5)(6)(a)

Criminal Procedure Laws of Eastern Nigeria 1963, s. 215

Evidence Act, 138(1)(2), 150

Criminal Procedure Law, s. 286

E **LEAD JUDGMENT BY ARIWOOLA JSC**

F This appeal is against the decision of the Court of Appeal, Port Harcourt Division delivered on the 30th November, 2006 affirming the conviction and sentence of the Appellant to death for the murder of the deceased Nnenna Nwosu by the Abia State High Court presided over by Uzokwe, J.

G The deceased Nnenna was discovered dead inside the septic tank in the premises where the Appellant and the 2nd Accused who is now deceased resided at No.17 1st Powerline. The deceased Nnenna was living with her family at No.16 Power line Abayi Ariaria. The Appellant was charged with the murder of Nnenna Nwosu as follows:

H “That you Sabina Madu (f) on the 30th day of August, 2002 at No. 17 First Powerline Aba in the Osisioma Ngwa Magisterial District, did conspire with others now at large to commit felony to wit: Murder and thereby committed an offence punishable under Section 324 of the Criminal Code Cap.30 Vol. II Laws of Eastern Nigeria 1963 as applicable in Abia State.”

Count Two:

“That you Sabina Madu (f) and others now at large on the same date and place and in the aforesaid Magisterial District, did kill one Nnenna Nwosu (f) and threw the corpse into a soak-away pit and thereby committed an offence punishable under section 319 (1) of the Criminal code Cap.30 Vol.II, Laws of Eastern Nigeria 1963 as applicable in Abia State.” B

The case proceeded to trial. At the end, the court convicted the Appellant and the 2nd Accused person for the murder of Nnenna Nwosu and consequently sentenced them to death. The Appellant was dissatisfied with the judgment of the trial court hence appealed to the court below. The 2nd convict had died shortly after he was convicted and sentenced. The Court of Appeal, Port Harcourt Division after hearing the arguments of counsel dismissed the appeal and affirmed the conviction and sentence of the Appellant to death by the trial court. The Appellant’s dissatisfaction led to the further appeal to this court which was initiated with the Notice of Appeal dated 16/12/2006 but filed on 26/01/2007. The said Notice of Appeal has seven (7) Grounds of Appeal. Parties filed and exchanged their briefs of arguments. When the appeal came up for hearing, Mr. Kemasuode Wodu of counsel to the appellant referred to the appellant’s brief of argument dated 26/04/2010 but filed on 8/5/2010. Having been filed out of time, sequel to an order of this court duly sought and obtained, the said brief of argument was deemed properly filed and served on 03/11/2010. Learned counsel adopted and relied on the said brief of argument as their submissions in urging the court to allow the appeal to discharge and acquit the appellant. Chief Umeh Kalu, the Hon. Attorney General of Abia State, argued the appeal for the State. He referred to the respondent’s brief of argument filed on 12/10/2011 but deemed as properly filed and served on 13/10/2011. He referred to the four issues formulated by the Respondent from the Grounds of Appeal filed by the Appellant. He adopted and relied on the said Respondent’s brief of argument to urge the court to uphold the concurrent decisions of the two courts below in affirming the conviction and sentence of the appellant and dismiss the appeal. H

In her brief of argument, the appellant formulated the following five (5) issues for determination.

Issues for determination:

B “1. *Whether the lower court was right when it upheld the conviction and sentence of the Appellant by the trial High Court, when the arraignment of the Appellant did not comply with the mandatory provisions of Section 36(6)(a) of the Constitution of the Federal Republic of Nigeria 1999 and section 215 of the criminal Procedure Laws of Eastern Nigeria 1963 as applicable to Abia state. (Distilled from Grounds 1 & 2)*

C 2. *Whether the lower court was right when it relied on the evidence of the PW1, PW2, DW1 and DW2 in affirming the judgment of the trial court convicting and sentencing the Appellant to death for the alleged murder of the deceased. (Distilled from Ground 3)*

3. *Whether the Appellant was given fair hearing (Distilled from Ground 4).*

D 4. *Whether the lower court was right when in affirming the conviction and sentence of the Appellant to death by the trial court, it relied on the alleged piece of evidence that the Appellant was the person with whom the deceased was last seen alive. (Distilled from Ground 5)*

E 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 the Murder of the deceased Nnenna Nwosu. (Distilled from Grounds 6, 7, 8, 9, 10, 11 12, 13, 14 and 15). ”*

F The Appellant in her brief of argument argued the above issues seriatim.

Issue No.1

G The appellant referred to the record of the trial court on the day she was arraigned and her plea taken on 2/3/2004. She contended that the record did not indicate or state the language in which the charge was read and explained to the appellant. Reference was made to Section 215 of the Criminal Procedure Laws of Eastern Nigeria, 1953 as applicable to Abia State. It was contended that before there could be a valid arraignment of an accused person, the following conditions must be met:-

1. The accused person must be placed before the court unfettered, unless the court otherwise orders.

2. The charge or information must be read over and explained

to the accused person to the satisfaction of the court and thereafter.

3. The accused person must be instantly called upon to plead to the said charge.

He relied on the following cases Udeh vs. State (1999) 7 NWLR (Pt.609) 1 at 20 & 22 Ogunye vs. State (1999) 5 NWLR (pt.604) 548 at 555, Ideomudia vs State (1999) 7 NWLR (Pt.610) 202 at 214. Learned appellant's counsel referred to section 36 (6) of the 1999 constitution and submitted that the trial of the appellant did not comply with the requirement of the Law hence it was in breach of the appellant's right to fair hearing rendering the proceedings null and void. He cited several cases, including Ogunye vs State (supra) Sunday Kajubo vs State (1988) NWLR (pt.73) 721 at 732, Ere Kanure vs State (1993) 5 NWLR (Pt.294) 38, Anyakora vs Obiakor (2005) 5 NWLR Pt.919) 507 at 532-533. Learned counsel submitted that the trial court did not comply with the mandatory requirement of the constitution. He contended that it can be reasonably presumed that the charge was read and interpreted to the appellant in English Language being the official language of the court, but not her native language which is Igbo. He submitted that failure to record the language in which the charge was read and interpreted has vitiated the entire trial and conviction of the appellant by the trial court. Learned counsel further submitted that the appellant was not validly arraigned before the trial court hence the appellant's trial, conviction and sentence by the trial court are null and void. He urged the court to hold that the court below ought not to have affirmed the judgment of the trial court. He urged the court to resolve the issue in favour of the appellant.

Issue No.2

The appellant contended that the court below, in affirming the judgment of the trial court relied on the evidence of PW1, PW2, DW1 and DW2. He relied on the 12 species of evidence. The appellant contended further that all the said 12 species of evidence except the 9th and 10th species were based on the evidence of the said PW1, PW2, DW1 and DW2. The 9th and 10th species of evidence dealt with the evidence of the Medical Doctor (DW4) as to the cause of death of the deceased. The appellant referred to the testimony of the PW1, PW2, DW1 and DW2 and contended that having testified in their native Igbo language, there is nothing on record to show that

the testimony was interpreted to the trial court in the language of the court. Learned counsel submitted that the evidence of those witnesses was not admissible before the trial court hence the trial court was wrong to have admitted the evidence and relied on it to convict the appellant. He urged the court to expunge the evidence of the witnesses which were not admissible but admitted wrongly and relied on by the trial court and the court below. He cited *Owoniye vs. Omotosho* (1961) 2 SCNLR 57 at 61, *Shanu v. Afribank (Nig) Plc* (2002) 17 NWLR (Pt....) 221 at *Olayinka v. The State* (2007) 9 NWLR (Pt.1040) 561 at 577-578. Learned counsel submitted that the effect of expunging or excluding the aforesaid piece of evidence from the record is that there would no longer be any basis or foundation for the decision of the court below in affirming the conviction and sentence of the appellant to death by the trial court. He urged the court to resolve this issue No.2 in favour of the appellant.

Issue No.3

This is whether the Appellant was given fair hearing. Learned counsel to the appellant submitted that it is mandatory for any person charged with a criminal offence to be heard in his defence before he is convicted for the commission of any such offence. He referred to the principle of ‘*Audi alteram partem*’, and submitted that whenever there is any breach of that principle, the entire proceedings wherein the breach occurred are rendered null and void. He cited, *Okafor vs. A.G. Anambra State* (1991) 6 NWLR (Pt.200) 649 at 578. Learned counsel submitted that the appellant’s right to fair hearing was grossly violated in the proceedings before the trial court as she was not heard in her defence. He referred to the evidence on record where the appellant testified as DW1 and spoke in her native language of Igbo but her testimony was not interpreted to the court in the language of court. He urged the court to hold that the testimony of the Appellant before the trial court was not interpreted to the court which he said meant that the appellant was not heard in her defence. He contended that whatever the trial court may have ascribed to the Appellant as her evidence before the court at best can only be matters of conjecture or speculation and courts of law do not embark on speculation. He relied on *ACB Plc Vs N.T.S {Nig} Ltd* (2007) 1 NWLR (Pt.1016) 596 at 628. He urged the court to hold that in the peculiar circumstances of this case, the trial court breached

the Appellant's fundamental human right to fair hearing when it went on to convict and sentence the appellant to death for alleged murder without hearing from the appellant.

Learned counsel submitted that the consequence of such a finding by the court is that the entire trial, conviction and sentence of the appellant by the trial court is null and void. He went further to say that if the appellant's trial, conviction and sentence to death by the trial court is null and void, then the court below could not have rightly affirmed or upheld the appellant's conviction and sentence. He urged the court to resolve Issue No.3 in favour of the appellant. Issue No.4.

This is whether the lower court was right when in affirming the conviction and sentence of the appellant to death by the trial court, it relied on the alleged piece of evidence that the appellant was the person with whom the deceased was last seen alive?

The appellant referred to the findings of the court below in upholding the conviction and sentence of the appellant with the reliance on the alleged fact that the appellant was the last person with whom the deceased was seen alive and the principle that that person is the one that killed the deceased. Reference was made to several decided cases where this court had relied on the above principle to uphold conviction and sentence such as; Nwaeze Vs State (1996) 2 NWLR {Pt.428} 1 at 16, Igbo Vs The State (1978) NSCC Vol.II 166 at 108, Emeka Vs State (2001) 14 NWLR (Pt.734) 556 at 685, Igabele vs State (2006) 5 NWLR (Pt.975) 100 at 121. Learned counsel contended that the above principle is not rooted in law but in common sense. He submitted that the upholding of the conviction and sentence of the appellant by the court below in reliance on the principle that she was the last with whom the deceased was seen alive, constitutes a grave violation of the appellant's fundamental human right to the presumption of innocence preserved in Section 36 (5) of the 1999 Constitution. He cited; Ubanatu Vs COP (1999) 7 NWLR (Pt.611) 512 at 522. He submitted further that a breach of that presumption completely nullifies the proceedings in which the breach occurred. He relied on Adeyemi vs State (1991) 6 NWLR (Pt.195) 1 at 29. Learned counsel contended that if an accused person is deemed to be innocent until proven guilty, such an accused person cannot be made to prove his innocence by offering some explanation simply

because the deceased was last seen alive in his company and where he fails to offer any acceptable explanation then he would be presumed to be the killer of the deceased. Learned counsel contended further that the law has always been static that it is the prosecution that must prove the guilt of the accused person beyond reasonable
 B doubt and not the other way round, that is, the Accused person proving his innocence. He cited *Ahmed v. State* (1999) 7 NWLR (Pt.612) 641 at 669, section 138(1) & (2) Evidence Act. Learned counsel contended that if at the close of the case of the prosecution,
 C the only evidence adduced by the prosecution is that the deceased was last seen alive in company of the Accused person, there is obviously no case made out against an accused person to require him to enter into his defence. He submitted that the court ought to accordingly discharge the accused person under section 286 of the criminal
 D Procedure Law.

Learned counsel referred to a couple of decisions of this court where the principle of person with whom the deceased was last seen alive being the one to explain what killed the deceased. And some cases where the court had held otherwise. He contended that this
 E court has the power to overrule itself on its decisions previously held and now hold that it is not a correct law to hold the person with whom a deceased was last seen alive, responsible for the death of the deceased or at least an explanation of what killed him. He urged the
 F court to resolve the issue in favour of the appellant and accordingly overrule all the decisions of this court where the said principle was applied, that the person in whose company a deceased was last seen alive is the person who killed the deceased.
 Issues No.5

G This is 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 the murder of the deceased Nnenna Nwosu. Learned counsel submitted that for an accused person to be convicted for the com-
 H mission of any offence, the prosecution must prove the guilt of the Accused beyond reasonable doubt. He referred to Section 138 of the Evidence Act and *Ajisosun Vs State* (1998) 13 NWLR (Pt.581) 230 at 256-260. He submitted that where there is any doubt in the case of the prosecution, such doubt must be resolved in favour of the

Accused person. He relied on *Onyejiaka vs State* (197) 11 NWLR (pt.530) 645 at 651. Learned counsel contended that in the case in hand, the prosecution which relied on circumstantial evidence woefully failed to prove its case against the appellant, who was the 1st Accused person in the trial court, beyond reasonable doubt. Reference was made to the record of proceedings at several pages for the facts relied on by the prosecution, the findings of the trial court and the reason why the court below upheld the decision of the trial court and affirmed the conviction and sentence of the appellant. B

Learned counsel contended that the appellant, by her testimony under cross examination denied knowledge of the pregnancy of the deceased. That there was no other evidence before the trial court that the appellant knew that the deceased was pregnant or that the appellant carried out abortion on her or advised her to carry out abortion. Learned counsel submitted that in view of the fact that the appellant could not be linked with the commission of abortion on the deceased which allegedly led to her death, it was wrong for the trial court and the court below to have held that it was the appellant that caused the death of the deceased by abortion. He referred to the findings of the trial court and urged the court to hold that there was no evidence before the trial court to justify such finding that the appellant was responsible for the alleged abortion or murder of the deceased. It was contended that the circumstantial evidence relied upon by the prosecution does not exclude the possibility of the alleged abortion to have been committed by someone else such as a quack doctor who may have unsuccessfully carried out an abortion of the alleged pregnancy of the deceased. Learned counsel submitted that the circumstantial evidence to be sufficient to find the conviction of an accused person, it must exclude the possibility of any other person committing the offence in question. He relied on; *Anekwe Vs. The State* (1975) NSCC Vol.10 page 558 at 562. Learned Counsel referred to the evidence of PW4 which attributed the cause of the death of the deceased to laceration in the womb which could have been caused by a sharp object application from a long or short sharp object. He submitted that where the prosecution in a case of murder with an object such as machete or other sharp objects, relies on circumstantial evidence, for such circumstantial evidence to lead to a conviction for murder, the accused person must have been seen with C D E F G H

the said object, possibly bloodstained shortly after the commission of the offence or same recovered from the said accused person. He cited, *State Vs Ogbubunjo* (2001) 2 NWLR (pt. 698) 576 at 591 *Ukorah Vs The State* (1977) NSCC Vol. II 218/223 *Okafor Vs State* (1990) 1 NWLR (Pt.128) 614 at 626. It was contended that in this case there was no evidence before the trial court to the effect that the appellant was seen with a sharp object shortly after the death of the deceased or any sharp object recovered from the appellant's house. He submitted that the conviction and sentence of the appellant to death by the trial court and the upholding of same by the court below are against the weight of evidence adduced before the court.

The appellant further contended that other areas where the prosecution left with grave doubts exclude the evidence of the date and time of death of the deceased. He submitted that this court had cause to set aside the conviction of an accused person for murder, inter alia, on account of failure of the prosecution to prove the time of the death of the deceased in question. Cited *Aigbadion Vs. State* (2000) 7 NWLR (Pt.666) 686, 701-702. He submitted that where an accused person pleads an alibi and the alibi was not investigated by the prosecution, the court is bound to discharge and acquit such an accused person. He cited *Mustapha Vs. State* (2007) 12 NWLR (pt.1049) 637 at 658, *Isiekwe vs. State* (1999) 9 NWLR (Pt.617) 43 at 65. Learned counsel urged the court to hold that the lower court erred when it held that the appellant caused the death of the deceased and affirmed the appellant's conviction and sentence to death by the trial court when the prosecution failed to prove its case beyond reasonable doubt. He urged the court to resolve Issue No.5 in favour of the appellant and thereby allow the appeal, set aside the judgment of the trial court which convicted and sentenced the appellant to death for the murder of the deceased Nnenna Nwosu and the affirmation of same by the court below.

The Respondent in its brief of argument also formulated four (4) Issues from the Grounds of Appeal filed by the Appellant, for determination of the appeal by the court. The said issues are as follows:-

"1. Whether the absence of evidence or note by the trial Judge showing that the charge was read and explained to appellant in a language she understands and that the proceedings were interpreted

rendered the trial of appellant a nullity.

2. *Whether the appellant was denied a fair hearing by the mere fact that PW1, PW2, DW1 and DW2 testified in Igbo language at the trial court.*

3. *Whether the circumstantial evidence relied upon by the learned trial Judge in convicting the appellant (which said conviction was affirmed by the court below) was cogent, positive and compelling enough.* B

4. *Whether the court below was not right in affirming the conviction and sentence of the appellant as the case of the prosecution was proved beyond reasonable doubt.* C

The brief of argument was settled by the Hon. Attorney General of Abia State, Chief Umeh Kalu who also argued same. He took the issues seriatim.

Issue No.1

Learned Attorney General referred to the proceedings of the trial court on 2nd March, 2003 when the plea of the appellant was taken upon her arraignment with the 2nd accused person. He indicated that the record shows that the charge on information was read and explained to both accused and each of them pleaded NOT GUILTY respectively. D

Learned counsel referred to Section 215 of the Criminal Procedure Law of Eastern Nigeria, 1963, applicable in Abia State and Section 36 (5) (a) and (e) of the 1999 constitution. He referred in particular to the three requirements of Section 215 of the CPL which must coexist and submitted that the three requirements coexisted in the instant case. He contended that the complaint of the appellant is not that she was placed before the trial court fettered, neither is it that he was not called upon to plead instantly thereto, rather her complaint was that it appears that the charge or information was not read over and explained to the accused in the language she understands. F
He referred to page 40 of the record of proceedings to show that the trial Judge recorded that the charge on the information was read and explained to the two accused persons. He submitted that the mandatory requirement was complied with by the trial court. Learned Attorney General contended that when the learned trial judge recorded that charge was read and explained to the accused persons, it means that the said count or information was read in English language and G H

explained/translated to Igbo language to the accused persons who testified in Igbo language at the trial.

He submitted that in the Southern States there is no compulsion on trial Judges to record the fact of interpretation, whereas in the Northern States, there is such a provision to record the issue of interpretation vide-section 241 of the Criminal Procedure Code. The only requirement in the Criminal procedure Law for interpretation is Section 35(5) (a) and (e) of the 1999 Constitution. He relied on *Edwin Ogba Vs. The State* (1992) 8 LRCN 362 at 399, Per Belgore, JSC (as he then was). *Queen Vs Eguabor* (1952) 1 All NLR 286, per Brett, FJ at pp. 290-291 *Godwin Anyanwu Vs. The State* (2002) 13 NWLR (Pt.703) 107, *Peter Locknan & Anor Vs The State* (1972) All NLR 498; *State v. Salih Mohammed Gwonto* (1983) All NLR 109. *Nwachukwu Vs. The State* (2007) 17 NWLR (Pt.1062) 31 *Pele Ogunye D & Ors V. The State* (1999) 88 LRCN 699.

Learned Attorney General submitted that the appellant and the co-accused were represented by their respective counsel before the trial Judge. Both counsel participated in the trial from the beginning to the end without any complaint or objection from either of the counsel. Whereas, it is the appellant's duty or that of her counsel to have objected to the proceedings if she had any complaint. Not having done so at the trial court, it is too late now so to do. He cited; *Francis Durwode V. The State* (1997) 1 NWLR (Pt.482) 306 at 402. Learned Attorney General submitted further that there was no breach of the mandatory provisions of the Constitution and the Procedural Law. The appellant understood the charge read out to her and the fact that she was standing trial for murder. He said there was no procedural irregularity in the trial. He urged the court to resolve the issue in favour of the Respondent.

On Issue No.2, whether the appellant was denied fair hearing by the fact that the PW1, PW2, DW1 and DW2 testified in Igbo Language at the trial court learned Attorney alluded to various decisions of this court and court below on the meaning of "fair hearing". They include *Oloruntoba-Oju Vs Abdulraheem* (2009) 13 NWLR (pt.1157) 83 at 142. *Amamchukwu vs. FRN* (2009) 8 NWLR (pt.1144) 475 at 486- 487 *A-G of Kwara State vs. Abolaji* (2000) 7 NWLR (Pt. 1139) 199. He submitted that in the instant case, the appellant was afforded an opportunity to be heard at the trial court.

She took her plea after the charge was read and explained to her. She cross examined the prosecution witnesses through her counsel. She defended herself in a language she understands, that is Igbo language. She was present on all day(s) the matter came up.

Learned Attorney submitted further that there is no evidence on record that the appellant did not understand Igbo or English Language, as the case may be. Therefore, if neither the accused person (Appellant) nor her counsel demanded the former's right to interpretation nor objected to the absence of an Interpreter, the right is lost for all time and cannot be invoked on appeal. No right of the appellant was breached at the trial court. The appellant was given fair hearing. He urged the court to resolve Issue No.2 in the negative and in favour of the Respondent.

Issue No.3 is whether the circumstantial evidence relied upon by the learned trial Judge in convicting the appellant, which said conviction was affirmed by the court below was cogent, positive and compelling enough.

Learned Attorney General contended that the fact that the appellant was the person with whom the deceased was last seen alive, is just one of the many species of evidence from which the learned trial Judge drew the inference that the appellant and her co-accused killed the deceased. The conviction and sentence was affirmed by the court below. He submitted that even though there is no direct evidence of someone who saw the appellant committed the offence of murder of the deceased, there were enough circumstances that warranted the learned trial Judge to draw the inference. He cited *Ude-Dibie & Ors Vs The State* (1976) 1 SC 133. Learned counsel referred to the circumstantial evidence relied upon by the prosecution at pages 103-105 of the record of proceedings which was accepted by the court below and reproduced by the court at pages 193-195 of the record. He submitted that the court below was right in affirming the conviction and sentence of the appellant, as this court has maintained that where direct eye witness account is not available, the court may infer from the facts proved, the existence of other facts that may logically tend to prove the guilt of the accused person. He relied on *Olusola Adepetu V. The State* (1996) 61 LRCN 4519-4543, *Chima Ejiofor v. The State* (2001) 86 LRCN 1318 at 1344. Learned Counsel referred to portions of the testimony of the appellant and

her attitude, after she discovered the deceased's body in the soak away or septic tank. He submitted that there are no other co-existing circumstances which can weaken the inference of her guilt. Cited Philip Omogodo Vs. The State (1981) SC 5 at 24

B On the doctrine of "*last seen*" which means, in effect, that the law presumes that the person last seen with the deceased bears full responsibility for his death if it turns out that the person last seen with him is dead. He relied on Igabele Vs. The State (2005) 139 LRCN 1831, Nwaeze Vs State (1996) 2 SCNJ 4-61. Gabriel Vs. State (1989) 3 NWLR (Pt.122) 457.

C On whether this court should depart or overrule itself from its previous decisions, based on the doctrine of "*last seen*" learned counsel contended that the request is untenable. He contended that the facts of the previous decisions of this court are on all fours with the case in D hand. He urged the court to refuse the invitation to overrule itself on the age long doctrine of "*last seen*". And resolve Issue No.3 against the appellant.

On Issue No.4 whether the court below was not right in affirming the conviction and sentence of the appellant as the case of the E prosecution was proved beyond reasonable doubt, the learned Attorney General submitted that in a charge of murder, the duty on the prosecution is to establish -

- (a) That the deceased died;
- (b) That the act or omission of the accused which caused the F death of the deceased was unlawful and;
- (c) That the act or omission of the accused must have been intentional with knowledge that death or grievous bodily harm was its probable consequence.

G He relied on; Alewo Abogede Vs. The State (1996) 37 LRCN 674, Godwin Igabele Vs The State (Supra) Idiok Vs. The State (2010) 8 LRCN 96. He submitted that the guilt of an accused person can be proved or established by the confessional statement of the accused or by circumstantial evidence or by evidence of an eye witness of the H crime. He cited; Emeka v. The State (supra) Adekunle v. The State (2006) 5 LRCN. He submitted that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt and if the evidence is strong against a man as to leave only a remote probability in his favour which can be dismissed with the sentence, of course, it is

possible but not in the least probable, the case has been proved beyond reasonable doubt. He submitted that the prosecution proved his case against the appellant beyond reasonable doubt. The court below was right in affirming the conviction and sentence to death of the appellant by the trial court.

Learned counsel referred to the concurrent findings of facts by the two courts below. He submitted that as there is no perversion in this case, this court should not disturb the said concurrent findings of facts of the courts below, but uphold same to dismiss the appeal and affirm the judgment of the court below.

I have considered the respective issues for determination formulated and argued by both the appellant and Respondent. There is not much difference. This appeal will therefore be determined by the issues formulated by the appellant. Issues 1, 2 & 3 formulated by the appellant shall be taken together. They all point at the same direction, that, if the plea was not properly taken when the appellant was arraigned before the trial court and the evidence of prosecution witnesses was taken in the language the appellant does not speak or understand, then she would be right to say that she was not given fair hearing by the trial court, hence the trial, conviction and sentence by the trial court would be a nullity and then there would be no basis for the court below to affirm the conviction and sentence of the trial court. The appellant's complaint is that since her arraignment before the trial court did not comply with the mandatory provisions of section 35(5) (a) of the 1999 Constitution of the Federal Republic of Nigeria, and Section 215 of the Criminal procedure Law of Eastern Nigeria, 1963 as applicable in Abia State, the Court below was wrong to have upheld the conviction and sentence by the trial court. What are these requirements? Section 36(6) (a) states thus:

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

(a) Be informed promptly in the language that he understands and in details of the nature of the offence."

Section 215 of the Criminal Procedure Law of Eastern Nigeria reads thus:-

"The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order and the charge or information shall be read over

and explained to him to the satisfaction of the court by the registrar or other officer of the court and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith.”

B The learned counsel had contended that the appellant as an Ibo woman, she speaks Igbo language which was not the language of the court. From the record of proceedings, it is clear that the plea of the appellant was taken on 2nd of March, 2003 by the trial court.
C The two accused persons, that is, the appellant and the deceased,
C 2nd Accused were present in court. On pages 40 - 41 of the records, it is stated as follows:

“Court:- Charge in information is read and explained to the Accused persons who Plead as follows:-

D *Count 1. - 1st Accused - Not guilty*
2nd Accused - Not guilty.”

The case, after the plea of the accused persons was taken, was adjourned to a later date for hearing. And on the next adjourned date, which was 30/3/2004, the two accused persons were present in
E court and adequately represented by counsel, the case proceeded to hearing with the first PW testifying.

In compliance with Section 215 of the Criminal Procedure Law, for the arraignment of an accused person to be valid, the following three essential requirements must be met:-

F ***(a) The accused must be placed before the court unfettered unless the court shall see cause otherwise to order***

(b) The charge or information shall be read over and explained to the Accused to the satisfaction of the court by the Registrar or other officer of the court; and

G ***(c) The accused shall then be called upon to plead thereto unless of course, there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and***
H ***the court is satisfied that he has in fact not been duly served therewith.*** See *Oguniye vs. The State* (1999) 5 NWLR (Pt.604) 548 at 555 *Idemudia vs. The State* (1999) 7 NWLR (Pt. 610) 202 at 204.

There is nothing on record to dispute the fact that the trial court in the instant case complied with the mandatory requirement

of the Constitution and the Law. The appellant was arraigned before the trial court unfettered, the charge was duly read and explained to the appellant and she was called upon by the court to plead to the charge, to which she accordingly pleaded and was so recorded. If the charge had been read to the accused without an explanation in the language she understands, she should have said so, or her counsel should have raised an objection. That is, at least, the natural human reaction. In Paul Onyia Vs. The State (2008) 12 SCM (Pt.2) 520 at 631, a case in which the accused person speaks Igbo which is not the language of the court but where the information was read out in English and explained in Ibo language to the accused person, this court on appeal for an alleged failure to comply with the requirement of the law, opine as follows:-

"It is a common spontaneous human reaction in court for an accused person who does not understand the language used to say so openly in court or protest that he needs an interpretation to the language that he understands." See also Madu Vs State (1997) 1 NWLR (pt.482) 386; Nwachukwu Vs The State (2007) 12 SCM (Pt.2) 447. **It is therefore unfortunate for the appellant's counsel to have submitted that "the non statement of the language that the charge or information was read and interpreted to the appellant in the trial court clearly shows that the charge or information was not read to the appellant and interpreted in Igbo language which the appellant understands and spoke in the trial court."** There was no sincerity in the statement of the counsel and the argument lacks merit. It is clear from the record and the appellant did not complain that she did not understand the charge or information. Furthermore, it is clear on record, that the appellant and DW2 testified in court in Igbo language. See pages 55-57 of the record of proceedings. In the same vein, PW1 and PW2 also testified in Igbo language, same language spoken and understood by the appellant. See pages 41-47 and 57-62 respectively of the record of proceedings. **It is note worthy that throughout the hearing, the appellant was present in court and was represented by counsel of her choice who dutifully cross examined the prosecution witnesses. It is the duty of the appellant and counsel to raise the Issue before the trial court, that she did not understand the language being**

spoken by the prosecution witnesses. If after such objection was raised the court overruled it and yet proceeded with the case, the story would have been different. Not having stated that an objection or complaint was raised or made, it is safe in my view, to assume that the appellant had no cause to com-

plain. See Francis Durwode Vs The State (2000) 82 LRCN 3038 at 3065 (2001) FWLR (Pt.36) 950 at 971-2 in which case this court opine as follows:-

“in the realm of criminal Justice, it is the cardinal principle of our criminal jurisprudence that it is the duty of the accused or his counsel acting on his behalf to bring to the notice of the court the fact that he does not understand the language in which the trial is conducted otherwise it will be assumed that he has no cause of complaint.” See also; Adeniji Vs State (2001) FWLR (Pt.57) 809 at 817.

Earlier this court per Adio, JSC (of blessed memory) in Mallam Madu Vs. The State (1997) 1 NWLR (Pt .482) 306 at 402, had stated thus:

“The fact that the accused does not understand the language which the trial court is being conducted is a fact well known to the accused and it is for him or his counsel to take the initiative of bringing it to the notice of the court at the earliest opportunity or as soon as the situation has arisen. If he does not claim the right at the proper time he may not be able to have a valid complaint, after wards, for example on appeal.”

I am therefore convinced that the court below was right in affirming the judgment of the trial court, relying on the evidence of PW1, PW2, DW1 and DW2 all of who spoke and understood Igbo language in which each of them testified. Accordingly, and without any further ado, Issues 1, 2 and 3 are hereby resolved against the appellant. Now to the other Issues -

Issues No.4 and No. 5 are, whether the lower court was right when, in affirming the conviction and sentence of the appellant to death by the trial court, it relied on the alleged piece of evidence that the appellant was the person with whom the deceased was last seen.

And 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 the murder of the deceased, Nnenna Nwosu. As earlier noted in this judgment, the Appellant was charged, tried, convicted

and sentenced to death for the offence of murder of one Nnenna Nwosu.

According to the Criminal Code, an offence of Murder is committed when a person unlawfully kills another under any of the following circumstances, that is to say:

- If the offender intends to cause the death of the person killed, or that of some other person; B

- If the offender intends to do to the person killed, or to some other person some grievous harm;

- If death is caused by means of an act done in the prosecution of an unlawful purpose, which act of such a nature as to be likely to endanger human life; C

- 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 such an offence. D

- If death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid; E

- If death is caused by willfully stopping the breath of any person for either of such purposes.

In the second case above, 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. It is trite law, that in a charge of murder, the burden is on the prosecution to prove that the deceased died, that the death was caused by the accused; that the accused intended to either kill the victim or grievously harm him. See: Durwode Vs. The State (Supra) Idemudia Vs State (2001) FWLR (Pt.55) 549 of 564, Akpam Vs. State (2001) FWLR (Pt.56) 735. In other words, in a murder charge, prosecution owes it a duty to discharge by proving the death of victim, responsibility of accused by act or omission, intentional act or omission of the accused with knowledge that it could cause grievous bodily harm or death. The prosecution must F
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prove that the act or omission caused death but not that it could have caused death. See: Ubanu & Ors Vs State (2004) FWLR (Pt.191) 1533 at 1546, Godwin Igabele Vs The State (2005) 3 SCM 143 at 151, Alewo Abogede Vs State (1996) 5 NWLR (Pt.448) 270.

The issue in contest bothers on the doctrine of “Last Seen”. That is, if a person who was last seen alive in the company of another is found dead, that other in whose company the deceased was last seen alive in law is presumed to bear full responsibility of the death of the deceased. There is no doubt that in this case, there was no direct eye witness to the murder of the deceased by the appellant. What the trial court relied on was circumstantial pieces of evidence after having duly warned himself on the danger in basing the court’s decision on circumstantial evidence in the absence of any eye witness. Indeed, the circumstantial pieces of evidence which the prosecution relied on and found by the trial court are as follows:-

“- The 1st accused, though much older than the deceased, was a close friend of the deceased, according to the prosecution witnesses and the accused person. 1st accused admitted that the deceased used to take care of her baby, she was the only friend deceased used to.... and the deceased kept her house keys with her. It was also the evidence of pw1 which I accept to be true that 1st accused and his wife were friends right from the time they moved into their present residence opposite accused person’s house. That before his wife left for the village in 1998 she asked first accused to be taking care of their 17 year old child in her absence.

- The 2nd accused admitted that he was the deceased’s boy friend and had sex regularly with her. That it was 1st accused who earlier told him that the deceased was his (sic) sister, that introduced the deceased to him.

-The deceased was last seen alive on 30/8/02 with the accused persons (according to their own admission). 1st accused said deceased followed her half way to the market while 2nd accused said she came to him to ask for money.

- PW2 saw the accused persons patrolling the backyard of the premises, but ignored them because he thought they were going to have sex.

- The body of the deceased according to the admission of the

accused persons was later seen in the septic tank in their backyard and not that of the deceased.

- *The two accused persons up till 1/9/02 were the only persons that knew the body was in the septic tank, i.e. two whole days before the 2nd accused decided to let the cat out of the bag by telling PW2 (the Caretaker) because, according to him, the deceased appeared to him in a dream and demanded to know why he left her body in the Septic tank. 1st accused (sic) said in his statement of 13/9/02, Exhibit E that he did not tell earlier because the 1st accused warned him that if he did she will say that he was responsible because the deceased died as a result of abortion.*

- *Both accused admitted that it was 1st accused that led 2nd accused to the Septic tank.*

- *When PW1 returned from the village and asked 1st accused where the deceased was, 1st accused gave him different accounts as to where the deceased told her she was going to.*

- *The autopsy report Exhibit C showed a gravid (pregnant) Womb that was empty with ragged perforations/lacerations at two points.*

- *PW4 stated the cause of death to be the combined effect of perforation/laceration of the womb with external protrusions of the internal organs and fracture of the spine of the neck.*

- *The accused persons lied and contradicted their statement.*

- *The conduct of the accused persons after the deceased was last seen with them, were more consistent with their guilt than their innocence.” See pages 104-105 of the record.*

The trial Judge in his findings went further to state as follows:

“Thus, absence of credible explanation from the accused persons in this case, who admitted they saw the deceased and were with her that morning prior to her death and before her body was found with extreme violence done to it, in their septic tank, as a result of which she died, leaves no other inference than that the accused persons killed the deceased. Moreso, as the 1st accused (sic) never said he was not responsible for the pregnancy. All he said in his defence was that he did not know she was pregnant. 1st accused who threatened 2nd accused that she will disclose that the deceased died of abortion cannot also pretend she did not know the cause of death or deny that she was equally responsible” See pages 106-107 of the

record.

Still on record and found by the trial court is as follows:

B *“1st accused was callous enough to go back to frying her Akara balls while the body of her friend and a girl entrusted to her care was rotting inside the septic tank. She equally got up the next morning and went about her normal business of frying Akara while the body of her late friend was still inside the septic tank and in the same pre-*
C *mises where she was frying her Akara. She was callous enough to send PW1 on a wild goose-chase, first to his son at Faulk’s road to look for her daughter, when she knew all the time that she was dead.”*

There is no doubt that the deceased did not die naturally but was killed. Through the evidence of PW4, a Pathologist who also specialized in forensic and hysto-pathology medicine, the cause of death was proved not to have been self-inflicted. PW4 performed D the postmortem examination on the deceased and tendered Exhibit C, as his report. It reads thus:

E *“I received the body of a young adult Negroid female. The external findings were that of generalised pallor which is a medical parlance for lack of blood. The neck was rotating which means that there was fracture of the neck bone. Internally there were lacerations and perforations in a womb that was pregnant. There was also protrusion of the internal organs from the vaginal opening. I therefore concluded that the cause of death in my opinion to be lacerations and perforations of the womb and protrusion of the internal organs*
F *from vagina. It is my opinion that the lacerations and protrusions in the womb were not self inflicted but by some other persons. The lacerations could have been caused by a sharp object application from a long or short sharp object. The rotating neck could have been*
G *caused by either someone forcefully breaking the neck or by fall.”*

In Ndiike Vs The State (1994) 9 SCNJ 46 at 54-56 which was followed by this court in its decision in Igabele vs The state (supra) the court had held as follows:

H *“....it is not a condition or legal imperative that there must be an eye witness before a murder charge could be proved beyond reasonable doubt. Proof of the commission of the offence may proceed on circumstantial evidence.”* See also; Ilori & Anor v. State (1980) 8-11 SC 81.

Also in Emeka Vs State (2001) 9 SCM 34, (2001) 14 NWLR

(Pt.734) 666 at 683, this court held as follows:

“where the accused person was the last person to be seen in the deceased’s company and circumstantial evidence is not only overwhelming, but leads to no other conclusion, it leaves no room for acquittal”

In the instant case as I stated earlier, the prosecution established that the deceased actually died as a result of an illegal abortion performed or assisted in performing on the deceased by the Appellant. It is a misconception and misleading, to say the least for the learned counsel to the appellant to come to the conclusion that the doctrine of “last seen” is rooted only in common sense but not law therefore urging this court to overrule itself on the previous decisions based on the doctrine. This doctrine is indeed of global application.

In some other jurisdictions, it is called *“the last seen theory”* In the Indian case of Rajashkhanna Vs. State of A.P (2006) 10 SCC 172, the Indian Supreme Court noted as follows:

“The last seen theory, comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.”

However, in S. K. Yusuf Vs. West Bengal (2011) the same Supreme Court after referring to its earlier stand above further held that where there is a long time - gap between *“last seen together”* and the crime, and there is possibility of other persons intervening, it is hazardous to rely on the theory of *“last seen together”*. Even if time gap is less and there is no possibility of others intervening, it is said to be safer to look for corroboration. In the instant case, it is very clear without an iota of doubt as found by the trial court and concurred by the Court below, that the circumstances from which the inference of guilt was drawn were fully established by impeachable evidence beyond a shadow of doubt. The circumstances are of a determinative tendency unerringly pointed towards the guilt of the appellant. From the circumstantial evidence adduced by the prosecution, I am convinced and I so hold that the court below was right in affirming the conviction and sentence of the appellant by the trial court based on the doctrine of *“last seen.”* The case was therefore proved before the

trial court beyond reasonable doubt. Accordingly, Issues 4 and 5 are hereby resolved against the appellant'

Now to the person and attitude of the Appellant. I must say that the appellant did not show that she is a mother herself who has children. Her behaviour as rightly found by the trial court, portrayed her as an embarrassingly callous woman who cannot be entrusted with anything, much more, a human being, she is simply a disgrace and disappointment to motherhood. Her cruelty is simply animalistic to say the least. She is not fit to live in the community of man. In my view she was rightly convicted and sentenced by the trial court and the decision was correctly affirmed by the court below.

In effect, I hold that this appeal deserves to fail for lacking in merit and should be dismissed for the following reasons:-

(a) The Prosecution established a clear case of murder against the appellant as all the ingredients of murder was proved; the cause of death had been established through circumstantial evidence. See *Uguru Vs The State (2002) 7 SCM 3.87*.

(b) On the doctrine of "*last seen*", the appellant was last seen alive with the deceased before being found dead in the septic tank at the back of Appellant's house.

(c) Concurrent findings of facts of the two courts below should be respected and not disturbed. Being a judgment supported by credible evidence and not being perverse, had not occasioned any miscarriage of justice, hence should be affirmed and upheld.

(d) As proof beyond reasonable doubt is not synonymous with proof beyond any shadow of doubt but ought to be proof beyond reasonable doubt, it is upheld in this case. The case was established beyond reasonable doubt.

In the final analysis, I dismiss this appeal and affirm the decisions of the two courts below on the conviction and sentence of the appellant to death for the murder of Nnenna Nwosu.

H **ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead judgment of my learned brother ARIWOOLA, J.S.C just delivered. I agree with his reasoning and conclusion that the appeal be dismissed for lack of merit. My learned brother has dealt exhaustively with the issues for

determination in the appeal leaving me with nothing useful to add without repeating the relevant facts and applicable principles of law thereto. I therefore dismiss the appeal accordingly

MUHAMMAD JSC

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I have had the advantage of reading in advance the judgment of my learned brother Ariwoola, JSC just delivered. I adopt his reasoning and conclusion that the appeal lacks merit. I accordingly dismiss the appeal. I affirm the concurrent decisions of the two lower courts.

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ADEKEYE JSC

This is an appeal against the judgment of the Court of Appeal, Port Harcourt Division delivered on the 30th of November 2006. The decision affirmed the conviction and sentence to death of the appellant, Sabina Chikaodi Madu for the murder of the deceased Nnenna Nwosu by the Abia State High Court, Osisioma Judicial Division. The background facts of this case before the trial court were properly reflected in the lead judgment.

E

The five issues raised for determination by the appellant in her brief are as follows -

1. Whether the lower court was right when it upheld the conviction and sentence of the appellant by the trial High Court when the arraignment of the appellant did not comply with the mandatory provisions of Section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria, 1999 and Section 215 of the Criminal Procedure Law of Eastern Nigeria, 1963 as applicable to Abia State.

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2. Whether the lower court was right when it relied on the evidence of the PW1, PW2, DW1 and the DW2 in affirming the judgment of the trial court convicting and sentencing the appellant to death for the alleged murder of the deceased.

3. Whether the appellant was given fair hearing.

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4. Whether the lower court was right when in affirming the conviction and sentence of the appellant to death by the trial court, it relied on the alleged piece of evidence that the appellant was the person with whom the deceased was last seen alive.

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 the murder of the deceased Nnenna Nwosu.

B The respondent settled four issues for determination in the respondent's brief as follows -

1 Whether the absence of evidence or note by the trial judge showing that the charge was read and explained to the appellant in a language she understands and that the proceedings were interpreted C rendered the trial of the appellant a nullity.

2. Whether the appellant was denied a fair hearing by the mere fact that the PW1, PW2, DW1 and DW2 testified in Igbo Language at the trial court.

3 Whether the circumstantial evidence relied upon by the D learned trial judge, in convicting the appellant which said conviction was affirmed by the court below was cogent, positive and compelling enough.

4 Whether the court below was not right in affirming the conviction and sentence of the appellant as the case was proved beyond E reasonable doubt.

My learned brother, Olu Ariwoola JSC did not leave any stone unturned in the consideration of all these issues in his lead judgment. I however wish to pass a few remarks by way of emphasis. I shall first F and foremost consider the issue of the arraignment of the appellant. It is the contention of the learned counsel for the appellant that the arraignment did not comply with the mandatory provisions of Section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria 1999 and Section 215 of the Criminal Procedure Law of the Eastern G Nigeria 1963 as applicable to Abia State. The respondent replied that the fact that the learned trial judge did not record verbatim that the charge was read out to the appellant and she perfectly understood same during her arraignment did not occasion any miscarriage of justice as none of her fundamental rights was infringed. There is evidence of interpretation on the date of arraignment and the accused H appellant did not complain to the trial court of the procedure taken by the court. There was no denial of the appellant's right to fair hearing as she spoke in Igbo language. The procedure is that there is a clerk of court who acts as an interpreter and who would interpret her

evidence from Igbo language to English language which is the language of the court. In the absence of any complaint from either herself or her counsel for want of interpretation, it is presumed that everything done in the matter was regularly done. The respondent referred to Section 150 of the Evidence Act.

Before delving into the legal question raised by this issue, I shall quote from the relevant laws referred to by the appellant. Section 36 (6) (a) and (e) of the Constitution of the Federal Republic of Nigeria 1999 provides that -

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

(a) Be informed promptly in the language that he understands and in detail of the Nature of the Offence.

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

Section 215 of the Criminal Procedure Law of Eastern Region 1963 applicable in Abia State provides that -

“The person to be trial upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order and the charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to want of such service and the court finds that he has been duly served therewith.”

It is apparent from the community reading of the foregoing laws that the requirements of a proper and valid arraignment are -

a. That the accused must be placed before the court unfettered unless the court sees cause to otherwise order.

b. The charge and information must be read over and explained to the accused in the language he understands to the satisfaction of the court by the registrar of the court.

c. The accused must be called upon to plead instantly thereto.

d. That the plea of the accused shall also be instantly recorded by the judge. These requirements must co-exist. Non-compliance with the requirements will warrant an order of retrial as the trial will be vitiated and rendered a nullity. *Lufadeju v. Johnson* (2007) 8 NWLR (pt.1037) pg.538, *Solola v. State* (2005) 11 NWLR (pt.937) pg.460,

Amala v. State (2004) 12 NWLR (pt.888) pg.520, Ezeze v. State (2004) 14 NWLR (pt.894) pg.491, Okeke v. State (2003) 15 NWLR (pt.842) pg.25, Dibia v. State (2007) 9 NWLR (pt.1038) pg.30, Idemudia v. State (1999) 7 NWLR (pt.610) pg.202, Kajubo v. State (1988) 1 NWLR (pt.73) pg.721, Okoro v. State (1998) 14 NWLR (pt.584) pg.181, Kalu v. State (1998) 13 NWLR (pt.583) pg.531. In effect, the requirements are mandatory and not directory.

The court proceedings in the trial court at page 40 of the Record on the 2nd of March 2004 reflected that the trial judge recorded that the information was read and explained to the accused persons who pleaded as follows -

Court 3 - 1st accused - Not guilty
 2nd accused - Not guilty

The connotation of this plea and what the court recorded is that the information was read and explained to both accused persons individually in English Language, translated and explained to them in Igbo language. After which the accused persons pleaded not guilty. It is apparent that they would have reacted if the court clerk had stopped at translating in English language which is the language of the court. The practice is that when an accused or witness fails to understand the language of court, the testimonies are translated by a court interpreter. The court record reveals that the appellant gave evidence in Igbo language at the trial before the high court.

I must draw attention to the practice that in the Southern States of Nigeria, there is no compulsion on trial judges to record the fact of interpretation of the language of the court in relevant cases; the only requirement in the Criminal Procedure Law is compliance with Section 36 (6) (a) and (e) of the Constitution. The foregoing is strengthened by decision of court in the case of the Queen v. Eguabor (1962) 1 All NLR pg.286 at pages 290-291 when the court held that -

"In the Northern Region, Section 241 of the CPC expressly requires that when any evidence is given in a language not understood by the accused and the accused is present in court, it shall be interpreted to him in a language understood by him, but the Criminal Procedure Act which is in force outside the Northern Region contains no particular direction on the point. The practice usually adopted in the High Courts and Magistrate Courts where a witness is giving evidence in a language not understood by the accused is made for

the benefit of the court, is for an interpreter to stand near the accused and tell him what the witness is saying. We consider that this should be the invariable practice where an accused person is not represented by counsel (as we believe it already is) and that it should be followed also where the accused personally expresses a wish to dispense with the translation and the presiding judge considers that the interests of justice with the translation will not be prejudiced by such course.” Edwin Ogba v. The State (1992) 8 LRCN pg.362 ^B

I believe the courts in the South acknowledge the routine use of an interpreter during court proceedings where witnesses do not understand the language of the court. They are already part of the court personnel in the form of a court registrar or court clerk. The law requires that there shall be adequate interpretation to an accused person of anything said in the course of trial or proceedings in a language which he does not understand. In the case of Idemudia v. State (1999) 7 NWLR (pt.160) pages 202 at 220, Karibi-Whyte JSC (as he then was) said that - ^C

“It is not disputed that it is perfectly useful and necessary for the court to record the fact of arraignment and that the charge was read to the accused in the language he understands; where this is different from the language of the court which is English language. Where the accused person understands the language with which the charge was read, it becomes unnecessary to record that fact specifically. It seems to me not possible for the court to know whether the accused understood the charge read and explained to him. Even though he may appear to do so. It is good practice to ask the accused whether he understood the charge read and explained to him and to record his answer. It does not seem to me that the omission to do, so by itself merely, could constitute a non-compliance with the constitutional and procedural requirement, unless it is the lack of understanding of the read charge that is apparent from the record of the trial. Finally, a satisfaction of the court or the compliance with the procedure or arraignment is not to me, a requirement which needs be express (sic) on the record. It is a requirement for the guidance of the trial court which should feel satisfied that the procedure has been complied.” ^F ^G ^H

The Supreme Court went further in the case of Okoro v. State (1998) 14 NWLR (pt.584) pg.181 to pronounce that -

“The provision of the law should not be stretched to a point of absurdity by reading into it that the judge must record that the charge was explained to the accused to his satisfaction before taking his plea. It will be impeaching the integrity of the judge to do that, as no judge will take the plea of an accused if he is not satisfied that the charge was read and explained to his satisfaction.”

The appellant was represented by counsel during the trial of the case and she did not complain of not understanding what transpired during her arraignment or any other irregularity. It is impossible from the evidence now on record to make an order which will have an effect of vitiating the proceedings that the arraignment did not comply with Section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria 1999 and Section 215 of the Criminal Procedure Law of Eastern Nigeria 1963 at an appellate level. It is also the submission of the appellant that the prosecution failed to prove the case against the appellant beyond reasonable doubt to warrant the lower courts upholding or sustaining the conviction and sentence of the appellant for the murder of the deceased Nnenna Nwosu.

In order to dislodge the presumption of innocence in favour of an accused person under Section 36 (4) of the 1999 Constitution of the Federal Republic of Nigeria, the prosecution has the burden to prove or establish the guilt of an accused beyond reasonable doubt, regardless of the plea of the accused or where he admitted the commission of the crime in his statement to the police or even if he does not utter a word in his defence. Where the prosecution failed to discharge this burden, leaving room for any slightest doubt, renders the benefit of doubt in favour of an accused person. The courts have repeatedly decided that proof beyond reasonable doubt does not mean proof beyond any shadow of doubt. *Aigbadon v. State* (2000) 4 SC (pt.1) pg.1, *Agbo v. State* (2006) 6 NWLR (pt.977) pg.545, *Igbele v. State* (2006) 6 NWLR (pt.975) pg.100, *Kim v. State* (1992) 4 NWLR (pt.233) pg.17, *Ubani v. State* (2003) 18 NWLR (pt.851) pg.22, *Ameh v. State* (1978) 6/7 SC Pg.27

In a murder charge, the prosecution is required to prove beyond reasonable doubt not only that the act of the accused could have caused the death of the deceased but that it actually did. If there is any possibility that the deceased died from other causes than the act of the accused, the prosecution has not established the case

against the accused person. Uguru v. State (2002) 9 NWLR (pt.771) pg.90, R. v. Nwokocha (1949) 12 WACA pg.453

In order to sustain a charge of murder the prosecution must prove beyond reasonable doubt the following -

- a. That the deceased had died.
- b. The cause of the death. B
- c. That the death resulted from the act of the accused.
- d. That the accused knew that his act would result in the death

of the deceased.

In homicide cases, prosecutor can discharge the onus of prove C
as to the cause of death by

- a. Direct evidence
- b. Circumstantial evidence that creates no room for doubt or speculation.

After the murder of the deceased, the appellant and the other D
accused now deceased concealed her body in a septic tank. The cause
of death of the deceased was determined through the report of a
medical practitioner who performed the post mortem examination
on her body and certified the cause of death to be *"the combined* E
effect of performance perforations/lacerations of the womb with ex-
ternal protrusion of internal organs and fracture of the spine of the
neck." There was ample circumstantial evidence to connect the ap-
pellant with the death of the deceased as they were last seen to-
gether. Hence the trial court relied on the doctrine of last seen. For F
circumstantial evidence to ground a conviction, it must lead to one
conclusion; namely the guilt of the accused person. Where therefore
there are other possibilities in the case than that it was the accused
person who committed the offence and that others other than the
accused had the opportunity of committing the offence with which G
he was charged, such an accused person cannot be convicted of
murder. Akinbisade v. State (2008) 14 NWLR (pt.1000) pg.717,
Adepetu v. State LRCN 4519 at pg. 4543, Ude-dibia & ors v. State
(1976) 1 SC pg.133. The circumstantial evidence against the ap-
pellant linking her with the death of the deceased was overwhelming. H
There was evidence of the appellant's close interaction with the de-
ceased. The appellant introduced the deceased to the 2nd accused.
The deceased was last seen alive with the appellant on 30/8/2002;
she was alleged to have followed her to the market. The appellant

and the deceased accused were seen going up and down at the back-yard of their premises. The body of the deceased was recovered from the septic tank following the information from the appellant and the deceased accused. The appellant gave conflicting account about the whereabouts of the deceased to her father. The appellant knew about the abortion committed for her. The appellant lied and contradicted her statements to the police. The doctrine of last seen means that the law presumes that the person last seen with the deceased bears full responsibility for his or her death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the accused person to give an explanation relating to how the deceased met his or her death. In the absence of an explanation, a trial court and even an appellate court will be justified in drawing the inference that the accused person killed the deceased. *Igabele v. State* (2006) 6 NWLR (pt.975) 100, *Obosi v. State* (1965) NMLR 140, *Nwaeze v. State* (1996) 2 SCNJ at pg. 61, *Gabriel v. State* (1989) 3 NWLR (pt.122) pg.457, *Adeniji v. State* (2001) 87 LRCN 1970.

The lower court was right to have affirmed the conviction and sentence of the appellant based on the avalanche of circumstantial evidence coupled with the doctrine of last seen rightly and properly invoked by the trial court. This court has no justifiable reason to upturn the concurrent findings of fact of both lower courts. With fuller reasons given by my learned brother Olu Ariwoola JSC, I agree that this appeal lacks merit. It is accordingly dismissed. The conviction and sentence of the appellant by the lower court is affirmed-

G

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, Olukayode Ariwoola JSC and the reasoning from which the decision was made.

H This is an appeal by the Appellant against the judgment of the Court of Appeal, Port Harcourt Division delivered on the 30th of November, 2006 affirming the conviction and sentence to death for the murder of the deceased Nnenna Nwosu by the Abia State High Court presided over by Uzokwe J.

FACTS:

The 1st Accused/Appellant herein was a senior friend of the deceased female, Nnenna Nwosu. The family of the deceased was friendly with the 1st Accused which friendship started when the family of the deceased moved into the premises at No. 16 Power Line Abayi Ariaria, Aba while the 1st and 2nd Accused persons were living at No. 17 1st Power Line, the scene of crime. In 1998 when the mother of the deceased was leaving for the village she entrusted the deceased to the care of the appellant and from then both became friends with deceased assisting appellant in frying Akara balls which was her vocation. The appellant was always put in the picture of the movement of the family of the deceased. On the 27/8/2002, the father of the deceased who testified as PW1 traveled to his village leaving the deceased behind and the appellant was aware of the trip. PW1 returned at about 8 pm on 30/08/2002, found the house locked and no one inside and went to the house of the appellant to collect the keys as they normally kept their keys with her. On PW1 asking for the whereabouts of the deceased the appellant said she was with her some moments earlier. On PW1 asking for his house keys, the appellant made a show of looking for it under the tray of akara balls and inside her room but did not bring the keys. PW1 then went to his house in the hope that the deceased had returned but she did not surface. He went back to appellant who told him she forgot deceased had told her she was going to visit her elder brother and PW1's older son at a housing estate at Faulk's Road. PW1 got there and was told by his son, he had not seen the deceased for one week. PW1 went back to his house at about 12 midnight and with the help of one of the neighbours forced open his door with an iron bar.

The following day, 31/8/2002 PW1 went back to appellant at 5 am to see appellant sweeping the frontage of her house where she usually fried akara balls. He demanded from the appellant if she still did not know the whereabouts of the deceased, at which she said PW1 should not be offended because she just remembered that Nnenna, the deceased had told her she will follow PW1 to the village to find out why he had not returned. PW1 then reminded appellant that she was present when he told the deceased the date of his return. He however went back to his village in Imo State and the deceased had not been there. And getting back the following morning,

he was told Nnenna's body was in a septic tank behind the house of the accused persons.

It was not disputed that the deceased Nnenna had a boy friend by name Chinenye Amuzie, the 2nd accused at the trial. That the said Chinenye was living in a room opposite that of the appellant and the appellant was aware of the intimate relationship between the deceased and Chinenye.

PW2 at the trial testified that on the 31/08/2002 he saw the appellant and 2nd accused pass by his window and at about 5 to 6 minutes later heard a knock on his door and he did not open as he thought the duo had been going to have sex and he did not want to be involved. He further stated that the following day being 1/9/2002, the same 2nd accused came back to his house and announced that "*he was dead*". He narrated his encounter with the appellant and how they discovered the body of Nnenna in the soak away pit and how appellant threatened the 2nd accused not to inform the caretaker or she would implicate him before the police on the basis that he impregnated the deceased and trying to abort the pregnancy the result was the death of Nnenna who he had to push into the pit (See page 45 of the Record). The 2nd accused stated at the trial that the deceased visited him on the day of her death and requested for money to do her hair and telling her he did not have money she left and went into appellant's room. The version of the appellant was that the deceased visited her and accompanied her to the market in the company of one woman, Mrs. Nnabuka also called Mama Uchenna. Asked by the trial Judge if she wished to call the said Mrs. Nnabuka in evidence she declined. The post mortem examination on the deceased was carried out by Dr. Nicholas Etebu specialist in forensic and histopathology from which he said she died from a combined effort of perforations/lacerations of the womb with external protrusion of internal organs and fracture of the spine of the neck. At the trial, PW1, PW2, Appellant who was 1st accused testified in Ibo language and it was not recorded that there was translation from Ibo to English and vice versa. However it was recorded earlier that the accused persons took their plea after the charge was read and explained to them. No where in the record was there an objection on any infraction in the interpretation even though the accused person was represented by counsel. At the end of the trial the learned trial judge found the ac-

cused persons guilty and sentenced them to death. Hence the appeal to the Court of Appeal which affirmed the earlier conviction and sentence, the verdict of the Court below producing this current appeal. On the 8th of March, 2012 date of hearing, learned counsel for the appellant adopted their brief of argument settled by Kemasuode Wodu Esq which was filed on 8/5/10 and deemed filed on 31/11/10. B In it were formulated five issues:-

1. Whether the Lower Court was right when it upheld the conviction and sentence of the Appellant by the trial High Court when the arraignment of the Appellant did not comply with the mandatory provisions of Section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria, 1999 and section 215 of the Criminal Procedure Law of Eastern Nigeria 1953 as applicable to Abia State? C

2. Whether the Lower Court was right when it relied on the evidence of the PW1, PW2, DW1 and DW2 in affirming the judgment of the trial Court convicting and sentencing the Appellant to death for the alleged murder of the deceased? D

3. Whether the Appellant was given fair hearing?

4. Whether the Lower Court was right when in affirming the conviction and sentence of the Appellant to death by the trial Court, it relied on the alleged piece of evidence that the Appellant was the last to see the deceased alive. E

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 the murder of the deceased Nnenna Nwosu. F

The Respondent's Brief was settled by Chief Umeh Kalu, Attorney General of Abia state and it was filed on 12/10/11. Learned counsel for the Respondent adopted the Brief in which were distilled G four issues for determination as follows:-

1. Whether the absence of evidence or note by the trial judge showing that the Charge was read and explained to appellant in a language she understands and that the proceedings were interpreted rendered the trial of appellant a nullity. H

2. Whether the appellant was denied a fair hearing by the mere fact that the PW1, PW2, DW1 and DW2 testified in Igbo language at the trial Court.

3. Whether the circumstantial evidence relied upon by the

learned trial judge in convicting the appellant (which said conviction was affirmed by the Court below) was cogent positive and compelling enough?

4. Whether the Court below was not right in affirming the conviction and sentence of the appellant as the case of the prosecution was proved beyond reasonable doubt.

The issues as couched by the Respondent seem better suited for the discourse herein and I shall utilize them albeit combining Issues 1 and 2 and then 3 and 4.

ISSUES 1 AND 2:

These two issues pertain to whether the absence or note by the trial judge showing the language in which the charge was read and explained to the accused persons vitiated the proceedings.

Also whether the fair hearing of the accused had been compromised when they and PW1 and PW2 testified in Igbo language.

Learned counsel for the Appellant contended that the arraignment of the appellant and her co-accused was flawed because it did not meet the relevant statutory provisions, viz Section 215 of the Criminal Procedure Laws of Eastern Nigeria 1963 applicable to Abia State and Section 36 {6} (a) of the 1999 Constitution of Nigeria. He cited *Ude v state* (1999) 7 NWLR {Pt. 609} 1 at 20 & 22; *Ogunye v state* (1999) 5 NWLR (Pt.504) 548 at 555; *Idemudia v State* (1999) 7 NWLR (Pt.610) 202; *Anyakora v Obiakor* (2005) 5 NWLR (Pt.919) 507 at 532 - 533; *Bamgboye v University of Ilorin* (1999) 10 NWLR (Pt.622) 270 at 333. Mr. Wodu of counsel for the Appellant said that since the appellant was not validly arraigned before the trial court and so the trial, conviction and sentence including the judgment were null and void and there was nothing for the Court below to affirm.

In response, learned counsel for the Respondent submitted that when the learned trial judge recorded that the information was read and explained to the accused persons it means that the said count on information was read in English language to Igbo language to the accused persons who testified in Igbo at the trial. That in the Southern States where Abia falls into, there is no compulsion on trial judges to record the fact of interpretation whereas in the North Section 241 of the Criminal Procedure Code had so provided. He cited *Edwin Ogba v The State* (1992) 1 LRCN 362 at 399; *Queen v Esuabor* (1962) 1 All NLR 286 at 290 - 291; *Godwin Anyanwu v The*

State (2002) 13 NWLR (Pt.703) 107; Nwachukwu v The State (2007) 17 NWLR (Pt. 1062) 31. Chief Kalu further contended that appellant and her co-accused each had a counsel representing them from beginning to the end and no objection raised by any of the counsel on any infraction based on a lack of interpretation. That it can be safely taken that there was regularity and no procedural breach. He referred to Mallam Madu v The State (1997) 1 NWLR (Pt. 482) 306 at 402; Edun & Ors v Inspector General of Police (1951) 1 All NLR 17. That there was no breach of fair hearing and the appellant had all the opportunity of knowing the case against her and her right of being heard guaranteed. He cited Oloruntoba-Oju & Ors v. Professor Shuaibu O. Abdurraheem (2009) 13 NWLR (Pt.1157) 83 at 142; Amamchukwu v FRN (2009) 8 NWLR (Pt.1144) 465 at 486 487; Attorney v. General of Kwara State v Abolaji (2009) 7 NWLR (Pt. 1139) 199; The State v Gwonto (1983) All NLR 109.

In summary the poser raised by the Appellant in these two issues are that the arraignment of the Appellant did not comply with the mandatory provisions of Section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria, 1999 and Section 215 of the Criminal Procedure Law of Eastern Nigeria 1963 as applicable to Abia State. Also that the trial Court ought not to have relied on the evidence of PW1, PW2, DW1 and DW2 in convicting and sentencing the Appellant to death for the murder of the deceased, and by the same token the Court of Appeal should not have affirmed those decisions. The Respondent disagreed with those views stating that the procedure at the Court of trial was in keeping with the Constitution and the law in that there was nothing shown that the non recording of the matter of interpretation from Ibo to English and vice versa occasioned a miscarriage of justice nor was the fundamental right to fair hearing infringed upon. Also that the fair hearing principle was complied with and the evidence proffered enough upon which the Court of trial and later the Court of Appeal could have inferred from the circumstances that the death of the deceased was from the act of the Appellant. From the record, the trial judge recorded that the information was read and explained to the accused person and the Appellant and the other accused pleaded not guilty. The Court recording that the Charge was read and explained to the accused leads to the presumption that it was explained to the accused in a language

of his or her understanding while the language of the court remained English. Therefore the interpretation can be taken to have been done. It is not necessary that the issue of interpretation from one language to English and the other way round once not so recorded would vitiate the charge and trial. I think not. Once the trial judge has conducted the proceedings substantially in keeping with the relevant Criminal Procedure Law as in this case, the Criminal Procedure Law of Eastern Nigeria Section 215 and Section 33 (6) of the Constitution impari materia with Section 36 (6) of the 1999 Constitution, then without any challenge to those records of the judge especially in this case where the two accused persons were each represented by counsel who went along with the proceedings from the very beginning to the end without the issue of interpretation or that the accused person was not following in what was going on, then the presumption of regularity would apply. I rely on *Okoro v State* (1998) 14 NWLR (Pt. 584) 181; *Paul Onyia v State* (2008) 18 NWLR (Pt. 1118) 142; *Francis Durwode v State* (2000) 82 LRCN 3038; *Madu v State* (1997) 1 NWLR (Pt. 482) 306 at 402.

From the record it can be seen that there was no denial of fair hearing merely because PW1, PW2, DW1 and DW2 testified in Ibo language and it was not stated on that interpretation took place and by whom. That is clearly a moot point since there was no issue raised through out, that the accused had been shut out of the proceedings or any part of it, particularly with the counsel on her behalf present at all times. As much as it cannot be contested, the desirability of having the recording of interpretation made, the absence of such in the light of there having been no objection that someone was not carried along in the course of the trial especially the main actor then the records are taken as regular and no denial of fair hearing nor can it be said there was a miscarriage of justice. The point being raised here and now is a luxurious posturing without substance and too late in the day. See *Oloruntoba-Oju v Professor Shuaibu O. Abdulraheem* (2009) 13 NWLR (pt.1157) 83 at 142; *Amamchukwu v FRN* (2009) 8 NWLR (Pt. 1144) 475 at 485 - 487; *A. G. of Kwara State v Abolaji* (2009) 7 NWLR (Pt.1139) 199; *State v Gwonto* (1983) All NLR 109. The conclusion therefore from the foregoing is that the two issues are resolved against the Appellant and that is that no infraction of her fundamental right took place and the Constitutional and Pro-

cedural Laws were complied with. The implication being that her right to fair hearing was protected and ensured.

ISSUES 3 AND 4:

On whether the circumstantial evidence relied upon by the trial judge in convicting the appellant was cogent, positive and compelling enough. Also whether the Court below was not right in affirming the conviction and sentence of the appellant as the case of the prosecution was proved beyond reasonable doubt. B

For the appellant was canvassed that in upholding the conviction and sentence of the Appellant by the Lower Court in apparent reliance on the said piece of evidence that the Appellant was the one in whose company the deceased was last seen alive and by application of the presumption that the Appellant was the one that killed the deceased because she was the one with whom the deceased was last seen alive, constitute a grave violation of the Appellant's fundamental human right to the presumption of innocence preserved in Section 36 (5) of the Constitution of the Federal Republic, 1999. He stated that a breach of that presumption as in the case in hand nullifies the proceedings in which the breach occurred. He cited *Ubanatu v Commissioner of police* (1999) 7 NWLR (Pt.611) 512 at 522; *Adeyemi v State* (1991) 5 NWLR (Pt. 195) 1 at 29. C
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Mr. Wodu of counsel further contended that if an accused person is deemed to be innocent until proven guilty, such an accused person cannot be made to prove his innocence by offering some explanations simply because the deceased was last seen alive in his company and where he fails to offer any acceptable explanation then he is presumed to be the killer of the deceased. He cited *Asake v Nigerian Army Council* (2007) 1 NWLR (Pt. 1015) 408 at 425. That the mere fact that an accused person lied is not sufficient proof of the guilt of the accused since the guilt has to be specifically proved beyond reasonable doubt. He referred to *Omosodo v State* (1981) NSCC Vol. 12 P 119 at 128; *Ahmed v. State* (1999) 7 NWLR (Pt.612) 641 at 669; Section 138 (1) & (2) of the Evidence Act; Section 286 of the Criminal Procedure Law of Eastern Nigeria applicable to Abia State: *Adeyemi v State* (1991) 6 NWLR (Pt. 195) 1 at 35. F
G
H

Mr. Wodu urged this Court to overrule its earlier decisions which applied the principle of last seen because the application of the principle negates the constitutional provision that an accused is deemed

innocent until proved guilty beyond reasonable doubt. That the proof beyond reasonable doubt is sacrosanct and where as in this case there exists a doubt the appellant/accused is entitled to a discharge and acquittal. He cited numerous authorities some of which are:- *Ajisopun v State* (1998) 13 NWLR (pt. 581) 236 at 259 -260; *Onyejiaka v State* (1997) 11 NWLR (pt. 530) 645 at 551. That for circumstantial evidence to be sufficient to ground the conviction of an accused person, it must exclude the possibility of any other person committing the offence in question, like this instance, a quack doctor. He cited *Anekwe v The State* (1976) NSCC Vol. 10 page 558 at 552; *State v Ogbubunjo* (2001) 2 NWLR (Pt. 598) 576 at 591 - 592; *Ukorah v The State* (1977) NSCC Vol. 11 P. 218 at 223; *Okafor v State* (1990) 1 NWLR (Pt. 128) 614 at 625.

In response, learned counsel for the Respondent contended that even though there is no direct evidence of someone who saw the appellant commit the offence of murder of the deceased, there are enough circumstances that warranted the trial Court to draw the inference. He cited *P. Ude-Dibia & Ors v. The State* (1976) 1SC 133.

The learned counsel for the Respondent said the guilt of an accused may be proved by anyone/or a combination of the following methods; namely

- (a) Confessional Statement or
- (b) Circumstantial evidence; or
- (c) Evidence of eye witnesses.

That one does not always need an eye witness account to convict an accused for murder if the charge can be proved another way as in this instance. He referred to *Emeka v The State* (2001) 14 NWLR (Pt. 34) 668 at 683; *Igabele v State* (2006) 6 NWLR (Pt. 975) 100. Chief Kalu of counsel stated for the Respondent that the Court of Appeal was right to have accepted the circumstantial evidence offered by the respondent at the trial court. He cited *R v Taylor & Ors* (1928) 21 CAR 20 at 21; *Adio v State* (1986) 2 NWLR (Pt. 24) 585 at 593. He said the doctrine of last seen applied since the appellant could not explain what happened to the deceased. He cited *Obasi v State* (1955) NMLR 140; *Adeniji v State* (2001) 87 LRCN 1970. That the act or omission of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence had been established by the prosecution beyond reasonable

doubt. He cited *Adekunle v State* (2006) 5 LRCN 1; *Alewo Abogede v State* (1995) 37 LRCN 674; *Osoba v State* (1992) 2 NWLR (Pt. 222) 104; *Grace Akinfe v State* (1988) 3 NWLR (Pt. 85) 729.

For the avoidance of doubt as to how she came to her conclusion, the learned trial judge had listed the points of the circumstantial evidence and these are as follows:-

“1. The 1st accused, now appellant though much older than the deceased, was a close friend of the deceased according to prosecution witnesses and the other accused person. The 1st accused admitted that the deceased used to take care of her baby, she was the only friend the deceased used to go to. The deceased kept her house keys with her. It was also the evidence of PW1 which I accept to be true that 1st accused and his wife were friends right from the time they moved into their present residence opposite accused person’s house. That before his wife left village in 1998 she asked first accused to be taking care of their 17 year old daughter in her absence.

2. The 2nd accused admitted that he was deceased’s boy friend and had sex regularly with her. That it was 1st accused who earlier told him that the deceased was his sister that introduced deceased to him.

3. That deceased was last seen on 30/8/2002 with the accused persons. 1st accused said deceased followed her half way to the market while the 2nd accused said she came to him to ask for money.

4. PW2 saw the accused persons patrolling the backyard of the premises, but ignored them because he thought they were going to have sex.

5. The body of the deceased, according to the admission of the accused persons, was later seen in the septic tank in their backyard and not that of the deceased.

6. The two accused persons up till 1/9/2002 were the only persons that knew the body was in the septic tank i.e. two whole days before the 2nd accused decided to let the cat out of the bag by telling PW2 (the caretaker) because according to him the deceased appeared to him in a dream and demanded to know why he left her body in the septic tank. 2nd accused said in his statement of 13/9/2002, Exhibit “E” that he didn’t tell caretaker because the 1st accused warned him that if he did so she will say that he was responsible because the deceased died as a result of abortion.

7. *Both accused admitted that it was 1st accused that led 2nd accused to the septic tank.*

8. *When PW1 returned from the village, and asked 1st accused where the deceased was, 1st accused gave him different accounts as to where the deceased told her she was going to.*

B 9. *The autopsy report Exhibit "C" showed a gravid (pregnant) womb that was empty with perforations/lacerations at two points.*

10. *PW4 stated the cause of death to be the combined effort of perforation/lacerations of the womb with external protrusions of the internal organs and fracture of the spine of the neck.*

C 11. *The accused persons lied and contradicted their statements*

12. *The conduct of the accused persons after the deceased was last seen with them was more consistent with their guilt than their innocence."*

D From those power points in presenting the findings of fact by the trial court, it can be stated firstly that the lies of the Appellant to the father of the deceased, PW1 were certainly not such as could be taken as stated in fear, rather, the lies showed a deliberate attempt to continue to cover the crime that had taken place and the body of the deceased. Again from those findings of fact above quoted which the Court of Appeal adopted the trial court would infer the guilt of the accused persons. This is in keeping with the law as even though an eye witness account is invariably the best evidence, the court can also infer from the facts proved, the existence of other facts that show up the guilt of an accused persons. Indeed, the 12 point findings though circumstantial, are cogent, compelling and point irresistibly to the guilt of the accused/appellant. The situation is such that there are no other co-existing circumstances that could weaken that inference of guilt or show what else could have happened and other possible actors in the dastardly act. See *Olusola Adepetu v State* (1995) 51 LRCN 4519 at 4543; *Chima Ejiofor v State* (2001) 86 LRCN 1318 at 1344; *Idowu v State* (1998) 1 NWLR 354; *Fatoyinbo v A. G. Western Nigeria* (1966) WNLR 4; *Lori v State* (1980) 8/11 SC 81.

On the doctrine of last seen which is a principle of law applicable globally whereby the law presumes that the person last seen with the deceased bears full responsibility for the death if it turns out that the person last seen with him is dead. That doctrine therefore

lays a burden on the accused to give an explanation on how the deceased met her death. This is an exception to the watertight provision in our Constitution that a person is presumed innocent until proved guilty. See *Peter Igho v State* (1978) 35 SC 51 at 62 - 63; *Igabelle v State* (2005) 5 NWLR (Pt. 975) 100; *Nwaeze v State* (1996) 2 SCNJ 417; *Obosi v State* (1955) NMLR 140; *Uguru v State* (2002) 97 LRCN 885. Indeed, the appellant's counsel urging this court to depart from its earlier decisions on this doctrine of last seen is clearly misconceived and cannot be justified. It is all the more incongruous a suggestion in this case at hand where the Appellant did nothing to rebut the presumption rock solid against her, as a person who saw the deceased last and did not proffer any explanation whatsoever that would exonerate her from the blame over the death of the deceased Nnenna. This lack of rebuttal by explanation coming on the heels of misinformation, misdirection and sending on worthless journeys of PW1, the father of the deceased all flow with the damning consequences and the necessity to apply the last seen doctrine without fail. I place reliance on *Abu v Oduebo & Ors* (2001) 89 LRCN 2632; *Pius Nweke v State* (2001) 84 LRCN.

The essential ingredients of the charge of murder are as follows:-

- (a) That the deceased died;
- (b) That the act or omission of the accused which caused the death of the deceased was unlawful and;
- (c) That the act or omission of the accused must have been intentional with knowledge that death or grievous bodily harm was its probable consequence.

The question that would follow naturally after those ingredients is whether or not the prosecution had established them and my answer without hesitation is positive. See *Abogede v State* (1995) 37 LRCN 574; *Ogba v State* (1992) 2 NWLR (Pt.222) 104; *Akinfe v state* (1988) 3 NWLR (Pt. 85) 729.

From the above and the fuller reasons in the leading judgment of my learned brother, Olukayode Ariwoola JSC. I see no reason to upset the concurrent findings of the two Courts below. I dismiss the appeal and affirm the judgment of the Court of Appeal which upheld the conviction and sentence by the trial High Court.