

SUPREME COURT OF NIGERIA
6TH JULY, 2012. SC. 36/2010
CORAM:- A. M. MUKHTAR, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, M. U. PETER-ODILI,
O. ARIWOOLA, JJSC

OGUEJIOFOR ILODIGIWE APPELLANT
V.
THE STATE RESPONDENT

MURDER - Ingredients - Proof - Prosecution must prove that deceased died - As a result of act or omission of accused - Which was intentional (H1)

CRIMINAL PROCEDURE - Crime - Proof - Means of - Prosecution proves its case by eye witness - Voluntary confession - And by positive circumstantial evidence (H2)

EVIDENCE - Crime - Testimony of lone witness - Admissibility - Where court finds such evidence to be true - It is bound to accept and act on same (H3)

COURTS - Findings - Discharge & acquittal of co-accused - Effect - Acquittal of 7th accused is not fatal to the findings - Since identification was spontaneous and natural (H4)

CRIMINAL PROCEDURE - Crime - Proof - Evidence against each accused - Must be specifically considered against their respective defence (H5)

ALIBI - Plea of - Sustainability - For the plea to be successful - Defence must show inter alia - That accused is separated by distance or ill health - From the crime scene (H6)

CRIMINAL PROCEDURE - Crime - Proof - Number of witness - Prosecution has discretion to call only material witness - In proof of its case (H7)

EVIDENCE - Contradictions - Previous statement - To contradict witness on matters of such statement - His attention must be drawn to them - Otherwise answers so elicited - Are inadmissible (H8)

FACTS

PW2 employed accused/appellant to fish for him in a fish pond. Thereafter, PW2 replaced appellant with deceased. Appellant was dissatisfied with the replacement. He therefore threatened to kill deceased if he did not resign from the fish pond work. Appellant vehemently refused several peace overtures extended to pacify him. Deceased was later declared missing. PW5 thereafter gave details of the killing and dumping of the deceased's body in Anambra River.

Following the account given by PW5, appellant and six others were arrested and arraigned before the High Court of Anambra State, Otuocha, for murder of deceased. At the end of trial, the court accepted the testimony of PW5, convicted and sentenced appellant and five others to death by hanging. Seventh accused was discharged and acquitted upon his successful plea of alibi. Being dissatisfied, appellant filed appeal at the Court of Appeal, Enugu contending that he is entitled to a discharge and acquittal given to seventh accused. The court dismissed the appeal and affirmed the conviction and sentence passed by trial court. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

"Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant for murder on the basis of the evidence of PW5 only in the circumstances of the case."

HELD (Unanimously dismissing the appeal per

CHUKWUMA-ENEH JSC)

MURDER - Ingredients - Proof

1. In other words as in *Nweze v. The State (supra)* by establishing on the peculiar facts of this case the following ingredients of the crime of murder as follows:

"(1) That the deceased is dead.

(2) That the death of the deceased is the result of the

act or omission of the accused (in this case of the appellant and his co-accused persons).

(3) That the acts or omission of the accused (i.e. the appellant and the co-accused persons here) which have caused the death of the deceased is intentional with full knowledge that death or grievous bodily harm as the probable consequence.”

These ingredients of the offence of murder which must co-exist have to be established as such beyond reasonable doubt for the prosecution to succeed

The burden never shifts excepting in a few cases where the law has placed that onus on the accused. Thus no onus is on the accused as the appellant here excepting on issues peculiarly within his personal knowledge and it is discharged on the balance of probability. (p. 2805 E)

CRIMINAL PROCEDURE - Crime - Proof - Means of

2. A prosecutor has to prove its case to wit:

(1) by an eye-witness of the crime.

(2) by confession or admission voluntarily made.

(3) by circumstantial evidence positive and compelling and pointing to one conclusion only that the accused committed the offence. (p. 2806 B)

EVIDENCE - Crime - Testimony of lone witness - Admissibility

3. Where a trial court has found the evidence of an eye witness unequivocal and true it is bound to accept and act on it irrespective that it is evidence of a lone eye witness of the crime. And so the appellant's challenge in this regard that both lower courts wrongly have accepted and acted on the sole evidence of PW5 in convicting the appellant is flawed as having no bases. (p. 2812 D)

COURTS - Findings - Discharge & acquittal of co-accused

4. Before concluding this question I now consider whether the discharge and acquittal of the 7th accused has fatally dented the findings of both lower courts of fixing the appellant (excluding the 7th accused) as well as the other six accused per-

sons at the scene of crime. My first reaction is definitely in the negative as it is trite law that where the identification is spontaneous and natural as here, the court would not be wrong to act it. (p. 2814 G)

B CRIMINAL PROCEDURE - Crime - Proof

5. I think on the backdrop of the foregoing abstract that the appellant has completely lost sight of and indeed has misconstrued the settled principle in such decisions as in R. v. Ukata (1958) FSC. 27 to the effect that the evidence against each of the accused persons as here must be specifically considered against each of them that is to say against their respective defenses and that an accused person cannot be connected with an offence unless and until the evidence available against him so clearly establishes beyond reasonable doubt that the act must have been done either by him or with someone he is criminally responsible. The implication arising from the foregoing context is that the benefit of doubt given to the 7th accused cannot without more be extended to the rest of the appellant and his co-accused persons. Even although they are charged together under a common purpose principle the defense of the appellant and the 7th accused has no common base. The defence of the 7th accused is premised on a successful plea of alibi which is not the basis of the defense of the appellant and the other accused persons. Their respective defences have been considered separately and severally on the backdrop of the respondent's case by the trial court as affirmed by the lower court to arrive at the conviction of each of them. (p. 2815 B)

ALIBI - Plea of - Sustainability

6. However for a plea of alibi to be successful the defence must show inter alia that the accused is so separated by distance that ordinarily he cannot have traveled from that place where it is alleged he was to the scene of the crime or that even if he has been staying within a short distance he has been seen by people there at the time the alleged crime is said to have been committed or that he has been physically prevented

from approaching the scene of crime by an external force or may be by ill-health and so certified by a medical doctor.
(p. 2815 H)

CRIMINAL PROCEDURE - Crime - Proof - Number of witness

7. He has clearly misconstrued the principle involved in the above cited cases on the absence of the common base of their defence in this case. The lower courts rightly rejected the appellant's submissions in that regard and I uphold the same. The other critical attack on the judgment of the lower courts is on the Oath taking as per Iyi Ani juju vis-a-vis the onus on the respondent to call the native doctor to testify as to the nature of PW5's illness, the cure and the divining effect on PW5's illness i.e. as to what transpired between PW5 and the native doctor. It is trite law that the onus is on the respondent to prove its case beyond reasonable doubt by calling necessary evidence to that effect and not a host of witnesses. In this regard it has the discretion how it goes about it i.e. by calling material evidence not a host of witnesses. I agree with the respondent that having established its case in the way it has seen fit it is not obliged to call a host of witnesses and in any case to call the native doctor to beef up its case. (p. 2816 E)

EVIDENCE - Contradictions - Previous statement

8. It is important the trial court has adverted its mind to these questions and so has them in mind when considering this case. I agree with the trial court's findings that in an attempt to make a mountain out of a mole hill of this question the appellant has ignored the rule that to contradict a witness on matters as per his previous Statement his attention must be drawn to them otherwise the answers so elicited are inadmissible against the witness. And indeed what the appellant has labeled contradictions here are minor discrepancies which have not affected the material aspects of the testimonies of these witnesses showing that the offence is committed and implicating the appellant and his co-accused. They are not opposite of what are contained in their respective previous Statements. In this respect I uphold the trial court's finding on this ques-

tion is sustainable. (p. 2818 E)

NOTABLE POINT OF INTEREST

CHUKWUMA-ENEH JSC

1. Supreme Court jurisdiction should be confined to matters of general policy

I do not think that this case clearly in spite of all its bizarre features has fallen into any of the above categories vis-a-vis the question of concurrent findings talkless of the appeal dealing with a recondite area of the law. I think I should further make that point early enough in this judgment. And so the sooner the constitution now undergoing the process of amendment is so amended to recognize and entrench the unique position of this court as the apex court in this country and so confine the court's jurisdiction as in other common law jurisdictions to matters of pronouncing on general policy in cases in regard to recondite areas of the law so long shall this court be unduly inundated with matters as the instant one based on matters of facts alone. Our jurisprudence has come a long way in this context that the points I have made here have become self-evident. This is another case that is based entirely on evaluation or revaluation of issues of facts and should not be allowed to get this far. Appeals on questions of fact alone (and even of mixed law and facts) should terminate at the lower court. (p. 2805 A)

REPRESENTATION

Olayode Delano, with Kemi Alakim (Mrs.), for the Appellant
A. O. Okeke Esq. D.P.A. Anambra State Ministry of Justice, for the Respondent

CASES REFERRED TO

Egbunike v. A.C.B Ltd. (1995) 2 NWLR (pt. 375) 34
Ndidi v. The State (2007) 13 NWLR (pt. 1052) 633
Ikemson v. The State (1989) 5 NWLR (pt. 110) 455
Umani v. The State (1988) 2 SC (pt. 41) 88
Onafowokan v. The State (1987) 7 SCNJ 252
Susanya v. Onadeko (2005) 8 NWLR (pt. 926) 185
Dogo v. The State (2001) 3 NWLR (pt. 699) 192

Ubani v. The State (2003) 18 NWLR (pt. 851) 244

Effiong v. The State (1998) 1 NWLR (pt. 512) 362

Onafowokan v. The State (1987) 3 NWLR (Pt. 61) 538

Ejeka v. The State (2003) 23 WRN 64

Kwaghashoir v. The State (1995) 3 NWLR (Pt. 386) 651

Garko v. The State (2006) 6 NWLR (Pt. 977) 524

Igubele v. The State (2006) 28 WRN (2006) 6 NWLR (pt. 975) 100

Onyikoro v. R. (1959) SCNLR 659

STATUTE REFERRED TO

Evidence Act 2004, ss. 149(d), 199 and 209

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

This appeal filed by one Oguejiofor Ilodigiwe (appellant) is against the judgment of the Court of Appeal Enugu Division (lower court) that has affirmed the judgment of the High court of the Anambra Judicial Division holden at Otuocha, (trial court presided over by Ezeani J.) which has convicted and sentenced the appellant and 5 (five) other co-accused persons to death by hanging for the murder of one Maduneke Enweonye missing since 8/6/1994 and whose dead body has not been recovered to this day.

Aggrieved by the decision the appellant has by an undated Notice of Appeal appealed the decision to this court raising five grounds of appeal therein. As required by the Rules of this court all parties to this appeal have filed and exchange their respective briefs of argument. The appellant in his brief of argument filed in this matter on 28/9/2010 has formulated a sole issue for determination as follows:

“Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant for murder on the basis of the evidence of PW5 only in the circumstances of the case.”

The respondent in its brief of argument filed on 18/10/2010 on its part has adopted the lone issue raised by the appellant as its own issue for determination.

To fully understand this case I set out the salient facts as found by the trial court and also as culled from the records of the lower court’s judgment; they are as follows: The dispute in this matter among members of Isiokwe Anaku Community to which the families of the appellant and Maduneke Enweonye (deceased) belong is over a fish-

ing pond called “Ikpi Fishing Pond” situate at Isiokwe Anaku. The appellant’s people claimed that the pond belongs exclusively to his family while the family of the deceased has maintained that the pond belongs to the entire Isiokwe Anaku community. Eventually the community has resolved that “Ikpi Fishing pond” is the common property of all Isiokwe Anaku Community and thereafter they let out “Ikpi Fishing pond” for a fee to one Chief Philip Ezeoba for 5 years. He appointed PW2 as the manager to manage the Fishing pond and he in turn employed the appellant to fish in the pond for him. The manager later replaced the appellant by appointing the deceased in his stead. This change over did not go down well with the appellant. It so displeased the appellant that he made no secret of his displeasure and this broke out in the open on 21/5/94 at the Community Town Hall during the native festival of “Uta Amanwulu” at which place the appellant had issued a threat to kill the deceased and dispose of his body if he did not withdraw his employment from “Ikpi Fishing Pond”. Not even the protestations from his kinsmen against the threat could make the appellant to withdraw his threat as he along with some of his immediate kinsmen stormed out of the Community Town Hall that day (21/5/94) to his house nearby where they continued their separate meeting- He also expressed his resentment by protesting to the manager of the fishing pond. This orgy of resentments has culminated in the event of 8/6/1994 when the deceased disappeared vis-a-vis the PW5’s story of the incidents of that fateful night (8/6/94) of the killing of the deceased and the decision to dump his remains in Anambra River. The deceased had not been seen again ever since by anybody who knew him including his relatives. The appellant and six others were arrested and charged with the offence of murder. More facts are as Stated in the body of this judgment.

It will be seen that the appellant’s case here as well as the sole issue raised for determination has been premised on attacking the credibility of PW5 as an eye-witness. I have decided therefore to set out in the body of this judgment the material parts of his testimony in relation to the detailed account of what transpired between PW5 and the appellant and his co-accused persons at the locus criminis as given before the trial court. It is on the background of the above facts so far that I now go on to examine the cases of both parties in this appeal. The appellant as per his brief has adverted to the cases of Sowemimo

v. The State (2004) 11 NWLR (pt.885) 55 and Adekunle v. The State (2006) NWLR (pt.1000) 717 and thereupon has re-echoed the onus on the prosecution to prove the death of Maduneke Enweonye (deceased) and that the acts of the appellant and his co-accused persons have caused the death of the deceased beyond reasonable doubt. He has opined that where the prosecution is relying also on circumstantial evidence as here to prove its case the evidence must be cogent, unequivocal and compelling pointing only to the accused persons' guilt, thus ruling out the possibility of any fabrication concoction and the like. See also *Lori v. The State* (1980) 8-11 SC 81 at 86-87, *Tepez v. The Queen* (1952) AC 490 at 489, *Popoola v. C.O.P.* (1964) NMLR.1 and *Igabele v. The State* (2006) NSCQR 321. The point is taken that the only an eye-witness account of the incident is as has been given by PW5 while the other witnesses' evidence are purely circumstantial. The appellant has pointed out the critical weaknesses of the circumstantial evidence in the prosecution's case in this matter as it has failed in proving conclusively the essential ingredients of the crime in connection with the accused persons on the issues as to the death of the deceased and that the appellants' acts caused his death particularly so as the body of the deceased has not been discovered. The appellant has referred to the controversy amounting to severe contradictions, inconsistencies surrounding the evidence of the respondent's witnesses vis-a-vis the findings as to the traces of blood of the deceased at the scene of crime and the footprints of the appellant incriminating him and other co-accused persons as having been fixed at the locus criminis that night and as establishing the case against the appellant. It is pointed out that this story has been wrongly accepted by the trial court and as pinning the appellant at the locus criminis in view of the prevarications in the evidence of the prosecution witnesses. The appellant has also made strongly, the point that these pieces of evidence have been rightly rejected by the lower court on appeal to it even though wrongly accepted and acted upon by the trial court as not being well founded in pinning the appellant and the others at the locus criminis and thus casting serious doubts on the respondent's entire case as to proving the death of Maduneke Enweonye and its causal connection with appellant's acts. Standing on this submission it has been submitted, even then, that the lower court on having rejected the said pieces of evidence ought not to

have turned-round later on in its judgment to rely on the same weakened evidence of PW5 so showed to be unreliable and rickety to convict the appellant and his co-accused persons. In this regard he has opined that the lower courts have by acting on PW5's evidence alone thrown the necessary caution as to acting on the evidence of a
B sole witness in cases as this one to the winds thus rendering their respective decisions erroneous in law.

The appellant in an attempt to destroy PW5's credibility has decried accepting the evidence of PW5 without caution even as PW5
C is also a relative of the deceased, and as can be gathered as having other ulterior purpose to serve against the background of the surrounding circumstances of this matter, which has made it all the more evident even moreso by his failing to report the incident at once on 8/6/94 to the police and the recording of his Statement to that effect
D to the Police only as on 30/9/1994 - a period of 3 months late thus raising serious suspicions against it as an afterthought. As regards the swearing of Iyi Ani juju by PW5 on the night of 8/6/94 at the locus criminis and the injunction of secrecy on the pain of death not to reveal how the deceased had been killed, the appellant has described
E this story among others - as incredible, concocted and fabricated. So also the story that PW5 on having fallen sick immediately after the incident of 8/6/1994 for which he received treatment from a native doctor i.e. one Okoko Ujaonwu who cured him not only of his immediate sickness but also of the spell cast on him by the said oath.
F And how the native doctor enjoined him (PW5) to reveal those who killed the deceased on his having been freed from the baneful effects of the oath of Iyi Ani. The appellant has also decried these facts as not having been investigated by the police at all as PW5 has made his
G Statement too late to enable the Police to investigate the facts therein. Nonetheless, that as per these pieces of evidence the lower courts have accepted and acted in error on PW5's testimony without due caution. He makes the point that for these pieces of evidence about PW5 and his native doctor to merit acceptance by the court they
H must in all circumstances even as the native doctor has not testified here be credible; the appellant in this regard has referred to *Egbunike v. A.C.B Ltd.* (1995) 2 NWLR (pt.375) 34 to support the contention.

In contending that PW5's evidence is not credible generally even in the absence of any serious cross-examination on those ques-

tions as alleged by the respondent, the appellant in this regard has strongly contested the premise of the specific finding by the trial court that “the eye witness account given by the PW5 was not shaken by cross-examination” and as also has been affirmed by the lower court, as unfounded. Even then he has relied on *Fasugba v. I.G.P. (1964) 2 ANLR 15* to upstage the findings surrounding the intervention of the native doctor in treating PW5 and on the prosecutions failing to call the native doctor to testify being an important witness in this matter and thus it has given a lie to the credibility of PW5’s stories of having been cured by him of his illness and whatever manner of relationship between them, which stories even then are totally inadmissible evidence being hearsay evidence. The appellant has also debunked whatever as alleged happened at the locus criminis describing them as part of an incredible story concocted against the fact that the incident as alleged happened on a very dark night after a heavy down pour of rains and they the accused persons could not have been identified at the locus criminis by PW5’s in such circumstances particularly so at the flash of PW5’s torchlight. In this regard he has referred to the compounding circumstances of the credibility problem arising from the discharge of the 7th co-accused whom PW5 also identified as having been at the locus criminis but all the same has been discharged on a successful plea of alibi. He has therefore opined overall that it is unsafe in the premises to rely on PW5’s rickety evidence to convict as here where the prosecution’s case of pinning all the accused persons at locus criminis armed with the named dangerous weapons in their respective possession has been severely flawed and dented even moreso as one of them (i.e. 7th accused) has been proved by his successful plea of alibi to be somewhere i.e. elsewhere at the time of the offence. On the evidence of identification of the appellant proper and his co-accused persons at the locus criminis the appellant challenged the totality of PW5’s evidence as not having met the conditons laid down by the law for accepting such evidence to warrant putting any credence upon it. And in short that the critical evidence of their identification is not credible in the circumstances and should be rejected and has referred to and relied on *Ndidi v. The State (2007) 13 NWLR (pt.1052) 633*, *R. v. Turnbull & Ors. (1976) 3 AER 549* cited with approval in *Ikemson v. The State (1989) 5 NWLR (pt. 110) 455 at 472* to support the contention.

The appellant has therefore challenged his conviction and that of his co-accused persons on the fact of the trial court having discharged the 7th co-accused on the same evidence of PW5 upon which they have been convicted and that every one of them is entitled to a benefit of doubt as the 7th accused and relies on *Wosari Umani v. The State* (1988) 2 SC (pt.41) 88 at 100-101 per Nnamani (of blessed memory) on what alibi connotes and also *Adedeji v. The State* (1971) 1 ANLR 75, *Abele Onafowokan v. The State* (1987) 7 SCNJ 252 per Oputa JSC. In sum the appellant has made mountain out of above scenarios, consequently he has submitted that the two lower courts have not evaluated or properly evaluated PW5's evidence of identification of the appellant at the locus criminis as against the enormous damaging background of the acquittal of the 7th accused also based on the same evidence. Moreso, he has submitted that based on what is required in law as espoused in the case *Ndidi v. The State* (supra) that the lower courts have not respectively warned themselves of the dangers of acting on the discredited identification of the appellant by PW5 against the peculiar surroundings of the alleged incidents of that night. The appellants has also recalled the saga of events surrounding the swearing of "Iyi Ani juju" at the scene of crime and has further submitted that the inconsistencies in PW5's evidence vis-a-vis the other 9 witnesses' stories in these respects have made PW5's evidence most unreliable and self-contradictory and otherwise fabricated and particularly as the spot where the Oath of "Iyi Ani juju" took place as alleged so far has remained at large as no police witness has testified to its reality. See *Agba v. The State* (2006) NSCQR p.137 at 162 and *Abele Onafowokan v. The State* (supra).

The appellant has described PW5 as a tainted witness who has some other purpose of his own to serve as buttressed by PW5's delay in reporting of the incident to the police for a thorough investigation of the incident by the police and the appellant has also relied on *R. v. Kofi Martin* (1936) 5 WACA 77 to castigate PW5 as thus rendering his entire evidence suspect. For all these reasons he has submitted that his conviction rests on a fragile and weak basis and not proved beyond reasonable doubt and therefore has urged that the sole issue be resolved in his favour.

On concurrent findings of the two lower courts as per *Ibodo v. Enarofia* (1980) 5/7 SC 42, *Enang v. Adu* (1981) 11/12 SC 25,

Susanya v. Onadeko (2005) 8 NWLR (pt.926) 185, Dogo v. The State (2001) 3 NWLR (pt.699) 192 and Ubani v. The State (2003) 18 NWLR (pt.851) 244, the appellant has submitted that in line with his submissions at there is no credible and reliable evidence to support the findings and so they are perverse leading to a miscarriage of justice in convicting him of the crime. The court is urged to set aside the conviction and sentence of the appellant and discharge and acquit him. The respondent on an overview of its case here has referred and relied on the decided cases of similar facts to contend that he has satisfied the requirements of the law by proving the death of the deceased and the causal connection with his death to the acts of the appellant and the co-accused persons and has urge this court to affirm the conviction of the appellant for the murder of Maduneke Enweonye. Again, it relies on the settled principles that evidence of a single witness if believed by the court can establish conclusively a criminal case irrespective of whether or not it is a murder charge. The respondent has all the more urged that based on PW5's evidence which is unequivocally true and having been believed by the courts it has proved its case beyond reasonable doubt and that the lower courts rightly have acted on the evidence of PW5 plus the circumstantial evidence of the case in convicting the appellant and his co-accused persons of the crime. And in this regard in affirming the conviction of the appellant as it has been proved beyond reasonable doubt not only that deceased is dead but also that the acts of the appellant and his co-accused persons have caused his death. See Sunday Effiong v. The State (1998) 1 NWLR (pt.512) 362, Alonge v. I.G.P. (1959) SCNLR 516, Onafowokan v. The State (1987) 3 NWLR (Pt.61) 538 at 552. As regards the issue of contradictions it is submitted that they are mere discrepancies arising from the additions to the extra judicial Statements made by the witnesses and not being opposite to their earlier Statements are not contradictions as such in real terms of word to the case of the prosecution as to vitiate its case; even then that to have that effect on its case the contradictions must be material. See Ejeka v. The State (2003) 23 WRN 64; (2003) 4 SCNJ. 161 at 158 and on the distinction between contradictions, inconsistencies and discrepancies the court is referred to Agbo v. The State (supra). And more importantly that a witness must be challenged on the earlier Statement made previously by the witness vis-a-vis the

new Statement in accordance with the law to properly ground the contradictions or inconsistencies with his present Statement. See *Kwaghashoir v. The State* (1995) 3 NWLR (Pt.386) 651 at 661 E - F. It is submitted that the contradictions and inconsistencies are mere discrepancies as they have not related to the material ingredients of the crime of murder as charged here. And so that the lower court wrongly interfered in its summing up with the evidence and findings by the trial court in respect to the traces of blood found at the locus-criminis and also the footprints of the appellant as found and accepted by the trial court as at P.296 to 292 of the record as they are no contradictions as to affect the summing-up but mere discrepancies. see *Garko v. The State* (2006) 6 NWLR (Pt.977) 524, *Igubele v. The State* (2006) 28 WRN 1; (2006) 6 NWLR (pt.975) 100 at 130, 195 186; and *Dagaya v. The State* (2006) 1 SCNJ 251. And besides that the appellant in a criminal trial must challenge all evidence he is disputing by cross-examination as it is the only way of attacking lawfully admitted evidence at trials, and that the appellant has failed to do so in this regard and so cannot be heard to complain here. It relies on *Okosi v. The State* (1989) 1 CLRN. 29 at 33 Ratio 6 to make the point.

It is also submitted in the circumstances of this case that once the evidence of PW5 has been carefully considered and is found to be direct, unassailable and true, the fact that the witness is the mortal enemy or even then a relative of the deceased will not render the evidence unreliable or suspect without more. See *Omotola v. The State* 37 NSCQR (pt. 11) 963 at 972 Ratio 15. On the appellant's challenge of the witness' failure to report the matter to the police early enough it is submitted that it cannot ipso facto make in this case, PW5's evidence unworthily of credit. See *Ogulana v. The State* (supra) *Onyikoro v. R.* (1959) SCNLR 659 and *Ishola v. The State* (1979) 9/10 SC 81. The respondent on not having called the native doctor to clarify the Oath of *Iyi Ani juju* has alluded to the fact that there is no law against the prosecution acting on its discretion as to the nature of evidence to call or otherwise obligating the prosecution to call a host of witnesses to prove its case. See *Hausa v. The State* (1994) 6 NWLR (Pt.358) 281, *Udo v. The State* (2006) 15 NWLR (Pt.1001) 178 and *Ugwumba v. The State* (1998) 6 SCNJ 217 - And that the native doctor has always been available if the appellant had

wanted him to testify on his behalf. On acquittal of the 7th co-accused on a successful plea of alibi vis-a-vis the issue of identities of the appellant and the other co-accused persons, again on their being pinned to the scene of crime that night, the respondent has regretted not having appealed this point of the 7th accused's acquittal as in its view it is erroneously founded. It has submitted all the same that the trial court has acted out of error of judgment (i.e. by giving the 7th accused - a benefit of doubt) and to have based on that in discharging the 7th accused person without really evaluating the evidence against him particularly so against the background that all the accused persons, the appellant as well as PW5 are from the same kindred and they have been known to PW5 before the incident. Relying on *Yongo v. Commissioner of Police* (1990) 5 NWLR (pt. 148) 603, it is submitted that on the acquittal of the 7th co-accused it does not automatically lead to the acquittal of the others including the appellant. In this respect the respondent has argued that the identification of the accused persons including the appellant has been spontaneous and natural and that it has been largely unshaken in cross-examination and rightly believed and acted on by the lower courts and all the more so as it is also a visual identification of known persons to him. See *Adeyemi v. The State* (1991) 1 NWLR (Pt.170) 691 at 694.

On the issue of common purpose principle vis-a-vis the common base for their defence as against the issue of the acquittal of the 7th accused it is urged that it does not follow that having been jointly tried of the same offence the benefit of doubt accorded to the 7th co-accused on his successful plea of alibi ought also to have been extended to the rest of the accused persons. The respondent has made the point that the appellant's defence has no common base with the defence of the 7th co-accused person and so they i.e. the appellant and his co-accused persons cannot reap from the benefit of doubt given to the 7th co-accused. On not having called the native doctor to authenticate as to what has transpired between him and the PW5 vis-a-vis the contention of the onus on the respondent to discharge, if I may repeat the respondent has opined that it is irrelevant as it has otherwise proved its case beyond reasonable doubt and not beyond all the shadow of doubt by the credible evidence from PW5 and other circumstantial evidence and therefore it is not bound to call the native doctor who has been available at all time for

the appellant. And that the option to call him has shifted to the appellant to discredit the evidence of PW5.

In sum the respondent submits that the prosecution has discharged the onus on it by proving the death of Maduneke Enweonye and that his death has been caused by the acts of the appellant and his co-accused persons as per the eye-witness account of PW5 supported by cogent, Strong and overwhelming circumstantial evidence pointing irresistibly to the direction of his death in the hands of the accused persons. See *Ochemaje v- The State* (supra), *The State v. Uzuagwu* (1972) 2 ECLR (pt.2) 429, 434; *The State v. Edebor & Ors.* (1985) 914 SC 69 at 76 - 77 and *The State v. Okorie* (1982) 1 NCR 1 at 202 and that the conviction is sustainable, even where as here the corpus delicti is not discovered but strong unassailable evidence has been led to his having been killed by the appellant and his co-accused and his remains dumped in Anambra River by the appellant and his co-accused Persons. See *Edim v. The State* (1972) 4 SC 160, *Enewoh v. The State* (1990) 4 NWLR (pt.145) 469 at 482, *Njoku v. The State* (1992) 8 NWLR (pt.263) 714 at 723.

The court is urged to resolve the lone issue in favour of the respondent; and that the appeal be dismissed for being un-meritorious and to affirm the decisions of the lower courts. Because of the nature of this case I have taken pains to set out in great detail the cases on both sides of the divide. And I must however, again in this appeal as in some others before it make the point that from the lone issue raised for determination as settled by both parties the appellant wittingly or unwittingly has unequivocally put the lower courts decisions in issue having done so by questioning their decisions on issue of facts or mixed law and facts. And this has provoked a complete reappraisal and discussion involving evaluation or revaluation of PW5's evidence as per the disputed findings otherwise rightly considered and pronounced upon by the two lower courts. In other words querying thereby the concurrent finding of facts and raw by the two lower courts not, with respect, on the bases as upon the traditional grounds as I will show anon. Clearly having thus raised issue of facts or of mixed raw and facts it is my view that this court ought not to be lumbered with undertaking such excursions. Even moreso clearly where an appellant has not established the concurrent findings as preserve, unsupported by credible admissible evidence or has occa-

sioned a miscarriage of justice.

I do not think that this case clearly in spite of all its bizarre features has fallen into any of the above categories vis-a-vis the question of concurrent findings talkless of the appeal dealing with a recondite area of the law. I think I should further make that point early enough in this judgment. And so the sooner the constitution now undergoing the process of amendment is so amended to recognize and entrench the unique position of this court as the apex court in this country and so confine the court's jurisdiction as in other common law jurisdictions to matters of pronouncing on general policy in cases in regard to recondite areas of the law so long shall this court be unduly inundated with matters as the instant one based on matters of facts alone. Our jurisprudence has come a long way in this context that the points I have made here have become self-evident. This is another case that is based entirely on evaluation or revaluation of issues of facts and should not be allowed to get this far. Appeals on questions of fact alone (and even of mixed law and facts) should terminate at the lower court.

This case in spite of its bizarre facts and surroundings has raised for reconsideration the question of whether or not the burden of proof on the respondent (as a prosecutor) to prove this case of murder against the appellant beyond reasonable doubt has been discharged on the testimony of PW5 alone.

In other words as in Nweze v. The State (supra) by establishing on the peculiar facts of this case the following ingredients of the crime of murder as follows:

“(1) That the deceased is dead.

(2) That the death of the deceased is the result of the act or omission of the accused (in this case of the appellant and his co-accused persons).

(3) That the acts or omission of the accused (i.e. the appellant and the co-accused persons here) which have caused the death of the deceased is intentional with full knowledge that death or grievous bodily harm as the probable consequence.”

These ingredients of the offence of murder which must co-exist have to be established as such beyond reasonable doubt for the prosecution to succeed. Mandilas & Karaberis

Ltd. v. Inspector General of Police (1958) 5 FSC. The burden never shifts excepting in a few cases where the law has placed that onus on the accused. Thus no onus is on the accused as the appellant here excepting on issues peculiarly within his personal knowledge and it is discharged on the balance of probability. Woolington v. DPP (1935) AC 462; 25 CR APPR 27 per Lord Sankey cited in R. v. Adamu (1944) 10 WACA 161. ***A prosecutor has to prove its case to wit:***

- (1) ***by an eye-witness of the crime.***
- (2) ***by confession or admission voluntarily made.***
- (3) ***by circumstantial evidence positive and compelling and pointing to one conclusion only that the accused committed the offence.***

The respondent has resorted to proving the instant crime firstly by relying on the evidence of PW5 as an eye-witness and by means of circumstantial evidence i.e. in establishing its case against the appellant. In this regard it has adverted to the peculiar circumstances of this matter as per the circumstantial evidence of the other 9 (nine) witnesses. See Sowemimo v. The State (supra), Adekunle v. The State (supra) and Lori v. The State (supra), Tepez v. The Queen (1952) AC 480 at 489 and Igabele v. The State (supra). It is the prosecution's case that Maduneke Enweonye has been killed by the appellant and his co-accused persons near his hut by the Ikpi Fishing Pond in Isiokwe Anaku of Anambra L.G.A and that his dead body has been dumped in Anambra River and also that his body has been sufficiently so weighted with some heavy objects to prevent the dead body from floating or surfacing. It is an uncontested fact that the corpus of the deceased has not been seen or recovered to this date. The eye-witness, PW5 has given an eye witness account of the macabre saga of events that happened at the Ikpi Fishing pond on 8/6/1994 at night while fishing in the said River also that night.

From the lone issue for determination the appellant has attacked the lower court's decision principally for predicating the decision solely on PW5's testimony in the trial court. I therefore see it fit to set out for ease of reference a crucial chunk of his testimony i.e. viva voce at the trial court from p.94 to p.96 of the record thus:

"After the rain the stream over flowed and water rose to the bank causing the fish to come up to the banks following the course of

the stream. We went fishing that night after the rains. As I was going I took a machete torch and a bag. My torch was good. It produced light. When I reached at Iyisawa, which is at Ikpi fishing pond, as I was fishing I heard a loud noise saying "Anaku doo Isiokwe doo". I listened careful and the noise was coming from Ikpi. I stopped fishing and listened attentively. It was the voice of Muoneke Enweonye. I^B decided to go to Ikpi to find out the reason for the shout.

As I was going the ground was muddy and difficult to walk upon. The loud noise was lessening. As I was approaching the Ikpi I head some murmuring. I listened attentively and it was the voice of^C our Anaku people. When I got near I flashed my torch light and saw Francis Obidike, Jideofor Anyagbo. Ohidezie Anakwe, Simon Ibenegbu Nebeife, Oguejiofor Ilidogwe, Ezeakonam Nkebuisi and Iriemena Chieke (Chukwuemeka) and other fine persons namely Onwughalu Ikenwa; Iliegbuna Ugwonwa, Emmanuel Chieke, Obuora D Chieke, and Mbanefo Chinweuba. When I flashed the torch light I saw Francis Obidike holding a single barreled gun. Jideofor Anyagbo was holding a machete, Onwughalu Ikenwa was holding a single barreled gun, Obiora Chukwuemeka was holding a rod. Others were holding some heavy sticks. When I flashed the torch light Oguejiofor^E Ilodigwe asked who was flashing the torch light. I did not reply at first and he asked again, then I replied that I was the one Godfrey Emengini. He asked me what I came here to do. I told him I came to know why Maneme Enweoye was shouting. Oguejiofor Ilodigwe asked^F Jideofor Anyagbo and Chidozie Anakwe and Ezeakonam Nkebuisi to catch me and kill me. I asked them why they want to kill me. They told me that I heard the voice of Muoneke and that if they leave me to go home I will tell our people what happened. Francis Obidike told them not to kill me. He called me and asked me to swear 'Iyi Ani' for them promising that I should not tell our people what happened otherwise they will kill me. As I was afraid that they will kill me I agreed to swear the Iyi Ani. Francis Obidike then got a machete and made a mark on the ground in form of a coffin. He put a machete at the head and at the foot of the coffin. He dug out the ground in the shape of the coffin. He filled the digged up ground with water. He got some leaves and them and put the tied leaves on the dug up ground. That is what we call Iyi Ani.

Francis Obidike told me to listen to hear how I was going to

swear. He said if I tell anybody that they killed, Muoneke the ground will kill me if I did not tell anyone I shall live. He then told me to use my hand and get the water and drink it so that the water from that ground will kill me if I tell anyone of the incident. I did the swearing as he prescribed. I then asked Francis Obidike where is Muoneke whose voice I heard before coming. He told me to look at Muoneke. I flashed the torch light and saw Muoneke lying on his back facing upwards with his hands spread out. Muoneke's mouth was open, his noise and ears meaning that he had died. I asked them why they killed Muoneke. They replied that Muoneke refused to go out from Ikpi and that was why he was killed. Francis Obidike asked the others to decide what to do to the corpse. Oguejiofor Ilodigwe said they should bury him by the side of Ikpi. Francis Obidike told him that if they bury Muoneke by the side of Ikpi the corpse will be easily located. Francis Obidike asked me what I was waiting for. He said I should go since I had taken the Oath for them. I started going home slowly. I heard Francis Obidike tell the others that they should take the corpse to Anambra River. Onwughalu Ikenwa told Francis Obidike that the decision was good but that unless they tie the corpse to something heavy it will float on the River. When I got to my farm at Ofia Awala, I could not sleep. In the morning I went home to Anaku. People started looking for Muoneke. I was not one of those looking for Muoneke. After a while I felt sick, very sick I nearly died. I went to a native doctor to find out why I was sick. I now say it was Onyejelu Uyaonwu who I asked to call the native doctor for me. The name of the native doctor is Okoko Uyaonwu. The person I sent was Onyejelu Emengini. The native doctor told me that the cause of my sickness was that I failed to reveal the names of people who killed someone. He said that unless I reveal them I would die. I told the native doctor that I took oath for the people that was why I failed to reveal them. The native doctor told me to reveal and that the effect of the oath will be destroyed. He told me to bring a fowl (white) eggs, and chickens and white cloth and that he the native doctor will supply others things necessary for job. I did as directed by the native doctor. As I was getting better I went and told my brother Ajana Ofodile what I knew of the death of Muoneke. He reported to our kindred and then reported to the police at Awka. When he came back from Awka he told me that the Police invited me to come to Awka and make Statement

I went to Awka and made Statement to the police. That is all."

The foregoing is the evidence of PW5 (an eye-witness) account) giving a graphic and vivid account to every essential material detail of what he saw that fateful night 8/6/1994 at the Ikpi Fishing Pond thus establishing firstly the death of Maduneke Enweonye, secondly that the acts of the accused persons including the appellant have caused his death and thirdly the disposal of his remains by dumping the same in the Anambra River. The two lower courts have made their respective findings that the Maduneke Enweonye (deceased) is dead thus have accepted the evidence PW5 as narrated above and the connection of the accused persons' acts in his death. The trial court as regards the evidence of PW5 has found at P169 of the record, thus:

"Although PW5 is from the same Umuakuma family of Isiokwe as the deceased after watching him testify. I am not in any doubt that he had no purpose of his own to serve in giving his evidence.

I, therefore hold that the evidence of PW5 is credible. The prosecution witnesses and the accused persons are well known to one another.

They all, excepting the policemen, came from the Isiokwe village in Anaku Community."

Concluding its finding the trial court at p.172 L8 - L14 said:

"In the instant case, the eye-witness account given by PW5 was not shaken by cross-examination. The accused persons were seen with the body of the deceased gushing out blood at night and the deceased eventually died and the body was not found. The court is bound to hold that they (sic) guilt of the six accused persons had been proved beyond reasonable doubt.

In Princewill v. The State (1994) 20 LRCN 303, 318 Iguh JSC State that, where the court is satisfied that the prosecution has proved beyond reasonable doubt that the death of the deceased was caused directly or indirectly by the act of the accused to the exclusion of all other possibilities, the court is bound to convict. I find the 1st, 2nd, 3rd, 4th, 5th and 6th accused persons guilty of murder of Maduneke Enweonye."

The trial court having found the accused persons including the appellant guilty rightly has convicted and sentenced each of them to death. The lower court also has made findings on the death of the

deceased and that the appellants and his co-accused persons killed him and disposed of the remains by dumping the same in the Anambra River; and in sum in this regard it has held at P.300 of the record 15 Lines from the bottom of that page thus:

B *“The question of the conviction of appellants being based on mere suspicion suffers from the guilt of the appellants being seen from the myopic lenses of counsel for the appellants which cannot see through the force of evidence of the PW5 as an eye-witness account”.*

C There can be no doubt from the two abstracts above that the two lower courts have made PW5’s evidence the cornerstone of their respective decisions in this matter. It is no wonder then that the appellant has launched severe attacks against the decisions with all the arsenal based on facts in its armoury. The appellant has in its brief of
D argument raised substantially all over again the questions he has raised in the lower courts which have clearly been laid to rest by the concurrent findings of the lower court as in the cases set out above. I have depreciated as misplaced the thrusting upon this court the task of reviewing the appellant’s case vis-a-vis the defence case all over again
E even as where the grounds for doing so are rather spurious and preposterous. I find both findings of the lower courts speaking pre-emptorily flawless. All attempts to fault the death of the deceased and that the acts of the appellant and his co-accused caused his death by the appellant therefore has failed as I shall show more pungently
F anon. I uphold them

In view of the foregoing abstract of PW5’s testimony at the trial court substantial portion of which I have set out above, I think I
G should approach the discussion of this matter from the angle of examining whether or not the prosecution really has discharged its onus in proving its case against the appellant beyond reasonable doubt. It is the respondents case that by establishing the Case against the appellant upon PW5’s evidence will read to determining on the facts of the case that Maduneke Enweonye is dead and that the appellant
H and his co-accused persons by their acts have caused his death and the disposal of this dead body by dumping it in the Anambra River. In that regard the appellant has challenged the eye-witness account as accepted and relied upon by the lower courts as the major plank of his attack of the decisions of the lower courts. The appellant has

contended that the decisions are fundamentally flawed as firstly on question of the identity of those seen at the scene of crime by PW5 on the backdrop of having acquitted the 7th co-accused on a plea of alibi a crucial finding by both lower courts.

In sum the appellant furthermore has launched his attacks on PW5's testimony as accepted and acted upon by the lower courts from another angle that the contradictions as well as inconsistencies in the prosecution's case are so profoundly damaging with specific regard to the findings of traces of blood and the footprints particularly of the 1st accused and Iyi Ani juju as sworn by PW5 and on the dangers of relying and acting on PW5's evidence alone to convict the appellant. Also highlighted in his attacks is the failure to call the native doctor as a crucial witness to give evidence of the Oath and what transpired between him and PW5's also that the lower courts have not warned themselves as required by the law in dealing with PW5 as a tainted witness clearly with a purpose of his own to serve being a relation of the deceased and whose evidence has to be treated with caution. More importantly, that the discharge of the 7th co-accused on a successful plea of alibi, if I may repeat, has dented structurally PW5's evidence on the whole making it most unreliable and so to warrant the discharge and acquittal of each one of them by being given the benefit of doubt as arising from the 7th co-accused's acquittal. I now, proceed to give these questions elaborate analyses on the backdrop of the prosecution's case in this matter.

The appellant has thrown the first gauntlet by having challenged PW5's evidence on the fact of the death of Maduneke Enmeonye (deceased) particularly as the body has not been recovered and that the acts of the appellant and his co-accused persons caused his death. He has specifically raised the question as to the identities of the appellant and his co-accused persons at the locus criminis as given by PW5 as against the peculiar circumstances of the events of the night of 8/6/1994. He has highly deprecated the issue of accepting the discredited evidence of the identity of those seen at the scene of crime as given by PW5 at night even moreso by the mere flash of PW5's torch light.

It is my view that the appellant with respect has over flogged these questions and in so doing he has completely lost sight of the pertinent fact that the appellant, his co-accused and the PW5 are

relations from the same kindred and have lived together to be well known to one another. It would be surprising if this were not so. Again the appellant has also lost sight of the length of time PW5 spent in the midst of the accused persons that night at the locus criminis. That length of time as borne out from his account as per the above
 B abstract of his viva voce evidence is sufficient time enough to enable PW5 to observe and note those of them of his kindred he saw and whatever dangerous weapons each of them was carrying that night. Besides the PW5 evidence is quite unequivocal, clear, authentic and
 C unshaken in cross-examination in these respects and the lower courts rightly have believed him and as rightly observed by the trial court he (PW5) has remained consistent in his Statement to the police as per Exhibit E vis-a-vis his viva voce testimony before the trial court. In the scenario the trial court as rightly affirmed by the lower court has
 D properly evaluated PW5's evidence before arriving at its conclusion if I may repeat that and I quote *"the eye witness account given by pw5 was not shaken by cross-examination"*. And my perusal of the records has clearly justified this finding as well grounded.

***Where a trial court has found the evidence of an eye
 E witness unequivocal and true it is bound to accept and act on it irrespective that it is evidence of a lone eye witness of the crime. And so the appellant's challenge in this regard that both lower courts wrongly have accepted and acted on the sole
 F evidence of PW5 in convicting the appellant is flawed as having no bases. See Adeyemi v. The State (1991) 1 NWLR pt.170) 691 at 694. Even though the circumstances of that night may be tough and tense as well as unfriendly by all accounts upon the gory events of that night, PW5's graphic and vivid account has been given
 G meticulously as per the above abstract as one who was truly at the locus criminis and seen it all. And therefore his evidence has not been faulted nor flawed not even under the intense rigorous heat of cross-examination as borne out by the instant records in this case. There can be no doubt that it is intended to be believed and as rightly so
 H believed by the lower courts. As can be seen it has been after a scrupulous evaluation of PW5's evidence by the trial court that his evidence has been accepted and acted on as has been rightly affirmed by the lower court. And so if I may recap that where the evidence of a witness is unassailable and truthful as to his account of the events***

vis-a-vis the offence charged even then after a rigorous cross-examination as here the court ought to accept and act on it. The account of PW5's of the incident has therefore been rightly accepted and relied upon by the lower courts to convict the appellant.

The appellant has however from another angle to this matter raised the question to the effect that these findings on the evidence of PW5 cannot be right when the same trial court on its careful analysis of the evidence of alibi as raised by the 7th accused person and his witness DW8 having accepted the same has discharged and acquitted the 7th accused of the instant offence. The acquittal has received the adverse strictures of the lower court and rightly for the reasons I shall advert to anon. The lower court on its part even though it has expressed its misgivings in regard to that findings has not reacted against it and rightly so as it has not been challenged on appeal to the court. It must however be noted that this is a visual identification of persons previously well known to PW5 before the incident and this fact is unquestionable and potent. I shall come back to this question later on. Even then labeling of PW5 as a tainted witness with a Purpose to serve without more has not diminished the quality of his evidence in that regard. He has been calm all through that episode as gathered from his Statement. At the locus criminis there can be no doubt that he saw the lifeless body of the deceased lying on its back facing upwards with his hands spread out, blood gushing out from his mouth, nose, ears, meaning that he is dead and there is evidence of ample length of time he used in really observing the surroundings and to identify the appellant and other accused persons. I must emphasize that the PW5's visual identification of the appellant and his co-accused persons not having been discredited as unreliable in any way in cross-examination the lower courts rightly have accepted it. I uphold the lower courts findings of the appellant's guilt following thereupon the death of the deceased and that his death has resulted from the acts of the appellant and the other accused persons. Besides the accused-persons could not have contemplated the disposal of his remains as gathered from the evidence of PW5 if the deceased were not really dead. That said; I say here that the appellant has otherwise misconstrued the strength of the respondent's case on this question as founded on the accepted evidence of an eye-witness. To displace the evidence of an eye-witness has to be by credible evidence and

the appellant case in this regard is defunct of any credible facts and circumstances to upstage the respondent's case on this question. The appellant's reliance on the finding on the 7th accused acquittal to question and attack the credibility of PW5's evidence not only on the identities of the appellant and other accused persons as having been
 B fixed at the locus criminis but also on the prosecution's entire case as has been showed above is again unfounded. I think the appellant's case on these sundry questions are baseless and based on slippery grounds.

C I therefore find on a close examination of the abstract of PW5's, testimony as set out above again, it has established the circumstances of PW5's meeting with the accused persons including the appellant at deceased's hut near Ikpi Fishing pond that fateful night, and besides, the length of time he was in their midst i.e. until he was
 D made to take the Iyi Ani Oath, and in my view it is long enough time for taking note of what transpired that night. There can be no doubt if I may repeat he spent enough time to observe the accused persons and their weapons as well as their dispositions and the opportunity of closely watching them and to further observe whatever weapons each
 E one of them was carrying. That PW5 has had adequate opportunity to observe the scene of the crime is beyond argument. See Omega v. The State (1965) NMLR 58. The potency of PW5's eye-witness account of their respective dispositions that night has to be considered
 F against the background that all the accused persons and PW5 are of the same kindred of Isiokwe Anaku and that PW5 has known all of them before the incident so that identifying each one of them at the locus criminis that night followed naturally. Where a visual identification as here has not been destroyed by any credible evidence to the
 G contrary the court will be entitled as here to accept and act on it.

Before concluding this question I now consider whether the discharge and acquittal of the 7th accused has fatally dented the findings of both lower courts of fixing the appellant (excluding the 7th accused) as well as the other six accused persons at the scene of crime. My first reaction is definitely in the negative as it is trite law that where the identification is spontaneous and natural as here, the court would not be wrong to act it. See Cohi v. The State (1997) 7 NWLR (pt.) 51, Anyanwu v. The State (1986) 5 NWLR (Pt.45) 612 at 633-4. The principle of law
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in this regard has been set out in the case of Akpan & Ors. V. The State (2002) 51 WRN 1, where Katsina-Alu in dealing with a similar question said:

“where two or more accused persons are charged with the same offence and the same evidence is rendered in proof of the charge, it does not automatically follow that the acquittal of one of them lead to the acquittal of the others. If there was a mistake in acquitting one of them the appellate court is not expected to partake in the error as two wrongs do not make a right.”

I think on the backdrop of the foregoing abstract that the appellant has completely lost sight of and indeed has misconstrued the settled principle in such decisions as in *R. v. Ukata* (1958) FSC. 27 and *Odigili & Ors v. The State* (1958) 7 SC 141 at 155 to the effect that the evidence against each of the accused persons as here must be specifically considered against each of them that is to say against their respective defenses and that an accused person cannot be connected with an offence unless and until the evidence available against him so clearly establishes beyond reasonable doubt that the act must have been done either by him or with someone he is criminally responsible. The implication arising from the foregoing context is that the benefit of doubt given to the 7th accused cannot without more be extended to the rest of the appellant and his co-accused persons. Even although they are charged together under a common purpose principle the defense of the appellant and the 7th accused has no common base. The defence of the 7th accused is premised on a successful plea of alibi which is not the basis of the defense of the appellant and the other accused persons. Their respective defences have been considered separately and severally on the backdrop of the respondent’s case by the trial court as affirmed by the lower court to arrive at the conviction of each of them.. I must say again here that the lower court has not been satisfied of the 7th accused’s acquittal as being proper although the finding has not been appealed.

However for a plea of alibi to be successful the defence must show inter alia that the accused is so separated by distance that ordinarily he cannot have traveled from that place

where it is alleged he was to the scene of the crime or that even if he has been staying within a short distance he has been seen by people there at the time the alleged crime is said to have been committed or that he has been physically prevented from approaching the scene of crime by an external force or
 B **may be by ill-health and so certified by a medical doctor.** At the end of the matter the trial court after considering all the evidence concerning the alibi of 7th accused has given him the benefit of doubt and to hold that he has been at Nsugbe at all times material to the
 C commission of this crime. He therefore, has discharged and acquitted him of the offence as charged. However I agree with the lower court to the effect that the trial court apparently, with respect, he acted out of sentiment in order words it has not necessarily premised its findings of letting the 7th accused off the hook of this crime on any
 D proper evaluation of the facts before it. And as the finding has not been appealed, I say no more of it.

I therefore find no basis for the appellant raising much dust over the discharge of the 7th accused person on the peculiar facts of the 7th accused's defence of being elsewhere at the time of committing the offence to erroneously rest upon those facts to urge for the
 E appellant's acquittal before this court.

He has clearly misconstrued the principle involved in the above cited cases on the absence of the common base of their defence in this case. The lower courts rightly rejected the appellant's submissions in that regard and I uphold the same. The other critical attack on the judgment of the lower courts is on the Oath taking as per Iyi Ani juju vis-a-vis the onus on the respondent to call the native doctor to testify as
 F **to the nature of PW5's illness, the cure and the divining effect on PW5's illness i.e. as to what transpired between PW5 and the native doctor. It is trite law that the onus is on the respondent to prove its case beyond reasonable doubt by calling necessary evidence to that effect and not a host of witnesses. In**
 G **this regard it has the discretion how it goes about it i.e. by calling material evidence not a host of witnesses. I agree with the respondent that having established its case in the way it has seen fit it is not obliged to call a host of witnesses and in any case to call the native doctor to beef up its case.** See Hausa
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v. The State (supra), Udo v. The State (supra) and Ugwumba v. The State (supra). The appellant if he wanted he ought to have called him as the native doctor has been well known in the community and his name has been spelt out in the evidence of PW5. Section 149(d) of the Evidence Act 2004 therefore is inapplicable to this case and so the appellant cannot exploit that provision to raise the presumption that the native doctor may not have been disposed to testify in favour of PW5 as the reason for not calling him. I must add that how he cured PW5 as well as what he told PW5 as to casting out the spell of the juju on him as given in evidence by PW5 at the trial court being relevant to this case is admissible and so does not amount to hearsay. The appellant has not challenged these disposition of facts before now.

The other issue I have decided to come back to is the submission that PW5 being a relative of the deceased is a tainted witness and has other purpose to serve in testifying against the appellant and the co-accused persons and has referred to *Moses v. The State* (2006) 11 NWLR (Pt.992) 458. PW5 is neither an accomplice in any sense of the term in this matter to require a number of witnesses to corroborate his evidence as a matter of law, one witness of truth if believed is therefore enough in the circumstances to convict an accused. See *Akpa v. The State* (supra) even then there is circumstantial evidence showing that the offence is committed and implicating the appellant and co-accused; nor has it been showed that he has any personal purpose to serve other than to serve the ends of justice by testifying as an eye-witness as to the incidents of 8/6/1994 at the Ikpi Fishing Pond. It must be observed that the trial court having been satisfied by the reasons given by PW5 for reporting the matter to the police about 3 months later, which has not prejudiced the case of either party to this matter and as rightly affirmed by the lower court I uphold the same as I have examined the cases of *Oguonzee v. The State* (supra), *Moses v. The State* (supra) and *Rex v. Kofi Marfu* (supra) and I have no doubt in my mind that the two lower courts have properly appraised the reasons given by PW5 to arrive at the correct decision on the question to accept the reasons.

The appellant has also raised the question of contradiction and inconsistencies in the testimonies of the prosecution witnesses i.e. as to PW3, PW4, PW5 and PW6 arising from their testimonies as

to the searches conducted for the missing Maduneke Enweonye. Specifically he has dwelt on traces of blood and foot prints and bent footprints as observed at the locus criminis during the searches and that these facts have not formed any part of their initial reports to the police nor of their Statements to the police later on but have been made manifest in their viva voce evidence at the trial. The lower court has tended to reject the prosecution's evidence in this regard as against the lower court that has rightly accepted their accounts even though they suffered from minor discrepancies. In my view it carefully evaluated the evidence of PW3, PW4, PW8 and PW10 on the issue as follows (at p.166 of the record):

"There is no doubt that there are some discrepancies in the Statements and testimonies of some prosecution witnesses but as Stated in Ayo Gabriel v. The State (1989) 5 NWLR 457, 469, minor discrepancies between a previous written Statement and subsequent oral testimony do not destroy the credibility of the witness. When such do not occur it may lead to a suspicion that the witness has been tutored. I am not in any doubt that there were foot prints and blood stains at the scene of crime."

It is important the trial court has adverted its mind to these questions and so has them in mind when considering this case. I agree with the trial court's findings that in an attempt to make a mountain out of a mole hill of this question the appellant has ignored the rule that to contradict a witness on matters as per his previous Statement his attention must be drawn to them otherwise the answers so elicited are inadmissible against the witness. And indeed what the appellant has labeled contradictions here are minor discrepancies which have not affected the material aspects of the testimonies of these witnesses showing that the offence is committed and implicating the appellant and his co-accused. They are not opposite of what are contained in their respective previous Statements. In this respect I uphold the trial court's finding on this question is sustainable.

On the non-recovery of the corpus of the deceased it has been submitted that the prosecution has failed to discharge this crucial onus. This assertion on the corpus delicti has not taken due cognizance of the unassailable evidence of PW5 as an eye witness ac-

count about the death of the deceased and how the acts of the accused persons including the appellant have caused his death at Ikpi Fishing pond on 8/6/194 and disposal of his body in Anambra River. The appellant is clearly implicated in this crime. The quality of the evidence adduced to support the prosecution's case as per PW5 and other circumstantial evidence by the 9 other witnesses in that behalf on the question of corpus delicti point conclusively to the appellant and his co-accused persons as having killed the deceased by their unlawful acts and that the remains have been dumped in Anambra River. The respondent has therefore discharged the onus on it in these respects beyond reasonable doubt even if I may repeat as the body of the deceased has not been discovered. And relying on such cases as Edim v. The State (197) 4 SC 160, Enemah v. The State (1990) 4 NWLR (pt. 145) 469 at 482 and Njoku v. The State (1992) 8 NWLR (pt.263) 714 at 723, I hold that the prosecution by positive and credible evidence has proved conclusively that Maduneke Enweonye is dead (i.e. has been killed) by the unlawful acts of the appellant and his co-accused persons and the remains have been thrown into Anambra River. I so hold.

For the above reasons I have no hesitation in dismissing the instant appeal as most un-meritorious and affirm the concurrent decisions of the lower courts. Appeal dismissed.

MUKHTAR JSC CFR

I agree.

MUNTAKA-COOMASSIE JSC

I was privileged to have read in advance the lead judgment of my learned brother Chukwuma-Eneh, JSC just delivered.

The facts of the case were neatly stated. I don't have to reconsider them here. I accept the facts as Stated by my learned brother. My lord Chukwuma-Eneh JSC has left no stone un-turned. He treated all the issues presented to us for the determination of the appeal. I adopt the reasons and conclusions ably Stated in the lead judgment in dismissing this appeal. I too dismiss same.

PETER-ODILI JSC

This is an appeal against the judgment of the Court of Appeal, Enugu Division delivered on the 18th day of July, 2001 wherein the Court of Appeal affirmed the judgment of the trial court which convicted the appellant and five other co-accused for the murder of one Maduneke Enweonye who was reportedly missing on the 8th day of June, 1994.

FACTS

The case of the respondent before the trial court was that there is a fishing pond called Ikpi which was disputed whether it was owned exclusively by one Sunday or by the entire Isiokwe kindred of Anaku. The fact of this case as put up by the prosecution was that sometime before the disappearance of one Maduneke Enweonye, there was a dispute amongst the members of the Umuereagu Isigkwe Anaku community as to the ownership of one Ikpi fish pond. The said dispute was subsequently resolved and the Ikpi fish pond leased to one Chief Philip Ezeoba of Nando for a period of five years. Following the lease of the fishpond to Chief Ezeoba, one Vincent Ezeoba (the PW2) employed the 1st accused as guard to watch over the pond. After a while the 1st accused was removed and replaced with the deceased-Maduneke Enweonye by the PW2 for no apparent reason. And the 1st accused was not happy and he was alleged to have expressed his resentment to the PW2 the manager of the fish pond.

Shortly after the incident above, and on the 21st day of May, 1994, at the Isiokwe Anaku Community Town called “Nkolori” during the “Uta Amanwulu festival, the issue of ownership of the said Ikpi fish pond arose again and the disagreement which ensued led to the dispersal of the meeting. And all the members of the 1st accused’s sub-family of Umueteagu Anaku left with him while all the members of the deceased sub-family of Umuakuma of Umuereagu Anaku remained in the meeting with the rest of Isiokwe people. It is important to emphasize at this point that all the accused persons including the appellant are from the 1st accused sub-family while all the prosecution witnesses other than the PW2 and the Police are from the deceased’s sub-family of Umuereagu Anaku.

At the trial and even in their extra judicial Statement to the

police, the prosecution witnesses alleged that during the said meeting the 1st accused issued a threat on the life of the deceased when he said that he will kill the deceased and hide his corpse. After the prosecution witnesses were bound over at the Magistrate Court, and the prosecution, fully aware of its shortcomings, PW5 came up with the story that he was there at the locus criminis at about 9.00 pm upon a flash of his torchlight he saw all the killers of his kinsman, including the 7th accused who was discharged on plea of alibi and affirmed by the court below. PW5 explained his late appearance in the case on the alleged “Iyi Ani” Oath which he took under the pain of instant death. PW5 gave evidence at the trial court that he fell sick after the oath but the cause of his sickness was diagnosed and diluted by native doctor who was not called as a witness. B
C

Despite the contradictory evidence of the prosecution witnesses, the trial court believed the story as narrated by the prosecution and disbelieved the defence and convicted the accused persons (the appellants inclusive) except the 7th accused whose alibi was accepted by the trial judge even in the light of the story of the PW5 who claimed to be an eye-witness to the alleged murder of Maduneke Enweonye. At the court below, the learned justices although affirmed the conviction of the appellants basically on the evidence of PW5 and Stated thus, *“for the foregoing reasons, the discovery of blood and foot prints at the scene of crime are based on contradictory evidence and therefore rickety evidence that are prejudicial to the appellants and ought to have been disregarded by the learned trial judge”*. D
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Being dissatisfied with the judgment of the lower court which relied on the evidence of PW5 and the evidence of DW8 to affirm the conviction of the appellant, the appellant has appealed to this court. At the hearing on the 19 - 4- 12, learned counsel for the appellant adopted and relied on the brief of argument settled by A. C. Anaenugu Esq, filed on the 28/9/10. In it was distilled a single issue, viz: G

Whether the court of Appeal was right in affirming the conviction and sentence of the appellant for murder on the basis of the evidence of PW5 only in the circumstances of the case... H

Learned counsel for the respondent adopted and relied on the respondent’s brief settled by A. O. Okeke Esq, Director of public

Prosecution (DPP) Anambra State, Ministry of Justice and the said brief filed on 18/10/10. The learned DPP adopted the issue as raised by the appellant.

SOLE ISSUE

B Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant for murder on the basis of the evidence of PW5 only in the circumstances of the case.

C Mr. Anaenugu, learned counsel for the appellant said it is an elementary principle of law that to sustain a conviction for the offence of murder, the prosecution which has the burden of proof must establish beyond reasonable doubt not only that the victim died but also that it was the act of the accused that caused the death of the deceased. He cited *Sowemimo v State* (2004) 11 NWLR (pt. 885) 515; *Adekunle v State* (2006) 14 NWLR (Pt. 1000) 717. That it is D settled law that circumstantial evidence must not only be cogent, complete and unequivocal but must equally be compelling and point irresistibly to the guilt of the accused/appellant and to no other person. That circumstantial evidence therefore must be narrowly examined so that a possibility of fabrication to cast suspicion on innocent E person is ruled out. He referred to *Lori v The State* (1980) 8 - 11 SC 81 ; *Tepez The Queen* (1952) AC 480 at 489; *Popoola v Commissioner of Police* (1964) NMLR 1 *Igabele v State* (2006) 25 NSCQR 21.

F For the appellant was canvassed that both the trial court and the court below attached undue and excessive weight on the testimony of the PW5 and in the process failed or neglected to exercise due caution in dealing with the said testimony. He said there are at least three factors why the testimony of this witness ought to be treated G with the greatest caution if the conviction of the appellant on a murder charge is to be based on it. Firstly, the PW5 is a relative of the allegedly dead person even though there is no law which precluded a blood relation of the deceased from testifying for the prosecution but the court has to exercise great caution before accepting or ascribing H any evidential value to the evidence of such witness. He cited *Oguoneze v. State* (1999) 2 LRCN 232. Learned counsel for the appellant said the court of Appeal erred not to concentrate on the peculiar features of this case in order to determine whether it is wise and prudent to base a sentence of death on the evidence of PW5.

He said the witness did not make his Statement to the police and did not report to the police until 30/8/94 a period of almost three months after the alleged offence and at a time the matter was already in court even though the offence was allegedly committed according to the same witness in the evening of 8/6/94. Mr. Anaenugu said the failure of the witness to report his alleged discovery to anybody earlier than he did was a hotly contested issue at the trial. That the two courts below resolved both issues in favour of the witness and accepted his story that he swore the “Iyi Ani and honestly believed that if he told anybody what he saw the Iyi -Ani would kill him. That the issue whether the witness swore the Iyi Ani is a crucial and decisive factor on which a decision whether or not to believe his testimony largely depends.

For the appellant was further contended that it is important that the native doctor who neutralized the effect of the Iyi - Ani oath to enable the PW5 to come forward should have testified and so in the absence of that evidence of the native doctor that the court needed to caution itself before that evidence was utilized. He referred to *Egbunike v A. C. B. Ltd* (1995) 2 NWLR (Pt.375) 34; *Fasugba v I. G. P.* (1964) 2 ALL NLR 15. Learned counsel for the appellant said the case of the accused/appellant depended on the correctness of the identification of the accused which the witness alleges, a trial judge must warn himself of the special regard for caution before convicting the accused. That the trial judge must not only warn himself but must meticulously examine the evidence proffered to see whether there were any weakness capable of endangering or rendering any contention that the accused was sufficiently recognized by the witness in this instance the PW5. He cited *Ndidi v State* (2007) 13 NWLR (Pt. 1052) 633; *R v Turbull & Ors* (1976) 3 ALL ER 549; *Ikemson v The State* (1989) 3 NWLR (pt. 110) 455 at 472. Learned counsel for the appellant went on to say that the alibi of the 7th accused was properly raised and the court ought to have taken it into consideration and caused a discrediting of PW5 as a witness. He cited *Wasari Umani v The State* (1988) 2 SC (Pt. 1) 88; *Adedeji v The State* (1971) 1 ALL NLR 75; *Onafowokan v The State* (1987) 7 SCNJ 233 at 253. He said PW5 was at best a tainted witness whose evidence should be treated with the greatest caution because of the possibility of it being fabricated to suit his purpose that PW5 is a relation of the deceased and the court did not caution itself before relying on his evidence. He

cited *Moses v State* (2006) 11 NWLR (Pt. 992) 458; *Rex v. Kofi Marfu* (1936) 3 WACA 77.

In response, Mr. Okeke learned counsel for the respondent Stated that the evidence of a single witness if believed by the court can establish a criminal case even if it is a murder charge. That it is in the light of the principle above the respondent is contending that they proved their case beyond all reasonable doubt. That the Court of Appeal was perfectly right in relying on the evidence of PW5, Godfrey Emengwu to affirm the conviction of the appellant. Mr. Okeke further Stated that for contradiction and inconsistencies in the evidence of the prosecution to vitiate the charge such must be material which is not the case here. He cited *Ejika v. State* (2003) 4 SCNJ 161 at 168; *Agbo v. State* (2006) 1 SCNJ 332; *Garko v State* (2006) 6 NWLR (pt.977) 521; *Igubele v State* (2006) 28 WRN 1 or (2006) 6 NWLR (pt. 975) 100 at 130; *Dasaya v The State* (2006) 1 SCNJ 251. For the respondent was further contended that in criminal trial, the defence must challenge all the evidence it wishes to dispute by cross examination. That is the only way to attack any evidence lawfully admitted at the trial. He cited *Okosi v The State* (1989) 1 CLRN 29 at 33; *Ogunlana v The State* (1995) 5 NWLR (Pt. 395) 266 at 285; *Omotola v The State* 37 NSCQR (pt. II) 963 at 972.

Mr. Okeke of counsel went on to submit that the mere failure of a witness to report to the police a person who designs to commit an offence or whom he had seen committing an offence does not ipso facto make him unworthy of credit to testify on behalf of the prosecution at such a trial. He referred to *Ogunlana v State* (supra); *Onyeokoro v R* (1959) SCNLR 659; *Ishola v State* (1978) 9 - 10 SC 81. He Stated further that before a previous Statement of a witness can be used to impugn the evidence of the same witness in court, that Statement must first be brought to the attention of the witness. That the PW5 properly identified the accused persons and the weapons each had. He; cited Sections 199 and 209 of the Evidence Act; *Kwaghashior v The State* (1995) 3 NWLR (pt.386) 651 at 661. Learned counsel for the respondent stated on that the prosecution did not need to call a host of witnesses to prove its case. It is within the discretion of the prosecution to call only material witnesses to prove its case. He cited *Hausa v The State* (1994) 6 NWLR (pt.358) 281; *Udo v. State* (2006) 15 NWLR (pt. 1000) 178; (1993) 6 SCNJ

217.

Mr. Okeke Stated further that where the identification is spontaneous and natural, the court would not be wrong to attach weight to it as in this case. He referred to *Otti v. The State* (1997) 7 NWLR 51; *Anyanwu v The State* (1986) 5 NWLR (Pt. 45) 612 at 633-4; *Adeyemi v. The State* (1991) 1 NWLR (pt. 170) 691 at 694. That it is not in all circumstances where with the acquittal of 7th accused, the appellant ought to have been given the same benefit of the doubt. This is because in the case in hand the appellants did not show in any way that the accused persons had a common base for their defence. He referred to *Akpan & Ors v The State* (2002) 51 WRN 1. Mr. Okeke, the learned DPP submitted that it is the law that the prosecution may rely on direct or circumstantial evidence to prove the fact of death and where the body is not discovered there must be strong and cogent circumstantial evidence both of death and of the killing of the accused. He said that is the situation in his instance. He cited *State v. Uzuagwu* (1972) 2 ECSLR (Pt 2) 429 at 434; *State v Edebor & Ors* (1975) 9 - 11 SC 69 at 76 -77; *The State v Okorie* (1982) 1 NCR 187 at 202.

Summary of the appellant's stand point are follows:

1. That PW5's evidence on identification/recognition of the appellant is doubtful, unnatural and incredible.

2. That the trial court failed to evaluate the evidence of PW5 on identification/recognition of the appellant at the locus criminis before convicting and sentencing the appellant. The Court of Appeal erroneously affirmed that conviction and sentence.

3. That PW5's evidence that on a flash of his torch light on a dark night in the jungle he was able to recognize about twelve men and what each was holding or doing in one fell swoop ought to have raised grave doubt in the mind of the trial court as to ascribe no probative value to same.

4. The quality of evidence at the end of the prosecution's case on the issue of identity or even recognition of the appellant by PW5 was very low and poor that no reasonable tribunal could be heard to convict on it.

5. PW5 is a tainted witness whose testimony should be accorded very little or no weight at all.

6. Discharging of the 7th accused who the PW5 identified as

being present at the locus criminis with the appellant and others on a plea of alibi cast serious doubt on the identification of the appellant by PW5.

7. That the fundamental aspect of the evidence of PW5 which is the cause of the delay in making statement to the police, that is the B Iyi - Ani native oath PW5 allegedly took and its eventual baneful effect is self contradictory and unrealistic.

8. Reliance placed by the trial court on the evidence of PW5 which the Court of Appeal upheld was clearly perverse and led to a C miscarriage of justice in this case.

The brief summations of the version of the respondent are as follows:

1. That it is trite law that the mere failure of a witness to report to the police a person who designs to commit an offence or D whom he had seen committing an offence does not ipso facto make him unworthy of credit should he testify on behalf of the prosecution in such trial.

2. That the fact that the accused persons did not invite the court to visit the locus in quo when the witness PW5 described how E Francis Obidike the 10th accused prepared the ground for oath taking further strengthened the fact that the evidence is not disputed.

3. That the inconsistencies alluded by the appellant in the evidence of the prosecution witnesses are not material.

4. That before any contradiction can be established between F the evidence of a witness and the Statement made previously by the witness, that statement must be brought to the attention of the witness in accordance with the provisions of section 199 and 209 of the Evidence Act.

G 5. That it is the discretion of the prosecution to call the number of witnesses it sees fit and only one witness can suffice in a given circumstances.

H 6. That it is not the law that as Stated by the appellants that since the accused persons were jointly tried on the same offence that once the benefit of doubt was given to the 7th accused it should have been extended to all the appellants.

7. That the evidence of what transpired between the native doctor and PW5 is not hearsay but something within the personal knowledge of PW5.

8. That the evidence of PW5 clearly corroborated the threat earlier made by the 1st accused that he will kill the deceased and his body would not be found.

On attack by the appellant on the conviction and sentence based on the evidence of the witness, PW5, Godfrey Emengwu, the law is well settled that the court can convict even in murder trial solely on the evidence of a witness. It is correct in this instance that there were other witnesses and the question that would naturally follow is, if the court of trial could pick and choose what evidence to utilize in the face of some contradictions and inconsistencies. Again the appellant's counsel had said court cannot so choose what to accept or not in the light of inconsistencies. It is clear from the evidence of some of the prosecution witnesses that there were inconsistencies but then the court cannot, based on such, jettison the case of the prosecution if those contradictions and inconsistencies are not material as has been shown in this case at hand. Therefore, in the face of such evidence from witnesses which on their own would not sustain a conviction when joined with such as the evidence of the PW5 who witnessed the incident and established effectively the reason for his not coming forward early enough with that evidence then the court is on solid ground to act. I am all the more strengthened in this view where the appellant was unable to challenge what the PW5 said nor rebut the matter of the oath the appellant and others placed on him not to divulge what he had witnessed and what had given him the necessary liberation to come out with the crucial information he had. See the cases of Sunday Effiong v State (1998)8 NWLR (Pt.512) 362; Alonge v I. G. P. (159) SCNLR 516; Onafowokan v State (1987) 3 NWLR (Pt. 61) 538 at 552; Garko v State (2006) 6 NWLR (pt.977) 524; Dagaya v. State (2006) 1 SCNJ 251.

It is not enough for an appellant or accused seeking to discredit the evidence of a witness just to flash the issue of his issue of his being a tainted witness just because he is related to the victim or deceased as in this case without any support to the assertion. It is for that reason that the cases of Moses v State (2006) 11 NWLR (Pt. 992) 458 and Rex v Kofi Morfu (1936) 3 WACA 77. do not apply to the case at hand. Further more, the evidence of PW5 at the trial was cogent, direct and unchallenged in cross-examination. The appellant cannot impugn the evidence of the PW5 on the basis that he said

something else or denied knowledge of what had transpired in relation to the crime in an earlier Statement to the police when he was not confronted with that previous Statement. This is even more poignant considering the full explanation rendered by the witness as to why he had held his peace earlier on account of that oath placed on him and from which he had been released by a spiritual process. The appellant did nothing to dispute or contradict all that only to fault the evidence on being late. See Sections 199 and 209 of the Evidence Act, *Kwaghashoir v State* (1995) 3 NWLR (Pt. 386) 651 at 661.

Again to be said is the matter of identity of those PW5 had seen at the scene of crime which considered fully with his other evidence was unassailable. This is because PW5 was of the same kindred with the accused persons and very well known to him and taken together with the fact of the Iyi- Ani oath the accused administered on him which fact is not disputed then the identity of the criminals as Stated by PW5 remained true. See *Anyanwu v State* (1986) 5 NWLR (Pt. 45) 612 at 633 - 4; *Adeyemi v. State* (1991) 1 NWLR (pt.170) 691 at 694.

The argument of the respondent through Mr. Okeke of counsel holds true that it is trite law that in the court of trial as in this instance the evidence of each of the accused persons must be specifically considered and the fact of the discharge and acquittal of the 7th accused would not translate automatically to the exculpation from blame of the other accused, the appellant herein inclusive. This is because as much as it is the law that where persons who are charged together for committing a crime have a common base for their defence the acceptance of the defence to the benefit of one of them should result in its acceptance for the benefit of the others. That is not the case in the case at hand since the accused persons including the appellant and 7th accused at the court of trial did not have a common based defence. Therefore nothing changed in the fortune of the appellant from the discharge of the 7th accused. I place reliance on *R. v. Ukata* (1959) FSC 27; *Obosi v State* (1965) NMLR 19; *Akpan & Ors v The State* (2002) 51 WRN 1. It must not be lost sight of that the prosecution did not call the native doctor who administered the Iyi- Ani oath on the 5th prosecution witness since the cross-examination of PW5 did not go into challenging his eye witness account and the oath administered on him. Therefore since this evi-

dence remained standing and unchallenged there was no further necessity for the prosecution to call for a back up evidence in support of evidence that can easily be taken as undisputed. Of note is that PW5's evidence lent a pillar of support to that of the threat delivered by the 1st accused/appellant that he would kill the deceased and his body would never be found. In that the mens rea or intent to kill the deceased is shown. I rely on *Bakare v the State* (1997) 3 SC 1 at 40. B Indeed, the evidence in this case is circumstantial especially so since the body was never found, however the evidence is strong, cogent and leads to the irresistible conclusion not only that the victim died C but also that the death was at the hand of the accused/appellant and others.

The irrefutable facts of the circumstances of the death of the deceased and through whose instrumentality have been proved beyond reasonable doubt. I place reliance on *State v Uzuawu* (1972) 2 D ECSLR (pt. 2) 429 at 434; *State v Edebor & Ors* (1975) 9 - 11 SC 691 *State v Okorie* (1982) 1 NCR 187 at 202; *Njoku v State* (1992) 8 NWLR (pt. 263) 714 at 723.

In conclusion therefore from the above and the better rendered reasoning in the lead judgment of my learned brother, Christopher Mitchel Chukwuma-Eneh, JSC, I dismiss this appeal while I affirm the decision of the court below in its affirmation of the judgment, conviction and sentence of the trial High Court.

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