

**SUPREME COURT OF NIGERIA**  
14TH DECEMBER, 2012. SC. 48/2011  
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-  
ENEH, M. S. MUNTAKA-COOMASSIE,  
M. D. MUHAMMAD, C. B. OGUNBIYI, JJSC**

MUSA IKARIA ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Proof - Burden of - Prosecution must prove its case beyond reasonable doubt - And quality of evidence adduced - Determines if the burden has been discharged (H1)

CRIMINAL PROCEDURE - Identification parade - Weight - Where quality of evidence arising therefrom is poor - Accused should be acquitted - Unless other evidence abounds in support (H2)

CRIMINAL PROCEDURE - Evidential burden of proof - Alibi - Burden of adducing evidence on an issue - Can be placed on either side - And where same is not discharged - The issue will be resolved against the party (H3)

ARMED ROBBERY - Proof - Ikemson v. State - Prosecution must proof beyond reasonable doubt - That appellant participated in the robbery (H4)

**FACTS**

Accused/appellant was arraigned before the High Court of Ogun State, for conspiracy to commit robbery and armed robbery contrary to Section 5(b) and punishable under Section 1(2)(a) of the Robbery and Fire Arms (Special Provisions) Act 1990 (as amended). In proof of its case at the trial, prosecution/respondent called four witnesses and tendered no admissible exhibits. Pw3 (victim of the robbery incident) told the court that she identified appellant as one of the robbers.

Appellant in his defence called one witness and also tendered no exhibits. He however raised the defence of alibi. At the end of

trial, the court without considering the defence of appellant, relied on the testimony of Pw3 in convicting appellant of armed robbery and sentencing him to death. Aggrieved, appellant appealed to the Court of Appeal, Ibadan Division. The court in its judgment affirmed appellant's conviction by the trial court but reduced the sentence to life imprisonment. Aggrieved further, appellant filed appeal at Supreme Court.

**ISSUE FOR DETERMINATION**

*“Whether the prosecutor proved its case beyond reasonable doubt to warrant the affirmation of the conviction of the appellant by the Court of Appeal.*

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

*CRIMINAL PROCEDURE - Proof - Burden of*

**1. It is trite that the law requires the respondent to prove its case against the appellant beyond reasonable doubt.**

**The quality of evidence the respondent adduces invariably determines if that burden has been discharged. Once the burden has not been discharged, concurrent findings holding otherwise, being perverse, on review on a further appeal would be interfered with and set-aside. (p. 4376 H)**

*Identification parade - Weight*

**2. The principle must be restated here that where the quality of the evidence of identification of the accused in the commission of the offence with which he is charged is poor, the accused, on the authorities, should be acquitted unless other evidence abounds in support of the identification. In the case at hand it is clear that respondent's case depends solely on the identification of the appellant as one of those who robbed PW3. The glance PW3 had of the appellant occurred under very intimidating and difficult circumstances. Respondent's evidence on the identity of the appellant as one of the robbers, from the record, is manifestly weak. The circumstances for which respondent's witnesses associate the appellant with**

***the offences he has been convicted for are doubtful and suspicious. The trial court should have applied caution in convicting the appellant.*** (p. 4378 G)

*CRIMINAL PROCEDURE - Evidential burden of proof*

***3. The burden of proving the guilt of an accused person beyond reasonable doubt is always on the prosecution. The burden never shifts being the ultimate burden. Admittedly, evidential burden in criminal cases, being the burden of introducing, adducing or producing evidence on any particular issue at the trial court could be placed on either the prosecution or the accused depending on the issue and, where the burden is not discharged the issue can be resolved against the party. In the instant case, however, appellant has discharged the evidential burden of introducing evidence of his alibi. The onus of disproving it as well as the general one of proving appellant's guilt beyond reasonable doubt remains that of the respondent. In the absence of any evidence of rebuttal of the alibi the appellant raises, the court below is wrong to have affirmed the trial court's conviction of the appellant for the offences the respondent failed to establish beyond reasonable doubt.***  
(p. 4380 E)

*ARMED ROBBERY - Proof*

***4. Finally, this Court held in Ikemson V the State (supra), a case relied upon by the trial court which decision the court below affirmed, that it is not enough for the prosecution to prove that there was armed robbery it must further establish beyond reasonable doubt that the appellant had participated in the robbery. In the instant case the respondent cannot be said to have proved appellant's participation in the robbery beyond reasonable doubt.*** (p. 4381 A)

**REPRESENTATION**

Segun Fowowe Esq., for the Appellant

Adebayo Oyagbola Esq. with O. M. Giwah Esq., for the Respondent

**CASES REFERRED TO**

- Bagudu v. State (1996) 7 NWLR (pt. 460) 279  
 Onugbogu v. State (1974) 9 SC 1  
 Chia v. State (1996) 6 NWLR (pt. 455) 465  
 Morka v. State (1998) 2 NWLR (pt. 537) 294  
 B Chukwu v. State (1996) 7 NWLR (pt. 463) 686  
 Alabi v. State (1993) 7 NWLR (pt. 307) 511  
 Orimoloye v. State (1984) NSCC 654  
 Okosi v. State (1989) NWLR (pt. 100) 642  
 C Nwabueze v. State (1988) NWLR (pt. 86) 16  
 Afolalu v. State (2010) 16 NWLR (pt. 1220) 584  
 Igwe v. State (1982) 9 SC 87  
 Ogbodu v. State (1987) 2 NWLR (pt. 54) 20  
 Archibong v. State (2004) 1 NWLR (pt. 855) 488  
 D Iyaro v. State (1988) 1 NWLR (pt. 69) 256  
 Sugh v. State (1988) 2 NWLR (pt. 77) 475

**STATUTES REFERRED TO**

- Robbery & Fire Arms (Special Provisions) Act 1990, ss. 1(2)(a), 5(b)  
 E Evidence Act, s.138

**LEAD JUDGMENT BY MUHAMMAD JSC**

- This is a further appeal against the judgment of the Ogun  
 F State High Court, hereinafter referred to as the trial court, before  
 which the appellant, Godwin Awin and others then at large were  
 tried for conspiracy to commit robbery and armed robbery contrary  
 to Section 5 (b) and punishable under Section 1 (2) (a) of the Rob-  
 bery and Fire Arms (Special Provisions) Act 1990 as amended by the  
 G Tribunal (Certain Consequential Amendments Etc) Act 1999.

- Aggrieved by his conviction and sentence by the trial court,  
 the appellant appealed to the Ibadan Division of the Appeal Court.  
 The court, hereinafter referred to as the court below, in its judgment  
 dated 28th October, 2010, affirmed appellant's conviction by the  
 H trial court but reduced the sentence imposed on him from death to  
 life imprisonment. The appeal before us, on a Notice containing two  
 grounds, arises out of appellant's dissatisfaction with the judgment of  
 the court below. Parties have filed and exchanged their briefs of argu-  
 ment. At the hearing, they adopted and relied on these briefs as

their arguments for and against the appeal and urged that the appeal be allowed or dismissed. The appellant has identified two issues in his brief for the determination of the appeal. The issues read:-

*“1. Whether the prosecutor proved its case beyond reasonable doubt to warrant the affirmation of the conviction of the appellant by the Court of Appeal.*

*2. Whether the learned justices of the Court of Appeal were right in law to hold that the testimonies of PW1 and PW2 were not hearsay and therefore inadmissible.”*

Respondent’s sole issue for the determination of the appeal which is not dissimilar to appellant’s 1st issue reads:-

*“Whether the learned justices of the Court of Appeal were wrong in law to hold that the prosecution had proved the charge of robbery against the appellant beyond all reasonable doubt.”*

It is argued in the appellant’s brief that the respondent, by Section 138 of the Evidence Act, has the onus of proving its case against the appellant beyond reasonable doubt. Reliance is placed on Bagudu V State (1996) 7 NWLR (part 460) 279; Onugbogu V State (1974) 9 SC 1; Chia v State (1996) 6 NWLR (part 455) 465 and Morka v State (1998) 2 NWLR (Part 537) 294 at 307 by learned appellant’s counsel in submitting that the respondent has not discharged the burden the law places on it. The court below, therefore, argues learned counsel, erred by affirming the wrong finding of the trial court in that regard. The evidence of PW1 and PW2 and indeed PW4, learned appellant counsel contends, are inadmissible in law and cannot form the basis of the conviction of the appellant. The testimonies of PW1 and PW2 submits learned counsel, are hearsay while the testimony of PW4 who has not been cross examined is equally unavailable to the respondent. This leaves the trial court and indeed the court below with the testimony of PW3. The finding of the court below at page 126 lines 4 - 14 fixing the appellant as a participant in the robbery is a serious error that has occasioned miscarriage of justice. The testimony of PW3, it is further argued, is incoherent not only on the vital issue of the identity of the appellant but also his presence at the scene of the crime. Such evidence being unreliable is incapable of sustaining a conviction for the grave offence of robbery. Relying on Chukwu V State (1996) 7 NWLR (Part 463) 686 at 702; Alabi V State (1993) 7 NWLR (part 307) 511 at

533; *Orimoloye V the State* (1984) NSCC 654; *Okosi V State* (1989) NWLR (part 100) 642 at 665 and *Nwabueze V the State* (1988) NWLR (part 86) 16 at 30, learned appellant's counsel urges that the sole issue the appeal raises be resolved in appellant's favour. Learned counsel to the respondent strongly supports the judgment of the court below. He refers to the findings of the trial court at pages 51 and 52 of the record and submits that the evidence that pw3 was robbed at about 9:00 pm on 1st February, 1999 and the appellant being one of the armed robbers remains uncontroverted. The court below cannot lawfully interfere with the trial court's findings from such evidence. Relying on the decision in *Afolalu v State* (2010) 16 NWLR (part 1220) 584, learned counsel argues that what is in issue here is the credibility of respondent's witnesses which in law the appellate court is not empowered to interfere with. It is entirely within the province of the trial court to appraise evidence led by the respondent and ascribe probative value to them. The lower court can only interfere where the trial court's decision is perverse. The court's finding at page 126 of the record of appeal, on the appellant's participation in the robbery is clearly attested to by respondent's witnesses except as to whether the appellant was upstairs or not when PW3 was being robbed. This court, learned counsel finally submits, does not usually interfere with concurrent findings of the two lower courts. He urges that the court keeps to this practice by further affirming the lower court's decision that has not been shown to be perverse. Learned respondent's counsel supports his submissions with the decisions in *Igwe V State* (1982) 9 SC (Reprint) 87; *Ogbodu V State* (1987) 2 NWLR (part 54) 20 at 29; *Afolalu V State* (supra) and *Archibong V State* (2004) 1 NWLR (part 855) 488 in urging that the unmeritorious appeal be dismissed.

The only issue that arises for the determination of the appeal is appellant's first issue which clearly subsumes his 2nd issue. Respondent's lone issue is similar to appellant's first too. The appeal accordingly deserves to be determined on the basis of appellant's first issue alone.

***It is trite that the law requires the respondent to prove its case against the appellant beyond reasonable doubt.*** This Court's decisions in *Onugbogu V the State* (supra) and *Morka V State* (supra) restate this principle of great antiquity. ***The quality of***

***evidence the respondent adduces invariably determines if that burden has been discharged. Once the burden has not been discharged, concurrent findings holding otherwise, being perverse, on review on a further appeal would be interfered with and set-aside.*** See *Iyaro v. State* (1988) 1 NWLR (Pt.69) 256; *Sugh V. State* (1988) 2 NWLR (pt.77) 475 and *Ekwunife V. Wayne (W.A.) Ltd* (1989) 5 NWLR (Pt.122) 422. In the instant case the respondent relied on four witnesses to establish its case. It does appear that of these witnesses only one, PW3, the victim of the offences for which the appellant is convicted, testified directly.

At page 9 line 19-21 of the record of proceedings, PW1 under cross examination stated as follows:

*“I was not there when the offence alleged was committed. I confirm that I was told what I told the court about the fact that the accused person committed the offence”.*

With the foregoing testimony, learned appellant’s counsel cannot be wrong in his submission that PW1’s evidence being hearsay is unhelpful to the respondent. See *Pharmacist Board of Nigeria V Adegbesole* (1986) 5 NWLR (Part 44) 707 and *Management Enterprises Ltd V Otunsanya* (1987) 2 NWLR (part 55) 179. Under cross examination, PW2, like PW1 testified as follows:-

*“The 1st defendant was alone when I saw him. Apart from the fact that I saw the accused running away, I was never a witness to any robbery.”*

The foregoing makes PW2’s testimony similarly worthless. The trial court, and correctly too, discountenanced, the evidence of PW4 that was untested. Now, the question to answer is whether the court below is right to have affirmed the finding of the trial court on the basis of the evidence led before it that the respondent has discharged the burden of proof the law saddles it with. Put differently, has the respondent proved its case against the appellant beyond reasonable doubt? I think not. It seems to me that the crucial issue the two lower courts failed to adequately consider is if indeed the appellant was one of the persons that robbed PW3 on the 1st of February, 1999 at her residence. It is not in doubt that neither PW1 nor PW2 witnessed the commission of the very robbery the appellant has been convicted for. They were not at the scene when the robbery took place. Whether or not the appellant was a member of the gang and

had participated in the robbery, only PW3 can testify to that fact. As rightly asked by learned appellant's counsel, is PW3's testimony devoid of doubt on this vital issue of the identity of the appellant and his participation in the robbery?

I agree with learned appellant's counsel that a careful examination of the evidence of PW3 reveals serious lacuna regarding the identity and presence of the appellant at PW3's residence where and when the robbery took place. PW3's evidence is that it was appellant's gang that robbed her on that fateful day. By her testimony, appellant was not the person who met her in the shop, pointed a gun at her and requested money from her. It is also evident from her testimony that she ceased to be composed on her being pointed a gun at by the person who approached her in the shop. She said she was "shaking" on her being pointed the gun. In the house where she was subsequently led to, it would appear, she never regained that composure. She was glaringly distressed. PW3 is ambivalent in her evidence on whether the appellant was one of the persons that went with her upstairs to retrieve some further loot. She ended up, under cross examination, stating that appellant was not one of the two that went with her upstairs to collect the remaining money she had and her jewelry. Appellant was left down stairs when the other two went upstairs with her.

Again, throughout her evidence, PW3 never described how the appellant dressed on the fateful day or the particular features that gave him out as being a member of the gang that robbed her. The robbery in her house was still ongoing when the alarm she told the court raised by PW2 forced the robbers to flee. She told the trial court that she identified the appellant as being one of those that robbed her after PW2 had raised alarm as to the presence of thieves in the vicinity and apprehended the appellant. She identified the appellant at the stake he was tied to.

***The principle must be restated here that where the quality of the evidence of identification of the accused in the commission of the offence with which he is charged is poor, the accused, on the authorities, should be acquitted unless other evidence abounds in support of the identification. In the case at hand it is clear that respondent's case depends solely on the identification of the appellant as one of those who robbed***



**PW3. The glance PW3 had of the appellant occurred under very intimidating and difficult circumstances. Respondent's evidence on the identity of the appellant as one of the robbers, from the record, is manifestly weak. The circumstances for which respondent's witnesses associate the appellant with the offences he has been convicted for are doubtful and suspicious. The trial court should have applied caution in convicting the appellant.** See *Olalekan V State* (2001) 18 NWLR (Part 746) 796; *Abudu V State* (1985) 1 NWLR (part 55); and *Ajibade V State* (1987) 1 NWLR (part 48) 205. In *Alabi v State* (1993) 7 NWLR (part 307) 511 at 537 has stated the position thus:-

*"In a case where the witness had a fleeting glance of the accused, during which he could not even identify the dress the accused was wearing, it calls for caution before the trial court could convict. It is relevant to establish how long did the witness have the accused under observation and whether the distressed condition of the witness during the commission of the crime would be an impediment to clear identification of the accused. The angle where the witness was standing during the commission of the crime, which facilitated his perception of the scene, should also be considered."*

An impartial view of the evidence before the trial court certainly induces some doubt in appellant's identification the benefit of which the court below in its affirmation of the trial court's decision denied him. In *Bozin V State* (1985) 2 NSCC 1087 at 1091 this court held:-

*"... When, as in this case, the evidence of the identity of the appellant is punctured with improbabilities and so many questions remain unanswered and unexplained, the trial court should have hesitated a lot before being satisfied and if it were in doubt, (a doubt which any impartial view of the evidence in this case should induce), it was its duty to give the benefit of that doubt to the appellant."* See also *Bashaya V State* (1998) 4 SCMJ 202 and *Chukwu V State* (1996) 7 NWLR (part 63) 686.

Furthermore, the trial court appears to have considered appellant's story unworthy of its attention. And the court below endorsed that stance. It is however very glaring from the record of appeal that appellant has totally denied being at the scene of the robbery or having had anything to do with the offences. He stated where

he was coming from his abode, the purpose of his being to Ifo and whom he was visiting on that fateful day. He neither knew PW3 nor belonged to the gang that robbed her. Appellant said he was not at PW3's house at the time of the robbery. He said he was arrested at the Ifo motor park by 6:00 pm and held by the people who accused him of the robbery he is convicted for. In this circumstance, the appellant is perfectly entitled to the alibi he raises. The respondent did not investigate appellant's assertion let alone make the outcome of such investigation available to the trial court. The respondent has a duty to investigate appellant's alibi and its failure in doing so and providing the trial court any evidence to prefer and rely on in place of appellant's version remains fatal to its case. The trial court's decision on appellant's guilt in total disregard of the alibi he raises and in the absence of any evidence of rebuttal as well as the lower court's affirmation of that decision is perverse. See *Nwosisi v State* (1976) 6 SC 109; *Odidika v state* (1977) 2 SC 21; *Njovens v State* (1975) 5 SC 17 and *Ikemson v State* (1989) 3 NWLR (Part 110) 455 at 481. The trial court found that it is appellant's burden to prove the truth of what he told the court. It cannot be!

***The burden of proving the guilt of an accused person beyond reasonable doubt is always on the prosecution. The burden never shifts being the ultimate burden. Admittedly, evidential burden in criminal cases, being the burden of introducing, adducing or producing evidence on any particular issue at the trial court could be placed on either the prosecution or the accused depending on the issue and, where the burden is not discharged the issue can be resolved against the party. In the instant case, however, appellant has discharged the evidential burden of introducing evidence of his alibi. The onus of disproving it as well as the general one of proving appellant's guilt beyond reasonable doubt remains that of the respondent. In the absence of any evidence of rebuttal of the alibi the appellant raises, the court below is wrong to have affirmed the trial court's conviction of the appellant for the offences the respondent failed to establish beyond reasonable doubt.*** See *Umani V State* (1988) 1 NWLR (Pt.70) 274 at 284; *Nwosisi v. State* (1976) 6 SC 109 and *Okosun V A.G. Bendel State* (1985) 3 NWLR (part 12) 283.

***Finally, this Court held in Ikemson V the State (supra), a case relied upon by the trial court which decision the court below affirmed, that it is not enough for the prosecution to prove that there was armed robbery it must further establish beyond reasonable doubt that the appellant had participated in the robbery. In the instant case the respondent cannot be said to have proved appellant's participation in the robbery beyond reasonable doubt.*** B

I resolve the issue raised for determination by the appellant in favour of the appellant. The appeal being meritorious is hereby allowed. The judgment of the lower court affirming the conviction of the appellant by the trial court and imposing a sentence of life imprisonment is hereby set aside. Appellant is discharged and acquitted. C

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### ONNOGHEN JSC D

I have had the benefit of reading in draft the lead judgment of my learned brother MUHAMMAD, JSC just delivered. I agree with his reasoning and conclusion that the appeal has merit and should be allowed. E

It is clear from the record that the conviction and sentence of appellant on the evidence is very much unsafe as the identification of appellant as a participant in the alleged robbery is very much in doubt, which doubt, it is settled law must be resolved in favour of appellant. Appeal is allowed and I abide by the consequential orders made in the said lead judgment. F

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### OGUNBIYI JSC G

The appeal is against the final judgment of the Court of Appeal Ibadan Division delivered on the 28th October, 2010. The accused/appellant was tried upon a two count charge of conspiracy to commit armed robbery and contrary to sections 5(b) of the Robbery and Five Arms (Special Provisions) Act 1990 and 1 (2) (a) of the same Act as amended by the Tribunal (Certain Consequential Amendment etc) Act 1999 respectively. H

In proof of its case, the prosecution called four witnesses and tendered no admissible exhibits. The appellant in his defence called

one witness and also tendered no exhibits. The trial court at the end of the day convicted the appellant of armed robbery and sentenced him to death. On appeal to the Court of Appeal same was dismissed and hence the appeal now to this court.

B As rightly submitted by the learned respondent's counsel the only issue before us is:-

*"Whether the learned Justices of the Court of Appeal were wrong in law to hold that the prosecution had proved the charge of robbery against the appellant beyond reasonable doubt."*

C The law is well established and enshrined in our judicial system that for the prosecution to secure the conviction of the accused/appellant, in the charge of this nature, it must prove the accused guilty beyond reasonable doubt. The proof must be in respect of the following three ingredients.

- D
- 1) The fact of robbery having been committed.
  - 2) The robbery was committed by use of arms.
  - 3) The accused was one of the armed robbers or the robber.

By the use of the phrase "*Proof beyond reasonable doubt*" it presupposes that all the ingredients establishing the offences must be proved to such a degree that there would be no question or stone left un-turned as to the certainty that it is the accused/appellant and none other that must have committed the act complained of. In other words, all fingers would irresistibly point towards the direction of the accused. The culpability of the appellant should not be in any shadow of doubt but a clear focus of attention. For such proof, to sustain, it must earn the credibility of witnesses' testimonies who must give a first hand account of facts which are within their personal knowledge. Any other source of information would be rated a hearsay evidence and therefore not admissible.

The burden placed on the prosecution to prove the charge against the accused/appellant never shifts and failure on the part of the prosecution to establish even one of the ingredients of the offence will lead to the discharge of the accused person. See the case of H Nweke V. State (2001) 4 NWLR (pt. 704) 588; Tanko V. State (2003) 16 NWLR (Pt. 114) 597 at 636 and Aruma V. State (1990) 66 NWLR (Pt. 153) 125. It is further relevant to also restate that the purport of section 138 of the Evidence Act is to affirm the absence of duty on the accused person to establish his innocence in a criminal charge

proffered against him. That duty squarely lies on the prosecution to establish the guilt of the accused beyond reasonable doubt. In the case of KIM V. State (1992) 4 NWLR (Pt.233) 17 for instance Nnaemeka Agu JSC (of blessed memory) in his summation said:-

*“The prosecution may still fail if the accused person does not utter a word in his defence if the prosecution fails to prove its case beyond reasonable doubt against the accused.”* See also the case of Woodmington v. DPP (1935) AC 462 and Igabele v. State (2006) 6 NWLR (pt. 975) 100.

In the case at hand the crucial evidence upon which appellant was convicted was that by PW3, the victim of the robbery. The trial court from all indications conclusively relied on her testimony as the principal witness. In view of her state of being at the time of the incident, the court needed to have exercised caution that conviction on such might not be very safe. The corroborating factor signaling a cautionary measure is especially where the accused/appellant raises a defence of alibi. The law is well settled that where an accused raises such a defence, the onus is on the prosecution to investigate for purpose of disproving same. The failure by the prosecution to do so should not work to the detriment of the appellant. It is the prosecution who has the onus of proving the accused/appellant guilty beyond reasonable doubt. That responsibility generally does not shift except in certain exceptional cases which does not arise in the case at hand. Plethora of authorities are well settled on this principle. The conviction and sentence of the appellant on the evidence of PW3 alone is very unsafe and hence the prosecution’s inability in proving the appellant’s culpability beyond reasonable doubt. The issue is therefore resolved in favour of the appellant.

My learned brother Dattijo Muhammad has adequately resolved the issue in his lead judgment and in the same vein I also allow the appeal as it is meritorious. The judgment of the lower court in affirming the conviction of the appellant by the trial court is also set aside by me in like terms as the lead judgment.