

SUPREME COURT OF NIGERIA
FRIDAY 22ND FEBRUARY, 2013. SC. 453/2010
CORAM:- W. S. N. ONNOGHEN,
C. M. CHUKWUMA-ENEH, B. RHODES-VIVOUR,
M. D. MUHAMMAD, C. B. OGUNBIYI, JJSC

EMMANUEL EGWEMI APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Interpreter - Need for - Accused who is not represented by counsel - And does not understand court's language - Must be provided with interpreter - Otherwise it will amount to breach of fair hearing (H1)

CRIMINAL PROCEDURE - Interpreter - Non provision of - Where accused is represented by counsel at trial - And there was no objection on the issue - It is futile to raise the issue on appeal (H2)

ALIBI - Plea - Conditions of - Accused must inter alia - Raise the defence at the earliest opportunity - Detailing his whereabouts - And must adduce evidence in support (H3)

EVIDENCE - Tainted witness - This is a witness with some purpose to serve by given evidence - Thus a Judge should scrupulously examine such evidence - And be slow to convict without corroboration (H4)

IDENTIFICATION PARADE - When necessary - The parade becomes necessary if there is grave doubt - As to who committed an offence - But the need does not arise in present case (H5)

EVIDENCE - Material fact - Cross examination - When witness testifies on such fact - Appellant who denies it - Should cross examine the witness - To show the contrary (H6)

JURISDICTION - Time to raise - Jurisdiction can be raised at any stage of proceedings - And in any court - Even in the Supreme Court

326 Egwemi v. State (2013) 1-2 KLR (pt. 323) 325; (2013) 13
for the first time (H7)

COURTS - Bias - Allegation of - Where a Judge is accused of bias - He is expected to disqualify himself - From hearing the case (H8)

EVIDENCE - Contradiction - Meaning - A piece of evidence contradicts another - When it affirms the opposite of what the other has stated (H9)

EVIDENCE - Contradiction - Court is only concerned with testimony on material facts - And not on peripherals that have no bearing on the substance in issue (H10)

CRIMINAL PROCEDURE - Proof beyond reasonable doubt - Joseph v. State - The phrase does not mean proof beyond all doubt - But prosecution proving guilt of accused - With compelling and conclusive evidence (H11)

MURDER - Conspiracy - Culpability - Where two or more persons conspire to kill another person - But the deed was done by one or more of them - Each of them is guilty of murder (H12)

FACTS

Accused/appellant was among an armed mob that attacked the house of one Alhaji Umoru Bamayi (deceased). Seeing the mob approaching, PW1 and PW2 ran into the bush beside the deceased's house, from where they witnessed the events that unfolded. On arrival, the mob manhandled the deceased. He was shot and bundled to a nearby river, where the assailants eventually drowned him. His wife was equally beaten. PW3 who also witnessed the attack corroborated the evidence of PW1 and PW2. Appellant cut off deceased's head and made away with it in full view of PW6.

Appellant was thus arraigned in the absence of the others (at large) before the High Court of Kogi State on a four count charge of criminal conspiracy, culpable homicide, voluntarily causing grievous hurt and mischief contrary to sections 97, 221, 245 327 of the Penal Code, respectively. Prosecution/respondent and appellant tendered their evidence at the trial. At the end, the court found appellant guilty

of counts 1, 2 and 4. Count 3 was abandoned by respondent. He was sentenced to death by hanging. He appealed to the Court of Appeal Abuja Division raising inter alia the defence of alibi and that PW1, PW2, PW3 and PW6 are tainted witnesses. The court dismissed the appeal and affirmed the sentence and conviction made by the trial court. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in relying on the precis of the Statement of the appellant tendered and admitted as exhibit YY to hold that the appellant did not give the kind of details of the alibi which could have demolished the accusations on him of having committed the crimes for which he was charged, convicted and sentenced.

2. Whether the Court of Appeal was right in upholding the rejection of the defence of Alibi put forward by the appellant.

3. Whether the learned justices of the Court of Appeal were not in error when they held that the prosecution proved its case beyond reasonable doubt notwithstanding the material contradictions in the evidence of the prosecution witnesses.

4. Whether PW1, PW2, PW3 and PW6 were not tainted witnesses with their own interest to serve.

5. Whether the Court of Appeal was right in holding that the appellant was sufficiently identified having regard to the evidence of identification before the court.

6. Whether the learned trial judge did not err in law in assuming jurisdiction and entertaining the charge of Criminal Conspiracy culpable homicide punishable with death and mischief against the appellant.

HELD (Unanimously dismissing the appeal per

RHODES-VIVOUR JSC)

CRIMINAL PROCEDURE - Interpreter - Need for

1. Section 36 (6)(a) of the Constitution applies to trials, and it is to the contents of an accused person's statement. An accused person who does not understand the language of the court, and is not represented by counsel must be provided

with an interpreter. Failure to provide an interpreter would amount to a clear breach of his right to fair hearing and may render the trial a nullity. (p. 339 A)

CRIMINAL PROCEDURE - Interpreter - Non provision of

- B 2. Where accused person is represented by counsel at trial and there was no objection on the issue it would amount to a futile exercise to raise it on appeal.** (p. 339 B)

ALIBI - Plea - Conditions of

- C 3. When an accused person raises the defence of alibi what he is saying is that when the offence for which I am charged was committed I was elsewhere.**

D 1. The defence of alibi must be properly put at the earliest opportunity by the accused person and this would be when he has the opportunity to make his statement to the Police. It must be detailed on where he was on the date in question and who he was with. It would then be the duty of the prosecution (the investigating police officer) to investigate it. Failure to
E investigate properly may cast some doubt on the probability of the prosecution's case.

F 2. The accused person is required to raise the defence of alibi and adduce evidence in support. The burden of proving an alibi is on the prosecution and not on the accused person.

3. A defence of alibi fails when the prosecution is able to show that the accused person was at the scene of crime when the offence was committed.

- G 4. Where an alibi is raised for the first time during trial the prosecution is expected to rely on its witnesses to show that the alibi is untrue, since at this stage the alibi cannot be investigated.** (p. 339 D)

H EVIDENCE - Tainted witness

4. A tainted witness may be an accomplice, but he is a witness who obviously has some purpose of his own to serve by given evidence. A judge should scrupulously examine such evidence and be slow in convicting without corroboration, although he

may convict without corroboration depending on the circumstances.

PW1 and PW2 are children/close relations of the deceased. PW3 and PW5 work on the deceased's farm. PW2 is a tractor driver, he also works on the farm for the appellant. PW1, PW2, PW3 and PW6 are not tainted witnesses as it was not shown that their testimony which they gave, they had some purpose of their own to serve. The fact that PW1 and PW2 were related to the deceased does not mean that they were not competent to testify for the prosecution. It was not shown that they were biased. Their evidence together with the evidence of PW3 and PW6 were those of truthful eyewitnesses. There was thus no miscarriage of justice. A claim that evidence of PW1, PW2, PW3 and PW5 was untruthful can only be sustained after cross-examination. After cross-examination their testimony was unshaken. They, to my mind had no interest whatsoever to serve. They told the truth as regards what they saw on 29/11/98. They are not tainted witnesses. (p. 341 E)

IDENTIFICATION PARADE - When necessary

5. It is also the case of the appellant that this is a case of mistaken identity as all the while he was identified as Emmanuel Nnoloka and not his correct name Emmanuel Egwemi. His case is that the wrong person stood trial and was convicted. Before I address this issue on identity I must say straightaway that an identification parade becomes necessary if there is grave doubt as to who committed the offence. In this case there is no need for an identification parade. I am satisfied that Emmanuel Nnoloka and Emmanuel Egwemi are one and the same person, the appellant, furthermore PW1, PW2, PW3 and PW6 are eyewitnesses. They knew the appellant before the incident. They gave clear compelling evidence of the role played by the appellant in the murder of the deceased. PW6 actually saw the appellant slash the throat of the deceased and made away with the head. In the light of overwhelming evidence the identity of the appellant was never in doubt. He was correctly identified as one of the mob who

killed Alhaji Umoru Bamayi on 29/11/98. (pp. 342 F/343 F)

EVIDENCE - Material fact - Cross examination

6. During the course of investigation PW5 Gbenileke Agoi, a crime detective discovered that the appellant was also called Emmanuel Nnaloka.

PW5 was not cross-examined on this material fact. That is whether it is true that the appellant is also Emmanuel Nnaloka. It must be elementary now that when a witness testifies on a material fact in controversy (in this case whether the appellant is also called Nnaloka) the appellant who denies it should cross-examine the witness to show the contrary. Where this is not done the court would be of liberty to take his silence as acceptance that he does not dispute the fact in the absence of cross-examination. (p. 343 B)

JURISDICTION - Time to raise

7. Jurisdiction can be raised at any stage of proceedings and in any court even in the Supreme Court for the first time. (p. 344 D)

COURTS - Bias - Allegation of

8. Where a judge is accused of bias or there is an allegation of bias the judge is expected to disqualify himself from hearing the case. This would fall with (1) above. Apart from the briefs of counsel judges of appeal are to restrict themselves only to the Record of Appeal. Nowhere in the Record of Appeal can it be seen that the learned trial judge in this case presided over a land matter involving the parties. In the absence of such a finding an allegation that the learned trial judge was biased is speculative in the extreme and clearly unfounded. The issue of bias crumbles like a pack of cards. (p. 344 H)

EVIDENCE - Contradiction - Meaning

9. Now, a piece of evidence contradicts another when it affirms the opposite of what that other evidence has stated, not when there is just a minor discrepancy between them. Two pieces of evidence contradicts one another when they are by

themselves in-consistent. A discrepancy may occur when a piece of evidence stops short of or contains a little more than, what the other evidence says or contains some differences in details. (p. 346 A)

EVIDENCE - Contradiction

10. When two or more persons are called as witnesses to say what they saw on a particular day there are bound to be discrepancies in their testimonies. The court is only concerned with testimony on material facts and not on peripherals that have no bearing on the substance in issue. The material facts in this case are:

- 1. When was Alhaji Umoru Bomoyi killed?**
- 2. How was he killed?**
- 3. Who killed him?**

It is only if there are contradictions in the testimony of the prosecution witnesses on the above that grave doubt would be cast on the prosecution's case.

I fail to see any contradiction in the evidence of PW1, PW2 and PW3, on how the deceased was beaten up on 29/11/98. The evidence of PW5 on how the deceased was killed is on its own and it is true. (p. 346 B)

CRIMINAL PROCEDURE - Proof beyond reasonable doubt

11. In Joseph v. State (2011) 16 NWLR (pt. 1273) 226, I explained the mandatory requirement of proof beyond reasonable doubt as provided by section 138 (1) of the Evidence Act thus:

"Proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It means the prosecution establishing the guilt of the accused person with compelling and conclusive evidence. It means a degree of compulsion which is consistent with a high degree of probability. Proof beyond reasonable doubt is not achieved by the prosecution calling several witnesses to testify. The court is only interested in the testimony of a quality witness, so long as the charge is not one that needs corroborations."

There were no contradictions in the prosecution's case

worth considering. Consequently the case of the prosecution (respondent) is indeed unassailable. Proof beyond reasonable doubt was easily attained. Both courts below were correct to so find. (p. 346 H)

B MURDER - Conspiracy - Culpability

12. The facts of this case brings into focus the long settled position of the law that where two or more persons form a common intention to kill another person and in furtherance of that intention one or more of them struck the victim with a machete from which death results, each one of them is guilty of murder punishable with death and its does not matter who actually struck the deadly blow. (p. 347 D)

D NOTABLE POINTS OF INTEREST

RHODES-VIVOURE JSC

1. Competence of court

In Madukolu & ors v. Nkemdilim 1962 2 NSCC p.374 some observations on jurisdiction and the competence of a court were made by the Supreme Court. The court said that: A court is competent when.

1. It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another; and
2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and
3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. (p. 344 D)

2. Bias – Meaning of

Bias means anything which tends or may be regarded as tending to cause a judge to decide a case otherwise than on the evidence. (p. 344 G)

REPRESENTATION

C. I. Enweluzo Esq., for the Appellant

J. A. Abrahams Esq. (Hon. A-G of Kogi State) with P. A. Alfa (DPP) and H. E. Yusuf (DDPP) Kogi State, for the Respondent

CASES REFERRED TO

Queen v. Wilcox (1961) 2 SCNLR 296	
State v. Okoro (1964) 1 ALL NLR 423	B
Onyegbu v. State (1995) 4 NWLR (pt. 391) 510	
Adele v. State (1995) 2 NWLR (pt. 377) 269	
Ifeanyi Chukwu v. State (1996) 7 NWLR (pt. 463) 686	
Ukwunenyi v. State (1989) 7 SCNJ 34	C
Ikono v. State (1973) 5 SC 231	
Njovens v. State (1973) SC 11	
Onyegbo v. State (1995) 4 NWLR (pt. 391) 510	
Ogunlana v. State (1995) 5 SCNJ 189	
Ishola v. State (1978) 11 NSCC 499	D
Ogunlana v. State (1995) 5 NWLR (pt. 395) 26	
Azeez Okoro v. State (1998) 14 NWLR (pt. 584) 181	
Orisakwe v. State (2004) 12 NWLR (pt. 887) 258	
Anyanwu v. State (1986) 5 NWLR (pt. 43) 612	
Nwokoro v. Onuma (1990) 3 NWLR (pt. 136) 22	E

STATUTES REFERRED TO

Penal Code, ss. 97, 221, 245, 327	
Constitution of Federal Republic of Nigeria 1999, s. 36(6)(a)	F

BOOK REFERRED TO

Jowitt's Dictionary of English Law 2nd Edn.

LEAD JUDGMENT BY RHODES-VIVOUR JSC G

The appellant as accused person was charged along with eight other accused persons who did not stand trial.

The charge against the appellant read:

1ST HEAD OF CHARGE

That you Emmanuel Egwemi and others presently of large, H namely David Nwadike, Boyi Nyekwewu, Raphael Boyi, Joel Boyi, Udakor Uchegwe, Thomas Anayi, Edogo Nnaye and Okolo Achemoye presently standing trial in this honourable court, on or about the 29th day of November 1998 at Akumaji in Ibaji Local Government

Area of Kogi State, agreed to do an illegal act to wit, invade the home of one Alhaji Umoru Bamayi, caused destruction to his properties and that of his wives and that of his children, beaten (sic) up his wife and eventually ended up by killing the said Alhaji Umoru Bamayi and that the same acts were done in pursuance of the agreement
 B and you thereby committed an offence punishable under section 97 of the penal Code.

2ND HEAD OF CHARGE

That you Emmanuel Egwemi and others presently of large,
 C namely David Nwadike, Boyi Nyekwewu, Raphael Boyi, Joel Boyi, Udolor Uchegwe, Thomas Anayi, Edogo Nnaye and Okolo Achemoye presently standing trial in this honourable court, on or about the 29th day of November 1998 at Akumaji in Ibaji Local Government Area of Kogi State caused the death of Alhaji Umoru of Okumaji Ibaji
 D by doing an act to wit: by drowning and cutting off his head with the knowledge or had reason to know that death would be the probable consequence of your act and you thereby committed an offence punishable under section 221 of the penal Code.

3RD HEAD OF CHARGE

E That you Emmanuel Egwemi and others presently of large, namely David Nwadike, Boyi Nyekwewu, Raphael Boyi, Joel Boyi, Udolor Uchegwe, Thomas Anayi, Edogo Nnaye and Okolo Achemoye presently standing trial in this honourable court, on or about the 29th day of November 1998 of Akumaji in Ibaji Local Government
 F Area of Kogi State caused bodily pains to Madam Ramatu Umoru by beating her to a pulp leading to her hospitalization and you thereby committed an offence punishable under section 245 of the Penal Code.

G 4TH HEAD OF CHARGE

That you Emmanuel Egwemi and others presently of large, namely David Nwadike, Boyi Nyekwewu, Raphael Boyi, Joel Boyi, Udolor Uchegwe, Thomas Anayi, Edodo Nnaji and Okolo Achemoye presently standing trial in this honourable court, on or about the
 H 29th day of November 1998 of Akumaji in Ibaji Local Government Area of Kogi State, caused destruction to the properties of Alhaji Umoru Bamayi his wives and children and you thereby committed an offence punishable under section 327 of the Penal Code.

The 1st head of charge is criminal conspiracy contrary to sec-

tion 97 of the Penal Code.

The 2nd head of charge is culpable homicide contrary to section 221 of the Penal Code.

The 3rd head of charge is voluntarily causing grievous hurt contrary to section 245 of the Penal Code.

The 4th head of charge is Mischief contrary to section 327 of the penal Code. B

Trial commenced on the 16th day of July 2003 before on Anyiogba High Court in Kogi State. S.T. Hussaini, J presided. The appellant/accused person entered not guilty pleas to the four counts preferred against him. The prosecution called seven witnesses. The accused person gave evidence. He called two witnesses. Documents which included the appellant's statement were admitted as exhibits. In a well considered judgment delivered on the 16th day of December 2004 the learned trial judge found the accused person guilty of counts 1st, 2nd and 4th (the 3rd count was abandoned by the prosecution) in these words: C

"The accused person set out along with others whose names appear in evidence on a mission ostensibly to annihilate and wipe out Umoru Bamayi from the surface of the earth." E

And so they marched to his house and caught him off-guard. They beat him to a state of plump (sic). That was at Okumaji.

They were not done yet. He was taken away in a most humiliating manner his hands were tied behind his back. He was taken to the riverside where Umoru Bamayi life was snuffed out of him. It was most brutish and mindless of them. There is nothing on record that can justify this hideous act. I hold that the prosecution has proved their case beyond reasonable doubt." F

And so the appellant was sentenced to death by hanging. Dissatisfied he lodged an appeal. The appeal was heard by the Court of Appeal, Abuja Division. That court affirmed the judgment of the trial court and observed in the concluding paragraph of the judgment thus: G

"In conclusion I have not seen anything upon which I can disturb the findings, decision, conviction and sentence on the appellant and so I dismiss this appeal which lacks merit. I uphold the decision, conviction and sentence of the court below." H

This appeal is against that judgment. In accordance with Rules

of this court briefs were filed and exchanged by counsel. Learned counsel for the appellant filed an appellant's brief on the 24th day of January 2011 and a Reply brief on the 1st of April 2011. Learned counsel for the respondent filed the respondent's brief on the 8th of March 2011. Learned counsel for the appellant formulated six issues

B for determination. They are:

1. Whether the Court of Appeal was right in relying on the precis of the Statement of the appellant tendered and admitted as exhibit YY to hold that the appellant did not give the kind of details of the alibi which could have demolished the accusations on him of C having committed the crimes for which he was charged, convicted and sentenced.

2. Whether the Court of Appeal was right in upholding the rejection of the defence of Alibi put forward by the appellant.

D 3. Whether the learned justices of the Court of Appeal were not in error when they held that the prosecution proved its case beyond reasonable doubt notwithstanding the material contradictions in the evidence of the prosecution witnesses.

E 4. Whether PW1, PW2, PW3 and PW6 were not tainted witnesses with their own interest to serve.

5. Whether the Court of Appeal was right in holding that the appellant was sufficiently identified having regard to the evidence of identification before the court.

F 6. Whether the learned trial judge did not err in law in assuming jurisdiction and entertaining the charge of Criminal Conspiracy culpable homicide punishable with death and mischief against the appellant.

G On his part learned counsel for the respondent formulated five issues for determination. They are:

1. Whether there were material contradictions in the evidence of the prosecution's case such that the prosecution could not be said to have proved the charges against the appellant beyond reasonable doubt.

H 2. Whether PW1, PW2, PW3 and PW6 were tainted witnesses with their own interest to serve.

3. Whether the Court of Appeal was right to hold that based on the evidence of identification before the lower court, the appellant has been properly and sufficiently identified by the prosecution

witnesses.

4. Whether the learned justices of the Court of Appeal properly considered and rejected the appellant's plea of Alibi.

5. Whether the learned trial judge rightly assumed jurisdiction over the charge of murder and other offences against the appellant.

An examination of issues formulated by counsel reveals they ask the same questions. I would in the circumstances address the issues formulated by the appellant to resolves this appeal. They shall be addressed in no particular order. B

At the hearing of the appeal on the 29th of November 2012 learned counsel for the appellant, C.I. Enweluzo Esq. adopted the appellant brief filed on 24/1/11 and reply brief filed on 1/4/11. He urged this court to allow the appeal. Learned counsel for the respondent Joe Abrahams Esq adopted the respondent brief filed on 8/3/11. He urged on us to dismiss the appeal. C D

THE FACTS

On the 29th day of November 1998, a mob armed with dangerous weapons to wit: cutlasses, knives, guns set out for the house of Alhaji Umoru Bamayi (deceased). The mob was made up of several persons and the appellant was one of them. The mob came from Itoduma village. Alhaji Umoru Bamayi lived in Okumayi. Both villages are in Kogi State. Seeing the mob approaching PW1 and PW2, children/close relations of Alhaji Umoru Bamayi ran into the bush beside their fathers' house where from their vantage position they saw events unfold. PW3 in the compound beside Alhaji Umoru Bamayi's house corroborated the testimony of PW1 and PW2 as he also saw the attack. On arrival the mob beat up Alhaji Umoru Bamayi so bad. He was shot, his hands were tied, then he was bundled off to a nearby river. His wife who pleaded with the mob to spare her husband's life suffered a similar experience. She was badly beaten. At the river the mob submerged his body and drowned him, he was brought up. E F G

The appellant cut off his head and made away with it in full view of PW6. This was indeed a brutal and savage attack better imagined, but it was real. It happened. H

Issues 1 and 2 would be taken together since they are on Alibi. I hereby reproduce both issues.

1. Whether the Court of Appeal was right in relying on the

precis of the statement of the appellant tendered and admitted as exhibit YY to hold that the appellant did not give the kind of details of the alibi which could have demolished the accusations on him of having committed the crimes for which he was charged, convicted and sentenced.

B 2. Whether the Court of Appeal was right in upholding the rejection of the defence and Alibi put forward by the appellant.

Learned counsel for the appellant observed that there was nothing in exhibit YY1, the statement of the appellant to show that there was compliance with Section 36(6) (a) of the Constitution. C Relying on *Queen v. Wilcox* 1961 2 SCNLR 296, *State v. Okoro* 1964 1 ALL NLR P423, *Onyegbu v. State* 1995 4 NWLR pt.391 p. 510. He submitted that in the absence of compliance exhibit YY1 is unconstitutional, worthless, null and void. On Alibi learned counsel D submitted that the investigating police officers failed to investigate the appellants defence of Alibi and both the learned trial judge and the Court of Appeal were wrong to reject it. Relying on *Fatai Adele v. State* 1995 2 NWLR pt.377 p.269, *Ifeanyi Chukwu v. State* 1996 7 NWLR pt.463 p.686.

E He submitted that the police has a duty to strictly investigate an alibi in order to approve or disprove it, but in this case the Police failed woefully to investigate it. He urged this court to resolve this issue in favour of the appellant. Learned counsel for the respondent F observed that the alibi set up by the appellant was by its very nature incapable of investigation because of its improbability of the facts and in such a case it will not be necessary to investigate. Relying on *Ukwunenyi v. State* 1989 7 SCNJ p.34, *Udoebre v. State* 6 NSCQR p. 755 at p.770.

G He submitted that the appellant failed to discharge the evidential burden on him in setting up his defence of alibi, contending that issue of alibi is tenuous, an afterthought. He urged this court to dismiss this appeal and affirm the judgment of the Court of Appeal. Learned counsel for the appellant complains that there was nothing H in exhibit YY1 to show compliance with the provisions of section 35 (6)(a) of the Constitution. It states that:

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

(a) be informed promptly in the language that he understands

and in detail of the nature of the offence.”

Section 36 (6)(a) of the Constitution applies to trials, and it is to the contents of an accused person’s statement. An accused person who does not understand the language of the court, and is not represented by counsel must be provided with an interpreter. Failure to provide an interpreter would amount to a clear breach of his right to fair hearing and may render the trial a nullity. Where accused person is represented by counsel at trial and there was no objection on the issue it would amount to a futile exercise to raise it on appeal. See Lockman v. State 1972 ALL NLR P.498, State v. Gwonto 1983 1 SCNLR P.142, Madu v. State 1997 1 NWLR pt. 483 p.386. B
C

There is nothing in the Constitution which makes exhibit YY1 unconstitutional and if there was the fact that there was no complaint about exhibit YY1 during trial and in the Court of Appeal is indicative of the fact, that, that threshold had been well and truly passed. Exhibit YY1 is good in Law.

1. ALIBI

When an accused person raises the defence of alibi what he is saying is that when the offence for which I am charged was committed I was elsewhere. E

1. The defence of alibi must be properly put at the earliest opportunity by the accused person and this would be when he has the opportunity to make his statement to the Police. It must be detailed on where he was on the date in question and who he was with. It would then be the duty of the prosecution (the investigating police officer) to investigate it. Failure to investigate properly may cast some doubt on the probability of the prosecution’s case. F
G

2. The accused person is required to raise the defence of alibi and adduce evidence in support. The burden of proving an alibi is on the prosecution and not on the accused person.

3. A defence of alibi fails when the prosecution is able to show that the accused person was at the scene of crime when the offence was committed. H

4. Where an alibi is raised for the first time during trial the prosecution is expected to rely on its witnesses to show

that the alibi is untrue, since at this stage the alibi cannot be investigated. See Adedeji v. State 1 ALL NLR p. 75, Ikono v. State 1973 5 SC p. 231, Njovens v. State 1973 SC p.11, Onyegbo v. State 1995 4 NWLR pt. 391 p. 510.

The offences for which the appellant was charged were committed on the 29th day of November 1998 at Akumaji in Ibaji Local Government Area of Kogi State. The alibi raised by the appellant was that between 1996 and 1999 he was at Bacita, and on 29/11/98 the day the offence were committed he was at Bacita. This testimony was corroborated by DW1, Christopher Eguche. After examining the statement of the appellant the Court of Appeal found that:

“...the defence of alibi cannot be considered in isolation from the evidence of participation in the crime charged whereas in this case the evidence of the prosecution witnesses has fixed the accused person at the scene of crime the alibi raised by him has been effectively demolished...”

PW1, PW2, PW3 and PW6 are eyewitnesses to the part played by the appellant in the death of Alhaji Umoru Bamayi on the 29th of November 1998. PW1 was not cross-examined on his testimony that he saw the appellant among the mob that attacked and beat up the deceased on 29/11/98. PW2, PW3 and PW5 were cross-examined on this issue but they remained un-shaken under cross-examination.

Their evidence clearly fixes the appellant at the scene of the crime and the alibi fades into insignificance. With such overwhelming evidence the alibi is worthless and is clearly an afterthought. See Njovens v. State 1973 SC 11, Onuchukwu v. State 1998 4 SCNJ 36. The defence of alibi is worthless. This issue is resolved against the appellant.

2. WHETHER PW1, PW2, PW3 AND PW6 ARE TAINTED WITNESSES.

Learned counsel for the appellant observed that the learned trial judge ought to have treated evidence of PW1 and PW2 with a high degree of circumspect, because they declared their unhappiness with Itoduma people, contending that they are tainted witnesses. He submitted that evidence of PW1, PW2, PW3 and PW6 demonstrated a complete lack of truthfulness and reliance on it by both courts below occasioned a gross miscarriage of justice to the appellant. Reli-

ance was placed on Mbenu & anor v. State 1988 3 NWLR pt.84 p.615. He urged this court to resolve this case in favour of the appellant.

Learned counsel for the respondent observed that there was no evidence before the lower court to show that PW1, PW2, PW3 and PW6 had interest to serve in giving evidence against the appellant. He submitted that taking all the circumstances and facts of the case together the said witnesses cannot be regarded as tainted witnesses. Relying on Ogunlana v. State 1995 5 SCNJ p.189. He urged on this court to resolve this issue in favour of the respondent.

On this issue this is what the Court of Appeal had to say:

“...The appellant’s grouse in the evidence of PW1, PW2, PW3 and PW6 just because they are relations of the deceased and so categorized as tainted witnesses account for which there should be corroboration, failing which the evidence would be disregarded cannot be supported either by law or in the usual course of human life or the evidence before the court. It is to be stated without difficulty that although the prosecution needs not call a host of witnesses on the same point in issue and if there is a witness whose evidence will settle it one way or the other, that witness ought to be called even if that witness is a relation... This issue is resolved in favour of the Respondent.”

A tainted witness may be an accomplice, but he is a witness who obviously has some purpose of his own to serve by given evidence. A judge should scrupulously examine such evidence and be slow in convicting without corroboration, although he may convict without corroboration depending on the circumstances. See Ishola v. State (1978) 11 NSCC 499, Ogunlana v. State (1995) 5 NWLR (pt. 395) 26, Azeez Okoro v. State (1998) 14 NWLR (pt. 584) 181, Orisakwe v. State (2004) 12 NWLR (pt. 887) 258.

PW1 and PW2 are children/close relations of the deceased. PW3 and PW5 work on the deceased’s farm. PW2 is a tractor driver, he also works on the farm for the appellant. PW1, PW2, PW3 and PW6 are not tainted witnesses as it was not shown that their testimony which they gave, they had some purpose of their own to serve. The fact that PW1 and PW2 were related to the deceased does not mean that they were

not competent to testify for the prosecution. It was not shown that they were biased. Their evidence together with the evidence of PW3 and PW6 were those of truthful eyewitnesses. There was thus no miscarriage of justice. A claim that evidence of PW1, PW2, PW3 and PW5 was untruthful can only be
 B **sustained after cross-examination. After cross-examination their testimony was unshaken. They, to my mind had no interest whatsoever to serve. They told the truth as regards what they saw on 29/11/98. They are not tainted witnesses.**

C 3. IDENTIFICATION OF THE APPELLANT

Learned counsel for the appellant observed that the identity of the appellant is in doubt notwithstanding that evidence of PW1, PW2, PW3 and PW6 fixed appellant at scene of the crime. He submitted that failure to call Madam Ramatu Bamaïyi, the wife of the deceased
 D who was also beaten up on the day in question, Chief John Okolo, and at least a neighbour of the deceased to corroborate the evidence of PW1, PW2, PW3 and PW6 was fatal to the prosecution's case. Relying on Anyanwu v. State (1986) 5 NWLR pt.43 p.612. He submitted that for the identification of the appellant to be of any weight
 E it should be supported by some other facts. He urged on us to resolve this ground as a fundamental basis for allowing this appeal.

Learned counsel for the respondent observed that PW1, PW2, PW3 and PW6 knew the appellant very well before the incident. He submitted that in the face of overwhelming evidence the learned counsel
 F for the appellant's argument on this issue is misconceived. He urged that this issue be resolved in favour of the respondent.

It is also the case of the appellant that this is a case of mistaken identity as all the while he was identified as Emmanuel
 G **Nnoloka and not his correct name Emmanuel Egwemi. His case is that the wrong person stood trial and was convicted. Before I address this issue on identity I must say straightaway that an identification parade becomes necessary if there is grave doubt as to who committed the offence. In this case**
 H **there is no need for an identification parade.** On this issue the Court of Appeal said:

"...Indeed the findings and conclusions of the learned trial judge are borne out from the evidence of these witnesses PW1, PW2, PW3 and PW6 whose identification and versions of what they saw flowed

naturally from the events as narrated and so I see no reason to deviate from the stand of the learned trial judge. Also not impressive is the attempt by the appellant to say the person to be arrested was Emmanuel Nnaloka different from himself Emmanuel Egwemi. There is however enough in evidence and finding of the trial judge upon which it is safe to say Emmanuel Nnaloka and Emmanuel Egwemi are one and the same. The two names used together in the past or separately..."

I agree with the above reasoning. **During the course of investigation PW5 Gbenileke Agoi, a crime detective discovered that the appellant was also called Emmanuel Nnaloka.** He said on oath. (See page 29 of the Record of Appeal)

"...with all the investigation I conducted I was able to discover that the accused person is the bearer of "Nnaloka" the name specified on the bench warrant issued at Idoh High Court. I was able to discover that denying this name was an avenue for his escape..."

PW5 was not cross-examined on this material fact. That is whether it is true that the appellant is also Emmanuel Nnaloka. It must be elementary now that when a witness testifies on a material fact in controversy (in this case whether the appellant is also called Nnaloka) the appellant who denies it should cross-examine the witness to show the contrary. Where this is not done the court would be of liberty to take his silence as acceptance that he does not dispute the fact in the absence of cross-examination.

I am satisfied that Emmanuel Nnaloka and Emmanuel Egwemi are one and the same person, the appellant, furthermore PW1, PW2, PW3 and PW6 are eyewitnesses. They knew the appellant before the incident. They gave clear compelling evidence of the role played by the appellant in the murder of the deceased. PW6 actually saw the appellant slash the throat of the deceased and made away with the head. In the light of overwhelming evidence the identity of the appellant was never in doubt. He was correctly identified as one of the mob who killed Alhaji Umoru Bamayi on 29/11/98.

4. JURISDICTION

Learned counsel for the appellant observed that the learned trial judge presided over Suit No: ID/26A/97 between Chief John

Okolo and U. Ubaje and so had knowledge of the facts of the land dispute that led to the killing of the deceased. He argued that the learned trial judge ought to have declined jurisdiction on the ground of bias. Reliance was placed on *Oyedeji v. Akinyele* (2001) FWLR (pt. 77) 790. He urged this court to hold that the learned trial judge
B wrongly assumed jurisdiction to entertain the charges.

Responding learned counsel for the respondent observed that the learned trial judge sat over a land matter involving nominal parties to this criminal charge/s and decided in favour of the complainant is not borne out by the Records. He observed that DW2 testified
C that a land dispute was decided by Grade 1 Area Court Idah (Suit No. CV/292/82.) He submitted that the issue is spurious, speculative and frivolous, contending that bias has not been proved. He urged this court to resolve this issue in favour of the respondent.

Jurisdiction can be raised at any stage of proceedings and in any court even in the Supreme Court for the first time.
D See *Usman Dan Fodio University V. Kraus Thompson Organisation Ltd.* 2001 15 NWLR pt. 736 p. 305.

In *Madukolu & ors v. Nkemdilim* 1962 2 NSCC p.374 some
E observations on jurisdiction and the competence of a court were made by the Supreme Court. The court said that: A court is competent when.

1. It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified
F for one reason or another; and

2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.
G

Bias means anything which tends or may be regarded as tending to cause a judge to decide a case otherwise than on the evidence.

See *Jowitt's Dictionary of English Law* 2nd Edition, *Nwokoro v. Onuma* (1990) 3 NWLR (pt. 136) 22, *Azuokwu v. Nwakanma* (2005) 11 NWLR (pt. 937) 537.
H

Where a judge is accused of bias or there is an allegation of bias the judge is expected to disqualify himself from

hearing the case. This would fall with (1) above. Apart from the briefs of counsel judges of appeal are to restrict themselves only to the Record of Appeal. Nowhere in the Record of Appeal can it be seen that the learned trial judge in this case presided over a land matter involving the parties. In the absence of such a finding an allegation that the learned trial judge was biased is speculative in the extreme and clearly unfounded. The issue of bias crumbles like a pack of cards.

4. MATERIAL CONTRADICTIONS IN THE PROSECUTION CASE AND PROOF BEYOND REASONABLE DOUBT.

Learned counsel for the appellant observed that the Court of Appeal erred in law in upholding the judgment of the trial court convicting the appellant despite the seeming irreconcilable and inconsistent evidence of PW1, PW2, PW3 and PW6. Reliance was placed on *Obidike v. State* (2001) 7 NWLR Pt.743 p.601; *Ahmed v. State* 2001 8 NWLR (Pt.746) p.622.

Responding learned counsel for the respondent submitted that the so-called contradictions are not material. Reliance was placed on *Esangbedo v. State* 1989 7 SCNJ p.1, *Agbo v. State* 2006 6 NWLR Pt.977 p.545. Dealing with the issue of contradictions Peter-Odili JCA (as she then was) said:

“...the learned trial judge had found that PW1 and PW2 were or variance in their account of the place they went to hide as one called it BUSH and the other called it FOREST. Clearly this is an area of semantics and cannot be said to be a material difference since in the normal cause of grammatical usage persons have been known to ascribe bush to a forest and vice versa. Also as the trial judge found not to be material in the evidence is the differences in the account as to the place of birth of PW1. I am of the same mind as the trial judge in his attitude to these differences which are in my view minor and not sufficient to either render the witnesses unreliable or their evidence of such as would create the doubt that would make it be said that the prosecution failed to prove its case in a criminal trial beyond reasonable doubt. It is in the light that I find this issue in favour of the respondent...”

And with the above reasoning the Court of Appeal found that there were no contradictions in the prosecution's case worth considering.

Now, a piece of evidence contradicts another when it affirms the opposite of what that other evidence has stated, not when there is just a minor discrepancy between them. Two pieces of evidence contradicts one another when they are by themselves in-consistent. A discrepancy may occur when a
 B ***piece of evidence stops short of or contains a little more than, what the other evidence says or contains some differences in details.*** See *Gabriel v. State* 1989 5 NWLR pt.122 p.460.

When two or more persons are called as witnesses to
 C ***say what they saw on a particular day there are bound to be discrepancies in their testimonies. The court is only concerned with testimony on material facts and not on peripherals that have no bearing on the substance in issue. The material facts in this case are:***

- D
- 1. When was Alhaji Umoru Bomoyi killed?***
 - 2. How was he killed?***
 - 3. Who killed him?***

It is only if there are contradictions in the testimony of the prosecution witnesses on the above that grave doubt would
 E ***be cast on the prosecution's case.***

PW1 and PW2 ran into the bush beside the deceased's house on 29/1/98 when they saw a well armed mob approaching the deceased's house. The appellant was one of those who made up the mob. The deceased was badly beaten up, shot and taken away on a
 F stretcher with his hands tied. PW3 who of the time was in the compound beside the deceased's house saw the horrific attack. His testimony corroborated the testimony of PW1 and PW2. The deceased was taken to a nearby river where PW6 saw the mob submerge the
 G deceased into the river with a view to drown him. He was brought up out of the river. The appellant proceeded to cut off his head and ran away with it.

I fail to see any contradiction in the evidence of PW1, PW2 and PW3, on how the deceased was beaten up on 29/11/
 H ***98. The evidence of PW5 on how the deceased was killed is on its own and it is true.***

In Joseph v. State (2011) 16 NWLR (pt. 1273) 226, I explained the mandatory requirement of proof beyond reasonable doubt as provided by section 138 (1) of the Evidence

Act thus:

“Proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It means the prosecution establishing the guilt of the accused person with compelling and conclusive evidence. It means a degree of compulsion which is consistent with a high degree of probability. Proof beyond reasonable doubt is not achieved by the prosecution calling several witnesses to testify. The court is only interested in the testimony of a quality witness, so long as the charge is not one that needs corroborations.”

There were no contradictions in the prosecution’s case worth considering. Consequently the case of the prosecution (respondent) is indeed unassailable. Proof beyond reasonable doubt was easily attained. Both courts below were correct to so find.

The facts of this case brings into focus the long settled position of the law that where two or more persons form a common intention to kill another person and in furtherance of that intention one or more of them struck the victim with a machete from which death results, each one of them is guilty of murder punishable with death and its does not matter who actually struck the deadly blow.

A diligent review of the Record of Appeal reveals to my satisfaction that the judgment of the Court of Appeal affirming that of the trial court is unassailable. Before this court now are concurrent findings of a trial court and the Court of Appeal on issues of fact properly considered by these two courts? The Supreme Court will not upset concurrent findings of fact of the two lower courts except in exceptional cases such as:

(a) Where the findings of fact are erroneous or perverse and not based on the evidence led.

(b) Where violation of some principle of law or procedure exists.

(c) Where there is miscarriage of justice. See *Ogbu v. State* 1992 8 NWLR pt.259 p.255, *Ogba v. State* 1992 2 NWLR Pt.222 p.164, *Igago v. State* 1999 14 NWLR PT.637 P.1, *Dakolo v. Dakolo* 2011 46 NSCQR p.669.

The findings of the trial judge affirmed by the Court of Appeal

in the penultimate paragraph of the judgment reads:

“The accused person set out along with others whose names appear in evidence on a mission ostensibly to annihilate and wipe out Umoru Bamayi from the surface of the earth. And so they marched to his house and caught him off guard. They beat him to a state of pulp. That was of Okumaji... He was taken away in a most humiliating manner his hands were tied behind his back. He was taken to the riverside where Umoru Bamayi life was snuffed out of him...”

These facts are not perverse. They are based on the evidence before the court. Concurrent findings of the courts below would in the circumstances not be upset by this court. This appeal is dismally devoid of merit. I dismiss it.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother, RHODES-VIVOUR JSC just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed. I therefore order accordingly. Appeal dismissed.

MUHAMMAD JSC

Having had the privilege of reading in draft the lead judgment of my learned brother Rhodes-Vivour, JSC I agree with the reasonings leading to the conclusion therein that the appeal completely lacks merit.

I rely on the facts of the case that brought about the appeal as captured in the lead judgment to emphasize very briefly on the awesome futility of the appeal.

The victims of appellant’s crime are Alhaji Umaru Bamaiyi, now dead, and his wife who had survived. The act of the appellant in company of others at large when appellant was being tried under Sections 97, 221 and 327 of the Penal Code for conspiracy, culpable homicide and destruction of property respectively. The 4th head of charge under Section 245 of the Penal Code for causing grievous bodily hurt was abandoned in the course of trial. PW1, PW2, relations of the victims of the heinous acts of the appellant, PW3, a

neighbour of the late Umaru Bamaiyi and PW6 were eye witnesses to the criminal acts of the appellant. They saw the appellant along with others in a mob mercilessly beat, and injured Umaru Bamaiyi and his wife. The mob eventually drowned, retrieved and thereafter kills Bamaiyi by cutting off his head.

PW1, PW2 and PW3 were by the victim's compound. They hid themselves at a vantage position when the appellant in company of the others committed the offences. PW6 particularly witnessed how the late Umaru was eventually drowned and killed by the mob. Appellant's real grouse from the six issues distilled in his brief for the determination of his appeal, relates to the lower court's erroneous affirmation of the trial courts findings regarding the alibi he set up and has conviction on the basis of the inadequate evidence before the trial court. It is argued that his defence of alibi was never investigated. Learned counsel for the appellant contends that respondent's failure to investigate and disprove his claim that he was never at the scene of crime remains fatal.

Learned counsel to the respondent conferred that investigating appellant's alibi was unnecessary as he was fixed on the spot of the offence by eye witnesses. The evidence of the witnesses having remained uncontroverted, appellant's defence of alibi, learned counsel further submits, is unavailing.

I agree with learned counsel to the respondent that where as in the instant case the prosecution has succeeded in putting the appellant on the spot of the offences he was convicted and sentenced for as affirmed by the court below, the defence automatically crumbles. Evidence had been led through PW1, PW2, PW3 and PW6 who saw the appellant in the mob that ruthlessly beat the late Umaru Bamaiyi and his wife and subsequently killed the former by drowning and cutting off his head from his trunk. Not surprisingly, after reviewing the evidence on record against the appellant, the court below rightly held thus:-

"The defence of alibi cannot be considered in isolation from the evidence of participation in the crime charged. Whereas in this case the evidence of the prosecution witnesses fixed the accused person at the scene of crime, the alibi raised by him has been effectively demolished."

That indeed is the correct statement on the appellant's de-

fence of alibi given the facts on record. In *Patrick Njovens and ors v. The State* (1973) 5 SC 12 at 47 expounded the principle thus:-

“There is nothing extraordinary or exoteric in a plea of alibi such a plea postulates that the accused person could not have been at the scene of crime and only inferentially that he was not there.

B Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disprove the alibi or attempt to do so, there is inflexible and/or invariable way of doing this.... If the prosecution adduced sufficient and acceptable evidence to fix the person at the scene of crime at the material time... his alibi is thereby logically and physically demolished.”

The court below, having held exactly what this court stated should be appellant’s fortunes in affirming the findings of the trial court on that issue, cannot be said to have erred. Appellant’s 2nd D issue must and is accordingly resolved against him. Learned appellant counsel has urged us to hold that being tainted witnesses, PW1, PW2, PW3 and PW6’s evidence is worthless if not corroborated and the affirmation of the trial court’s contrary holding by the court below is a further unpardonable error.

E Learned respondent’s counsel contended otherwise and, in my considered view, correctly too. I hasten to ask who a tainted witness is in order to determine whether or not these witnesses the appellant say they are do in fact answer that qualification. The lower F court rejected appellant’s argument that because these witnesses are relations of the victims of appellant’s conduct their evidence has by that fact alone become unreliable. Being the evidence of tainted witnesses same must be corroborated for any reasonable court to rely on same. In very many decisions, this Court has held that it is not in G every case that blood relationship between the victim or the injured person and the witness for the prosecution that it would be concluded that the witness is a tainted witness whose evidence is unreliable unless corroborated. The accepted definition of a tainted witness is a person who is either an accomplice or who, on the facts, H may be regarded as having some personal purpose to serve. In *Abayomi Olalekan v. State* NSCQLR Vol. 8 (2001) 207 and *Ben v. State* NSCQLR Vol. 27 (2006) 233. This court has held that the fact of blood relationship between the victim of the offence and the prosecution witness in the trial of the offender does not necessarily make

the witness a tainted witness. Thus who a tainted witness is remains a question of fact.

In the case at hand, on the evidence, PW1, PW2, PW3 and PW6 who are either blood relations or neighbours of the late Alhaji Bamaiyi do not have any purpose to serve other than to state what they saw happened to the deceased. Indeed they are victims of the very offence the appellant has been tried and convicted for with no purpose other than to inform the court the truth of what they saw. The trial court is the most suited to decide whether or not their testimony is reliable. Appellate courts are usually very slow in interfering with such primary findings. The court below is justified not to have interfered with the trial court's crucial findings of fact from these safe and reliable witnesses. Appellant's case is indeed a hopeless one as all the ingredients of the offences for which he has been convicted have, on the evidence, been established.

It is for these few remarks and more so the reasons adumbrated in the lead judgment that I dismiss the appeal and affirm the decisions of the court below.

OGUNBIYI JSC

The judgment arrived at by my learned brother Bode Rhodes-Vivour, JSC is apt and very well reasoned. I have had the privilege of reading same in draft and I also agree that the appeal is utterly devoid of any merit and is also dismissed by me.

It is pertinent to restate that the appellant and others now at large were charged on four counts head of charge contrary to various sections of the penal code. The learned trial High Court found the accused/appellant guilty and he was convicted and sentenced to death by hanging. On an appeal to the Court of Appeal Abuja Division, the conviction and sentence of the appellant was affirmed. A further appeal to this court was lodged and six issues were formulated from the seven grounds of appeal.

Briefly, the facts were that on the 29th day of November, 1998, of about 4 p.m. the deceased one Alhaji Umoru Bamayi in company of his wife and children were in the front of their home at Okumoji in Ibaji Local Government Area of Kogi State. The deceased was performing ablution for prayer when a group of persons including the

appellant herein dangerously armed with various lethal weapons viz: guns, knives and machetes invaded their home, beat him up, caused the destruction of his properties as well as those of his wife and children and eventually killed the deceased by causing him to drown of a river after which the deceased was pulled out of the river dead and
 B the appellant used his “knife” to cut off the head of the deceased.

At the trial court, it was alleged by the prosecution that the headless body of Alhaji Umoru Bamayi was thrown into the river while the appellant made away with the head of the deceased. It is
 C also revealed on the record of appeal that the deceased was the caretaker of a parcel of land allegedly belonging to one Chief John Okolo, which parcel of land had been the subject matter of a dispute between Chief John Okolo and the Itodumo people. Equally revealed by the record is the fact that the deceased Alhaji Umoru Bamayi was
 D killed not too long after he testified for the said Chief John Okolo in the land dispute between him and the Itodumo people. The appellant was a part of the mob who came from Itodumo village.

Before us on appeal, while the appellant formulated six issues from the seven grounds of appeal, five issues were raised on behalf
 E of the respondent. One of the grouse or complaint alleged on behalf of the appellant was against the evidence by the prosecution witnesses wherein the appellant’s counsel submitted are either contradictory in nature or that their testimonies are tainted by reason of
 F serving their own interests. It is to be noted that the witnesses P.W.1 and P.W.2 are children of the deceased while P.W.3 and P.W.6 are also his blood relations.

The general principle of law which is settled and well founded in our judicial system is, the prosecution, in a criminal matter has the
 G onus always to prove the accused guilty beyond reasonable doubt before his conviction can be sustained. This burden as a general rule does not shift. The reason behind this proposition is very well founded in our constitutional provision of presumption of innocence of the accused until proved otherwise.

H Before evidence is said to be contradictory in nature so as to create a doubt as to which of the two alternative stories should be believed, it must be such as to change the cause of events. The contradiction in this respect must be material and very fundamental. It must in otherwords imply that there are two or more conflicting ac-

counts or versions of the same incident. Contradiction therefore occurs where the witnesses' account of an incident is of variance with another witnesses' account of the same incident, such that accepting the account of one witness would mean rejecting the version of the other because both accounts are mutually in conflict. See the case of Benson Esangbedo V. The State (1989) 1 SCNJ 1 and Agbo v. The State (2006) 6 NWLR (pt. 977) 545 - 564. B

A mere variation and difference in the use of language is a natural phenomenon and should not account as material contradiction. Individual differences in perception are a factor which should also always be taken into consideration and not disregarded. This is because a prototype or straight jacket and repetitive narration should indicate possible tutoring. On the question of contradiction therefore, the trial court of page 73 of the record for instance held and said:- C

“This leads me to the question of alleged material contradiction in the evidence of witnesses for the prosecution. It has been pointed out that P.W.1 and P. W.2 are of variance in their account of the place they went into hiding in that one call it a bush and the other call it a forest. The difference in the account as to the place of birth of P.W.1 was pointed out as contradiction in the evidence of P.W.2 and P.W.1. D

There are other areas which learned counsel for defence also highlighted as constituting material contradictions in the evidence of witnesses for prosecution. I have read them all, I take the view that there may be discrepancies for but those discrepancies should not be relevant to the status of contradiction of material particulars on issue the court is called to decide... it is a matter of individual perception of the environment where P.W.1 and P.W.2 find themselves in when one refers to the place of their hiding as bush and the other call it a forest.” E

The lower court in approving the stand taken by the trial court also held thus and said:- F

“Whether or not there were contradictions in the evidence of the prosecution witnesses enough for the trial court to have jettisoned those pieces of evidence and thereby have the totality of the evidence unusable. The learned trial judge had found that P.W.1 and P.W.2 were of variance in their account of the place they went to hide G

as one called it *BUSH* and the other called it a *FOREST*. Clearly this is an area of semantics and cannot be said to be a material difference since in the normal course of grammatical usage persons have been known to ascribe bush to a forest and vice versa. Also as the trial judge found not be material in evidence is the differences in the account as to the place of birth of P.W.1. I am of the same mind as the trial judge in his attitude to these differences which are in my view minor and not sufficient to either render the witnesses unreliable or their evidence of such as would create the doubt that would make it be said that the prosecution failed to prove its case in a criminal trial beyond all reasonable doubt.”

I cannot in the circumstance agree more with the concurrent findings by the two lower Courts. In other words mere discrepancies or contradictions in the prosecution’s case should not be a reason for an acquittal. The contradictions are not predicated on material points so as to create any doubt in the prosecution’s case. There is, in this case, no reason to interfere with the lower court’s findings which affirmed that of the trial court. See the cases of *Hausa V. State* (1994) 6 NWLR (Pt.350) 281 of 307; *Oke V. Inspector General of Police* 14 WACA 645 and *Ejeko V. State* (2003) 4 SCNJ 16.

On whether or not P.W.1, P.W.2, P.W.3 and P.W.6 are tainted witnesses and therefore serving their interest, I hasten to say that the submission by the appellant’s counsel in that behalf is grossly misplaced. In other words, by the very fact that P.W.1 and P.W.2 are children of the deceased, it did not disqualify them from being competent witnesses. They cannot for that reason also be classified as tainted witnesses needing corroboration. In the same vein, P.W.3 and P.W.6 as relations of the deceased did not also disqualify or discredit their testimonies in anyway whatsoever.

Further still and on question of the appellant’s identity, it will be recalled that the witness P.W. 6 was an eye witness to the entire incident from beginning to the end. It is for instance on the record that he saw the appellant and identified him amongst others who abducted the deceased on a local stretcher. The witness also said affirmatively that it was the appellant who beheaded the deceased after drowning him in the river. This was an established fact on the record and an act of sheer inhuman brutality. The incident took place at 4 p.m. in a broad day light and the witness could not have mis-

taken the appellant's identity. The question of identity was on issue of fact and has to be carried along with other factors and chain of events of happenings. The finding by the trial court was therefore predicated on the evidence of P.W.1, P.W.2, P.W.3 and P.W.6 and which is clearly borne out on the record of appeal before us.

Further still and on the defence of alibi raised by the accused, B the onus is squarely on him to prove. In the instant case, it is clearly on record that P.W.6 identified the appellant in all the locations where the various criminal acts were committed. It was the appellant himself that gave conflicting statements of his whereabouts. For instance in C his evidence in court, he testified that he was in Bacita and lived along Zaria Road at the material time of the act alleged. However and in his written statement he said he was at the time of incident in Jebba. On the evidence of P.W.6, the appellant was certainly fixed properly at the scene of the offence and hence the defence of Alibi D which he sought to raise did not in my opinion avail him. It is also belated that the appellant should only raise such a defence of the trial and not before. This is totally not in consonance with the law. The prosecution from all indications had adduced enough evidence which E fixed the accused/appellant of the scene of the crime. The evidence is very overwhelming. The appellant as the main offender was, I hold rightly convicted and sentenced. He cannot and should not be let off the hook. The inhuman and horrific act of brutality he committed on the deceased must be meted out with punishment which is commensurate; he deserves no respite. F

It is for the foregoing reasons and the fuller reasons given in the lead judgment of my learned brother Rhodes-Vivour, JSC which I entirely agree and had the privilege of reading before now that I too dismiss the appeal as lacking in merit. In so doing, I also affirm the G concurrent judgments of the two lower courts. The appellant should die by hanging.