

SUPREME COURT OF NIGERIA
FRIDAY 8TH MARCH, 2013. SC. 257/2011
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC**

HAKEEM FATAI APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Conviction - Confession - Validity - Court of Appeal rightly affirmed the conviction of appellant - Since exhibit 7A was direct and voluntarily made (H1)

CRIMINAL PROCEDURE - Identification parade - Relevance of - Where identity of accused is not in doubt - The parade is not needed - As same is not a sine qua non to conviction (H2)

FACTS

Appellant and one Dare Jimoh were arraigned before the High Court of Ogun State sitting at Ijebu-Ode on a two-count-charge of conspiracy to commit murder and murder contrary to sections 324 and 319 (1) of the Criminal Code Cap. 29 Laws of Ogun State. The deceased, one Kemi David was robbed, raped, slaughtered and left in her pool of blood by some attackers in her house. The sad event took place when her siblings had gone for a night vigil in a church. Upon their arrival from church, the siblings raised alarm at the sight of the deceased's dead body. Their shout attracted the neighborhood's vigilante group who immediately went out in search of the attackers. PW1 (one of the vigilantes) stated that he saw one Adebayo Odukoya in a banana farm with blood stained hands at the early hours of the next morning.

The said Adebayo upon being questioned admitted that he was one of those that killed the deceased. He identified appellant as a member of his gang. The said Adebayo was said to have been shot by the police while trying to escape from custody. Prosecution/respondent called other witnesses in support of its case. The confessional statement of appellant was tendered and upon the objection

of appellant, a trial within trial was conducted. In its ruling following the trial within trial, the court admitted the statement as Exhibit 7. After hearing both sides, the court found appellant and the other person guilty of conspiracy to commit murder and murder. They were both sentenced to death by hanging. Appellant and the other person were dissatisfied and thus filed appeal in the Court of Appeal Ibadan Division. The court dismissed the appeal and affirmed the trial court's decision. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether in the light of the facts of this case, the Court of Appeal was right in holding that the purported confessional statement of the appellant (Exhibit 7A) was not only properly admitted in evidence but also properly relied upon by the trial court. This issue is derived from ground 1 of the Notice of Appeal.

2. Whether the identity of the appellant was never an issue and or did not arise having regard to the circumstances of this case. This issue is made in relation to ground 2 of the Notice of Appeal.

3. Whether the prosecution proved the charges of conspiracy to commit murder and murder beyond reasonable doubt to warrant the conviction and sentence of the appellant to death as affirmed by the Court of Appeal."

HELD (Unanimously dismissing the appeal per

MUNTAKA-COOMASSIE JSC)

Conviction - Confession - Validity

1. I have no doubt in my mind that the lower court was correct in its holding that Exhibit 7A was voluntarily made by the appellant. Exhibit 7A was direct, relevant and unequivocal about the participation of the appellant in the commission of the offences charged. The court is entitled to act only on the confessional statement of an appellant that is direct and relevant in convicting and sentencing the appellant. (p. 1301 E)

Identification parade - Relevance of

2. The issue of identification would arise where the identity of

the person that committed an offence is not known. In this case all the participants in the commission of the offence clearly identified themselves and also confessed to the commission of the offences charged. It is clear that late Adebayo knew his partners in crime. He did not only know where the appellant lived right down to his room but positively identified him to the team of policemen to which the P.W.5 belonged. It must also be noted that apart from the accused person, the only person, that could have been called to identify the appellant was Kemi David who, unfortunately was murdered in cold blood by the appellant and his cohorts. It is sufficed to say that where the identity of an accused is not in doubt there will be no need to embark on identification parade. Identification parade is not a sine-qua-non to conviction. (p. 1302 C)

NOTABLE POINTS OF INTEREST

MUNTAKA-COOMASSIE JSC

1. Brief of argument must relate to applicable law and facts in a matter

Before I proceed with the judgment, permit me my lords to state that the respondent's brief of argument is of little or no assistance to this court. The respondent's counsel, with respect, only quoted the judgment of the lower court being challenged before this court. No visible industry was put in the preparation of the brief and neither did he point out from the Record of proceeding and fact (s) that supports his stand point that the appeal be dismissed or to affirm the judgment of the lower court. I think I should say this, the duty of the respondent in an appeal is to defend the judgment appealed against. This, he would do by supporting his position with the facts, and/or evidence adduced before the court and marry same with the applicable law. No counsel would be allowed to just throw the judgment of the lower court at this court by mere reproducing same in his brief of argument and urge us to affirm or set same aside without sufficiently supporting its position with the applicable law married with the facts in order to enable us determine the appeal. Definitely the respondent's counsel would not reasonably expect us to do his work for him. I hope counsel appearing before this Honourable Court would note,

as in future, any brief of argument that is unhelpful to this court would not be considered, it will be ignored. (p. 1300 B)

ARIWOOLA JSC

2. Proof of murder – Ingredients

B Generally, on a charge of murder, the ingredients that must be established by the prosecution to prove the case beyond reasonable doubt are:

(i) That the deceased died;

C (ii) That it was the act of the accused that caused the death of the deceased.

(iii) That the act of the accused which caused the death of the deceased was intentional and it was with the knowledge that it would result in death or grievous bodily harm would be the probable consequence of the act of the accused. (p. 1308 G)

D

REPRESENTATION

Adewunmi Ogunsanya, Esq. with Mahmud Adesina, Esq., for the Appellant

E Toyin Bashorun (Miss), for the Respondent

CASES REFERRED TO

R. v. Kanu (1952) 14 WACA 30

Odu v. FRN (2002) 2 NWLR (pt. 761) 613

F Ibrahim v. The King (1914) AC 599

Ikemson v. The State (1989) 3 NWLR (pt. 110) 4

Nwosu v. The State (1986) 4 NWLR (pt. 35) 348

Ndukwe v. The State (2009) 2 SCN 147 1167

G Abohede v. The State (1996) 4 SCNJ 223

Onyejekwe v. The State (1992) 3 NWLR 444

Amadi v. Nwosu (1992) 5 NWLR (pt. 241) 273

Mohammed v. The State (2007) 4 SCNJ 119

Golden Dibia v. The State (2007) 33 SCNJ 160

H Ikemson v. The State (1959) 3 NWLR (pt. 110) 455

Ibrahim v. The State (1991) 5 SCNJ 129

Yusufu v. State (1976) SC 176

Dawa v. State (1980) 8-11 SC 236

STATUTES REFERRED TO

Criminal Code Cap. 29 Laws of Ogun State 1978, ss. 324, 319(1)
Evidence Act 2011, ss. 27, 28, 29

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The appellant and one Dare Jimoh were arraigned before the B
High Court of Justice Ogun State sitting at Ijebu-Ode on a two-count-charge of conspiracy to commit murder and murder contrary to Sections 324 and 319 (1) of the Criminal Code Cap. 29 Laws of Ogun State.

The facts of this case briefly are that on 27th day of October C
2009, at Madasa Lane Ijebu-Ode, some persons attacked the house of one Kemi David (deceased). The said Kemi David was robbed, raped and slaughtered by the attackers with a knife and left her in the pool of her blood. It was when her siblings who had gone for a D
night vigil in a church came back that they raised alarm which attracted the neighbourhood vigilante group in the area who came out in search of the people that attacked Kemi David.

PW.1, who was one of the vigilantes, stated that at the early E
hours of 28/10/2009; while in search of the attackers saw one Adebayo Odukoya inside a banana farm with his hands stained with blood. He picked him and handed him over to the monitoring group, and when he was questioned he admitted that he was one of the people that killed Kemi David. The said Adebayo Odukoya was said to have F
been shot by the police while trying to escape from police custody.

PW.2 is a brother of the deceased. He gave evidence of the death of the deceased and tendered the knife he saw beside the deceased which was used to slash her throat.

PW.3 is also an elder brother of the deceased and testified as G
to what he saw after they came back from the night vigil.

PW.4 was a police officer who was asked to interpret the statement of the accused person in Yoruba into English to the I.P.O, after the interpretation, the accused person signed and he signed as the H
interpreter.

PW.5 the Investigating Police Officer (I.P.O). He took the statement of the appellant who gave his statement in Yoruba language, which was later interpreted to him.

The appellant's confessional statement was tendered and upon

the objection of the defence a trial within trial was conducted. In its ruling the trial court admitted the statement as Exhibit 7. In its conclusion the trial court held as follows:-

B *“In view of the above, I hold that there was no torture meted out to the 2nd accused before he made identification. I hold that the statement is direct, positive and related to 2nd accused acts and knowledge as well as intention and is therefore admissible. I therefore admit the statement made by the 2nd accused on 3/10/09 at Eleweran in evidence and hereby mark it as Exhibit 7.”*

C Under cross-examination, the witness stated that it was late Adebayo who identified appellant as one of the people that committed the offence and took the police to the appellant’s house for his arrest. Adebayo’s statement was tendered as Exhibit 6.

D The accused person gave evidence in his defence as DW2. He denied knowing the 1st accused person or the late Adebayo. He also denied knowing Kemi David, the victim of the crime. He said that he was not identified by anybody before he was arrested. He stated that he only made one statement to the police and that he did not agree with the total content of Exhibit 7.

E After the conclusion of hearing, learned counsel to both parties addressed the court after which the trial court proceeded to deliver its judgment. The accused persons were found guilty of conspiracy to commit murder and murder contrary to Sections 324 and 319 (1) of the Criminal Code Cap. 30 Laws of Ogun State, and sentenced to death by hanging. In his conclusion the trial Judge held thus:-

G *“Having considered the totality of this case as well as the evidence led by the prosecutor and the defence of the accused persons which is denial and mistaken identity by which is rejected as there is no complainant to identify the accused but it was a comrade in crime that gave them out (sic). I hereby find that the prosecution proved that the two accused persons with others went and robbed at the Madasa Lane, raped Kemi David and also murdered Kemi David. I also find that there is not (sic) defence that could reduce the offence of murder committed by the accused persons to a lesser offence. I therefore find the two accused persons Dare Jimoh and Akeem Fatai guilty of the offence that on 27th October, 1999 they both conspired together to commit murder and actually murdered Kemi David at 4*

Madasa Lane Ijebu-Ode in the Ijebu Ode Judicial Division.”

The two appellants were dissatisfied with the decision of the trial court and, unsuccessfully appealed to the Court of Appeal, Ibadan Division hereinafter called the lower court. After considering the case presented by the parties, the lower court dismissed the appeal and affirmed the decision of the trial court. The lead judgment of the lower court delivered by Alagoa, JCA, (as he then was) read as follows:-

“From the totality of the evidence assembled and the evaluation of same is there any doubt that there was indeed a meeting of the minds of the 1st and 2nd appellants manifested by the overt act of killing the deceased? I have no doubt in my mind that the 1st and 2nd appellants intended to kill Kemi David and I find the offence of conspiracy to murder Kemi David against the 1st and 2nd appellants proved beyond reasonable doubt. I do not consider the finding of the trial High Court perverse and therefore will not disturb the said finding which was well considered and I therefore dismiss the appeal as lacking in merit.”

The appellants were again aggrieved by the judgment of the lower court and appealed to this court. The parties filed and exchanged their respective briefs of argument. The appellant in his brief of argument distilled three issues for determination as follows:-

ISSUES FOR DETERMINATION

“1. Whether in the light of the facts of this case, the Court of Appeal was right in holding that the purported confessional statement of the appellant (Exhibit 7A) was not only properly admitted in evidence but also properly relied upon by the trial court. This issue is derived from ground 1 of the Notice of Appeal.

2. Whether the identity of the appellant was never an issue and or did not arise having regard to the circumstances of this case. This issue is made in relation to ground 2 of the Notice of Appeal.

3. Whether the prosecution proved the charges of conspiracy to commit murder and murder beyond reasonable doubt to warrant the conviction and sentence of the appellant to death as affirmed by the Court of Appeal.”

The respondent in its brief of argument adopted the three issues as formulated by the appellant, and added the fourth issue, thus:-

“Whether or not the facts enunciated by this appeal justifies the intervention of this Honourable Court to disturb the concurrent findings of the lower courts.”

At the hearing, the learned counsel to the appellant adopted his brief of argument and urged this court to allow the appeal.

B On the issue No. 1 the learned counsel to the appellant submitted that in view of the surrounding circumstances to Exhibit ‘A’ particularly the element of torture, it ought not to have been admitted in evidence, let alone being acted upon in convicting the appellant. He submitted that it is only where a confessional statement has C admitted all the essential elements of an offence and shows unequivocal, direct and positive involvement of the accused person in the crime alleged that the court can rely on it to convict the accused person, cites the cases of *R v. Kanu* (1952) 14 WACA 30; and *Odu v. F.R.N.* D (2002) 2 NWLR (Pt. 761) 613. Thus where the statement is a product of torture, threat and/or inducement the confessional statement would be inadmissible. He referred to Section 28 of the Evidence Act and the case of *Ibrahim v. The King* (1914) AC 599.

E In the case at hand, he referred to the evidence of the appellant in the trial within trial on how he was tortured and the corroborative evidence of the 1st accused person that the appellant was tortured; and this piece of evidence was not properly appraised by the two lower courts. He therefore submitted that Exhibit 7A was wrongly F admitted.

On issue No. 2, it was the submission of the learned counsel that the appellant was not properly identified as one of those who killed Kemi David as decided in *Ikemson v. The State* (1989) 3 NWLR (pt. 110) 4.

G It was his submission that the lower court’s conclusion that the identity of the appellant as one of the persons that committed the offence was not an issue based on the evidence of P.W.5 that the late Adebayo Odukoya led the police to the house of the appellant is wrongly perverse and had occasioned miscarriage of justice. He stated H that the late Adebayo Odukoya in Exhibit 6 mentioned Akeem Ajayi while Exhibit 7A bears the name of Akeem Fatai, but the lower court treated Akeem Fatai and Akeem Ajayi as the same. The discrepancy in the names contained in Exhibits 6 and 7A was not explained.

On the issue No. 3, it was the contention of the appellant that

the burden was on the prosecution to prove the offence against the appellant and the standard of proof is that of proof beyond reasonable doubt, cites *Nwosu v. The State* (1986) 4 NWLR (pt. 35) 348 at 359. It was the counsel's submission that the prosecution has woefully failed to prove the ingredients of the offences charged. The ingredients are:- B

(i) that the deceased died;

(ii) that it was the act of the accused that caused the death of the deceased; and

(iii) that the said act of the accused is intentional. C

He cites the following cases: - *Ndukwe v. The State* (2009) 2 SCN 147 1167; and *Abohede v. The State* (1996) 4 SCNJ 223.

In the instant case, learned counsel pointed out that there is no doubt that the deceased died and the evidence that she was slaughtered was not certain. But the issue of whether the appellant's act resulted to her death is in doubt. The prosecution has failed to link the appellant to the act that led to the death of Kemi David. That without Exhibit 7A there is no other credible evidence linking the appellant to the death of the deceased. That the evidence of PW.5 concerning the commission of the crime is a mere hearsay evidence. E

Learned counsel to the respondent/prosecution adopted his brief of argument and urged this court to dismiss the appeal. On issue No. 1, learned counsel referred to the decision of the lower court where it affirmed the finding of the trial court that Exhibit 7A was properly admitted and acted on in convicting the appellant and pointed out that no new fact has been added or shown to warrant this court interfering with the concurrent finding of the two lower courts and urged this court to resolve the issue in favour of the respondent. F G

On issue 2, learned counsel contended that the identity of the appellant was not in doubt, he referred to the decision of the lower court, and therefore urged this court to uphold same.

On issue 3, learned counsel contends that court will not reject a confessional statement which clearly links the accused person with the offence especially where there is concurrent finding of fact by the two lower courts on the point. H

On issue No. 4 formulated by him, the learned counsel for the prosecution submitted that this Honorable court will not disturb a

concurrent finding of the two lower courts except and unless where it is shown that there is substantive error apparent on the record of proceedings. He cites *Onyejekwe v. The State* (1992) 3 NWLR 444; *Amadi v. Nwosu* (1992) 5 NWLR (pt. 241) 273.

He continued to state that the findings being challenged before this court and the appellant have not shown that the said findings are perverse either by reason of misapplication of the law or that the findings were not supported by the evidence adduced before the court.

Before I proceed with the judgment, permit me my lords to state that the respondent's brief of argument is of little or no assistance to this court. The respondent's counsel, with respect, only quoted the judgment of the lower court being challenged before this court. No visible industry was put in the preparation of the brief and neither did he point out from the Record of proceeding and fact (s) that supports his stand point that the appeal be dismissed or to affirm the judgment of the lower court. I think I should say this, the duty of the respondent in an appeal is to defend the judgment appealed against. This, he would do by supporting his position with the facts, and/or evidence adduced before the court and marry same with the applicable law. No counsel would be allowed to just throw the judgment of the lower court at this court by mere reproducing same in his brief of argument and urge us to affirm or set same aside without sufficiently supporting its position with the applicable law married with the facts in order to enable us determine the appeal. Definitely the respondent's counsel would not reasonably expect us to do his work for him. I hope counsel appearing before this Honourable Court would note, as in future, any brief of argument that is unhelpful to this court would not be considered, it will be ignored.

Coming back from this slight digression, I would say that this appeal centered mainly around the admissibility or otherwise of Exhibit 7A (the appellant's confessional statement) and the reliance placed on it by the trial court in convicting the appellant. The lower court agreed with the trial court. The lower court in its judgment held as follows:-

“Counsel for the respondent has stated in paragraph 6.08 at page 10 of the respondent's brief of argument that in answering the six questions to determine the veracity of Exhibit 7A the learned trial

judge considered the evidence of PW1, PW2, PW.3 and PW.5. The learned trial judge did more than that. He considered Exhibits 2 and 6 as well and clearly determined areas of consistency. Exhibit 7A was, to my mind, not only properly admitted but also properly acted upon by the learned trial judge."

My lords, in my view, this finding of the lower court is unassailable. I have carefully perused Exhibit 7A, in it, the appellant gave graphic details of how he, in concert with Adebayo Odukoya and the 1st accused person conspired and killed the deceased Kemi David. Exhibit 6, Adebayo Odukoya's statement to the police corroborated Exhibit 7; it is instructive to also note that the contents of Exhibit 2, the 1st accused's statement to the police are in tandem with the contents of Exhibit 7A. PW.1 who arrested Adebayo Odukoya and handed him over to the monitoring group who eventually handed him over to the police narrated that he caught Adebayo Odukoya and his confession that they killed Kemi David with his cohorts. It was the Adebayo Odukoya that led the police to the arrest of the appellant and he was identified as a participant in the commission of the crime. Above all, in his evidence at the trial he only told the court that he did not agree with all the content of Exhibit 7A. In his words he said:-

"I only made one statement to the police. I did not agree with the total contents of Exhibit 7."

I have no doubt in my mind that the lower court was correct in its holding that Exhibit 7A was voluntarily made by the appellant. Exhibit 7A was direct, relevant and unequivocal about the participation of the appellant in the commission of the offences charged. The court is entitled to act only on the confessional statement of an appellant that is direct and relevant in convicting and sentencing the appellant. See: Mustapha Mohammed v. The State (2007) 4 SCNJ 119; and Golden Dibia v. The State (2007) 33 SCNJ 160.

On the issue of identification of the appellant, the learned counsel to the appellant submitted that the name mentioned by Adebayo Odukoya in Exhibit 6 is Akeem Ajayi and not Hakeem Fatai which the appellant chooses to bear is totally irrelevant to the determination of whether he was identified as a party to the murder of Kemi David. It is on record that the said Adebayo Odukoya led the P.W.5

and its team to the appellant's house where he was arrested after being identified by the said Adebayo Odukoya. In his evidence the P.W. 5 said:-

"It was late Adebayo that took us to the 2nd accused house where he was arrested. Late Adebayo identified 2nd accused to us before he was arrested. The 2nd accused when he was arrested never gave his name but he called himself Akeem Fatai when his statement Exhibit 7 was being recorded."

Also Exhibit 2, the 1st accused statement clearly indicted the appellant as a participis criminis in the commission of the offences charged. This is coupled with own confessional statement Exhibit 7A where he admitted the commission of the offences charged.

The issue of identification would arise where the identity of the person that committed an offence is not known. In this case all the participants in the commission of the offence clearly identified themselves and also confessed to the commission of the offences charged. It is clear that late Adebayo knew his partners in crime. He did not only know where the appellant lived right down to his room but positively identified him to the team of policemen to which the P.W.5 belonged. It must also be noted that apart from the accused person, the only person, that could have been called to identify the appellant was Kemi David who, unfortunately was murdered in cold blood by the appellant and his cohorts. It is sufficed to say that where the identity of an accused is not in doubt there will be no need to embark on identification parade. Identification parade is not a sine-qua-non to conviction. See: Ukpabi v. The State (2004) 34 WRN 133; Ikemson v. The State (1959) 3 NWLR (pt. 110) 455, Abubakar Ibrahim v. The State (1991 5 SCNJ 129.

On the whole, I hold that the lower court was right in affirming the judgment of the trial court. I have no hesitation whatsoever in accepting the decisions of the trial and lower courts in this appeal.

Consequently, this particular appeal is dismissed for lacking in merit. The appeal actually is devoid of any merit. I therefore, without any slightest regret, affirm the judgment of the lower court delivered on the 30th day of March, 2011 in which death sentence handed down by the trial court was affirmed by the lower court.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother MUNTAKA-COOMASSIE, JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. B

Appellant was charged with one DARE JIMOH with the offence of conspiracy to commit murder and murder contrary to the provisions of Section 324 and 319(1) of the Criminal Code Cap 29 Laws of Ogun State of Nigeria, 1978 and convicted and sentenced to death for the murder of one KEMI DAVID at Madasa Lane, Ijebu Ode in Ogun State. The conviction and sentence of appellant was affirmed on appeal by the lower court in a judgment delivered on the 30th day of March, 2011 resulting in the instant further appeal. C

Learned counsel for appellant ADEWUNMI OGUNSANYA D ESQ, in the appellant's brief filed on 2nd August, 2011 and adopted in urgent of the appeal on 17th January, 2013 has submitted the following three issues for the determination of the appeal. D

"1. Whether in the light of the facts of this case, the court of appeal was right in holding that the purported confessional statement of the appellant (Exhibit "7A") was not only properly admitted in evidence but also properly relied upon by the trial court..." E

2. Whether the identity of the appellant was never an issue and or did not arise having regard to the circumstances of this case..." F

3. Whether the prosecution proved the charge of conspiracy to commit murder and murder beyond reasonable doubt to warrant the conviction and sentence of the appellant to death as affirmed by the Court of Appeal".

It can be seen that issues 1 and 3 are closely related and I hold G the view that if issue 1 is resolved against appellant, issue 3 becomes hypothetical as it is settled law that an accused person can be convicted solely on his confessional statement. In other words, if a court of law comes to the conclusion that a statement made by an accused person satisfies all the legal requirements of a confessional statement, H particularly as provided under Section 27, 28, 29 of the Evidence Act, 2011, then the charge against the accused must of necessity have been proved beyond reasonable doubt. The reason is simply that the court can and does convict an accused person solely on his

confessional statement. See *R v. Obiasa* (1962) ALL NLR 651; *Yusufu v. State* (1976) SC 176; *Dawa v. State* (1980) 8-11 SC 236; *Igbinova v. State* (1981) 2 SC 5 at 17- 18; *Egboghonome v. State* (1983) 13 LRCN 761. etc,

B It is the contention of learned counsel for appellant that the
confessional statement of the appellant, Exhibit “7A” was not voluntarily made as the same was extracted by torture of appellant by the police, and as such it ought not to have been admitted in evidence in the first place, let alone being relied upon in the conviction and sentence of the appellant; that the lower court was also in error in affirming the said conviction and sentence; that the testimony of appellant C on the question of his torture was corroborated by the evidence from his co-accused person which ought to have been accepted and relied upon in throwing out the said Exhibit “7A”.

D It is not in doubt the trial court, in determining whether, Exhibit “7A” was admissible in evidence following the objection as to its voluntariliness conducted a trial within a trial as required by law. It was at the conclusion of that exercise and after evaluation of the evidence produced in support of the contending positions of the prosecution and the defence that the court reached the conclusion that E the said statement was voluntarily made by appellant, admitted and relied subsequently on it in convicting and sentencing the appellant.

F It must be pointed out that in relation to a trial within a trial proceeding, the court usually bases its conclusion on the credibility of witnesses as the whole exercise of evaluation of evidence at that stage is based on the principle of oath against oath i.e. the oath of the prosecution witnesses as against the oath of the defence. It is in short, an evaluation based on whom the court believes to be speaking the G truth - a question of credibility.

In such a circumstance, it is my considered view that having regards to the principle of law that a trial court is in the best position to assess the credibility of witnesses. See *Nasamu v. State* (1979) 6 - 9 SC 153 at 159, and that it is the primary function of the trial court H or tribunal to evaluate evidence placed before it before arriving at a conclusion, it follows that it is only where and when the court fails to evaluate such evidence at all or properly that a court of appeal can intervene and in itself evaluate or re-evaluate such evidence.

As a general rule therefore when the question of evaluation of

evidence does not involve the credibility of witnesses but against the non evaluation or improper evaluation of the evidence, the appellate court is in as good a position as the trial court to do its own evaluation - see *Doma v. Ogiri* (1998) 3 NWLR (Pt. 541) 246 at 267; *Abisi v. Ekwealor* (1993) 6 NWLR (Pt. 302) 643 etc.

In the instant case, the trial judge evaluated the evidence adduced at the trial within trial and at page 61 of the record stated thus:-

“The only evidence of torture in this trial within trial is from the 2nd accused which the police witnesses actually denied. This is a matter of oath against oath and in the absence of any additional evidence from 2nd accused, I cannot in fact find that he was tortured to thumb print”.

It is demonstrably clear from the above that the basis of the conclusion of the learned trial judge is anchored on credibility of the witnesses who testified at the trial within trial proceeding thereby rendering the trial judge the sole arbiter of the evaluation process. An appellate court, such as the Supreme Court, is by law incapacitated as it cannot reevaluate the said evidence.

It is therefore my considered view that the trial judge was right in admitting Exhibit “7A” and also relying on it in convicting and sentencing appellant to death for the offence of murder. I also hold the considered view that the lower court was also correct in affirming the decision of the trial court in that respect.

Having found/held that Exhibit “7A” was properly admitted and relied upon in the proceedings and having held that a court is empowered to convict an accused based, solely on his confessional statement, it follows that Exhibit “7A” having met all the requirements of a confessional statement conclusively proved beyond reasonable doubt that appellant committed the offence for which he stood trial and was consequently properly convicted and sentenced accordingly.

I therefore resolve issues 1 and 3 against appellant. It is for the above reasons and the more detailed ones given in the lead judgment of my learned brother that I too find no merit in the appeal which is accordingly dismissed by me.

Appeal dismissed.

NGWUTA JSC

I had the privilege of reading in advance the lead judgment just delivered by My Noble Lord, Coomassie, JSC. I entirely agree with His Lordship's reasoning and conclusion.

Not only is the appellant and his gang a group of morally depraved
B brutes, their behaviour portrayed them as wild animals in human form. The offences of raping and slaughtering the women folk appear to be on the increase and so also is the heinous crime of killing women for ritual purposes.

C There is no reason here to disturb the concurrent findings of the two Courts below.

For the above and the fuller reasons in the lead judgment, I also dismiss the appeal as devoid of merit.

D

ARIWOOLA JSC

I had the privilege of reading in draft the lead judgment of my learned brother, Muntaka-coomassie, JSC just delivered. I agree with the reasoning and the conclusion arrived thereat.

E The appeal is against the decision of the Court of Appeal, Ibadan Division delivered on the 30th day of March, 2011 wherein the court upheld and affirmed the decision of the trial High Court of Ogun State.

F Sometime on 28th June, 2000, the appellant had been charged along with one other person known as Dare Jimoh. The two of them were charged with offences of conspiracy to commit murder and murder pursuant to Sections 324 and 319 (1) of the Criminal Code Cap 29, Laws of Ogun State of Nigeria, 1978 respectively. The two
G were tried, found guilty of the offences with which they were charged.

That on 27th October, 1999 they both conspired together to commit murder and actually murdered one Kemi David at 4, Madasa Lane, Ijebu-Ode, in Ijebu-Ode Judicial Division. They were convicted and sentenced to death. Dissatisfied with the judgment of the trial court,
H the appellant appealed to the Court below against the conviction and sentence of 15th October, 2003. In its Judgment delivered on 30th March, 2011, the court below dismissed the appeal and affirmed the conviction and sentence of the appellant by the trial High Court.

Further dissatisfied, the appellant had by his Notice of Appeal filed on 29th April, 2011 appealed on three (3) Grounds of Appeal against the judgment of the Court below. Briefs of argument were later filed and exchanged. The appellant's brief of argument was filed on 2nd August 2011. While the respondent's brief of argument filed on 18th October, 2012 was deemed properly filed and served on 17/01/2013, the day the appeal was argued. B

In the said appellant's brief of argument the following issues were distilled from the grounds of appeal.

1. Whether in the light of the facts of this case, the Court of Appeal was right in holding that the purported confessional statement of the appellant (Exhibit 7A) was not only properly admitted in evidence but also properly relied upon by the trial court. C

2. Whether the identity of the appellant was never an issue and or did not arise having regard to the circumstances of this case. D

3. Whether the prosecution proved the charge of conspiracy to commit murder and murder beyond reasonable doubt to warrant the conviction and sentence of the Appellant to death as affirmed by the Court of Appeal.

The respondent in its brief of argument formulated a sole issue in addition to the three issues distilled by the appellant, as follows: E

Whether or not the facts enunciated by this appeal, justify the intervention of this honourable court to disturb the concurrent findings of the lower courts.

From the four issues distilled by both parties for determination, the following sole issue can be summed up. F

Whether from the totality of the evidence adduced by the prosecution, in particular, the appellant's confessional statement - Exhibit 74, it can be said that the prosecution proved the case beyond reasonable doubt to prevent this court's interference with the concurrent findings of the two lower courts. G

During the trial, the prosecution called six (6) witnesses in support of the charge while the appellant alone testified in defence without calling any other witness. Amongst what the prosecution relied on to achieve conviction was the confessional statement which was admitted and marked Exhibit 7A. Exhibit 6 was the statement of one Adedayo Odukoya who had led the Police to the house of the appellant and identified him as one of those with whom they carried out H

the dastardly act of murder of their victim on 28/10/1999. On record, the trial court found as follows:

“In this case there is no eye witness account of how the murder of Kemi David was committed. However, there are many circumstantial evidence adduced by the prosecution and these include the evidence of PW1 that when there was an alarm raised, he came out in compliance with the vigilante rule and arrested one Adedayo Odukoya in a banana farm who had blood in his hands. He was handed over to the police and according to Exhibit 1, the man named Dare and Fatai as being his comrade in crime. The Adedayo Odukoya made statement Exhibit 6 where he confessed to the crime and named Dare Durojaiye and Akeem Ajayi. Exhibit 6 gave a detailed account of how the offence of robbery and rape were committed and since Kemi David could identify those that committed the offence she was eventually murdered by slaughtering her.

The accused persons were duly arrested by the Police and it was Adedayo Odukoya that took the police to their houses. The accused persons made confessional statements in which they admitted committing robbery and rape and that Kemi David was eventually murdered because she could identify these culprits.”

It is on record that the trial court found the appellant’s confessional statement in Exhibit 7A as very positive, direct, pungent and droved to be voluntary. The appellant along with the other co-accused were found guilty, convicted and sentenced to death based on his confessional statement and other pieces of evidence such as the evidence of one Adedayo Odukoya with blood stained hands who identified the appellant to the police as a co-culprit in the crime. The recovered blood stained knife identified to have been used to slaughter Kemi David.

Generally, on a charge of murder, the ingredients that must be established by the prosecution to prove the case beyond reasonable doubt are:

- (i) That the deceased died;
- (ii) That it was the act of the accused that caused the death of the deceased.
- (iii) That the act of the accused which caused the death of the deceased was intentional and it was with the knowledge that it would result in death or grievous bodily harm would be the probable con-

sequence of the act of the accused. See: Abogede v. State (1996) 5 NWLR (pt 448) 270, Igabele v. State (2006) 6 NWLR (pt 975) 100; (2006) 3 SCM 143; (2006) LPELR 1441. Edoho v. State (2010) 14 NWLR (pt 1214) 651; (2010) 6 SCM 52; (2010) LPELR 1015.

I have no doubt that the prosecution proved the case against the appellant beyond reasonable doubt. The trial court rightly relied on the confessional statement of the appellant; Exhibit 7A to convict and sentence the appellant and the court below correctly affirmed the judgment. B

It is however on record that the appellant at the trial even though he had made a confessional statement which was admitted and duly corroborated by the statement of Odukoya with whom the offence was committed, he raised an issue on his identification. In other words, he had raised a defence of mistaken identity as he said that his name is Akeem Fatai but not Akeem Ajayi as mentioned in Exhibit 6. It has been held by this court that where there is no dispute about the identity and identification of an accused person by a witness, there will also be no reason why his evidence alone, if believed, cannot ground and sustain a conviction even on a charge of murder. See Christopher Okosi & Anor. v. The State (1989) 1 NWLR (PT. E 100) 642, (1989) 1 CLRN 29. C
D
E

For the above reason and the fuller and more detail reasons of my learned brother in the lead judgment, I hold that this court has no reason to interfere or intervene in the concurrent findings of the two courts below that the prosecution proved its case beyond reasonable doubt, that the appellant was one of those who murdered the deceased Kemi David on 28/10/99. F

I too will dismiss the appeal for being devoid of merit and substance. Accordingly, it is dismissed by me. G

MUHAMMAD JSC

Oh no! Man is said to be the best of God's creation. Again it appears a settled view that if he decides to degenerate he becomes too easily the worst and unquestionably the most beastly of all. This case unfolds these two versions of what man is, by choice, capable of attaining. It is the sad story of an unfortunate young lady who was gang raped, robbed and brutally killed by the animal in us, the beastly H

among us whose morality, sanity and humanity had evaporated.

PW1 is easily one of the flowers in us. He apprehended Adebayo Odukoya in a farm close to Late Kemi David's residence. Adebayo, on being interrogated by the police, admitted being a member of the gang that raped and slaughtered Kemi. At the time of his arrest, Adebayo had been shot by the police who had pursued him. His hands were still stained with Kemi's blood. He eventually identified the appellant as being a member of their gang in his statement. PW4 and PW5 recorded and/or interpreted the appellant's confessional statement which the trial court, after a trial within trial, held that it was voluntarily obtained. The court admitted the statement as exhibit '7A'.

Akeem Fatai's appeal before us is a further appeal against the decision of the Ogun State High Court that tried and convicted him. The court below, the Ilorin Division of the Court of Appeal, had affirmed the judgment of the trial court.

The questions the appeal raises are subsumed in respondent's fourth issue for the determination of the appeal which reads:

"Whether or not the facts enunciated by this appeal Justifies the intervention of this Honourable Court to disturb the concurrent findings of the lower courts."

I prefer the foregoing issue for the purpose of determining the appeal. Arguing the appeal, learned appellant's counsel contends that exhibit '7A', appellant's statement, does not, by virtue of S 28 of the Evidence Act as interpreted in *R v. Kanu* (1952) 14 WACA 30 and *Odu v. FRN* (2002) 2 NWLR (Part 761) 613, satisfy all the requirements of a confessional statement. The essential ingredients of the offence appellant is convicted for are not shown to have been directly, positively and unequivocally admitted in the statement. Instead, the evidence led at the trial within trial, wherein the trial court admitted in evidence the statement, clearly shows that the appellant was tortured in the course of obtaining the statement. The inference of the trial court to the contrary as affirmed by the lower court is wrong in law.

In further argument, learned counsel submits that respondent's proof on the identification of the appellant as being one of those who raped and killed Kemi remains shaky. Adebayo Adekoya whom PW5 asserts led the police to appellant's house only led them to Akeem

Ajayi's house. The appellant on the other hand in exhibit '7A', his statement, unlike exhibit '6' Mr. Odukoya's statement, maintains that his name is Akeem Fatai.

Concluding, learned appellant's counsel submits that with the quality of exhibit '7A', appellant's purported confessional statement, the discrepancy between the evidence of late Odukoya in exhibit '7' B and that of the appellant, the two courts' decision that respondent had proved its case against the appellant beyond reasonable doubt is untenable.

Relying on *Nwosu v. The State* (1986) 4 NWLR (part 35) 348 C at 359, learned counsel urges that the issues the appeal raises be resolved against the respondent and that the appeal be allowed.

Responding, learned counsel to the respondent argues that exhibit '7A', the appellant's statement was properly admitted in evidence and relied upon by the trial court in convicting the appellant. D The lower court's affirmation of the trial court's finding on this point, further contends counsel, cannot be faulted. Exhibit '7A' is by Section 28 of the evidence Act a confessional statement and where it directly, positively and clearly links the appellant with the offence, counsel submits, it can properly be relied upon to convict the appellant. E

In further response, learned counsel contends that in between the statement of Odukoya, exhibit '6' and appellant's statement exhibit '7A' and the further evidence of PW4 and PW5, the identity of the appellant as a participant in the offences he has been convicted F for ceases to be in doubt. These findings by the two courts below being concurrent, submits learned counsel, can only be interfered with if they are perverse.

Counsel seem not to accept the position of this court in the G seemingly endless chain of decisions it delivered pertaining appellants confessional statements which contain clear, positive and unequivocal, facts regarding the ingredients of the offence for which they are convicted. As correctly submitted by learned counsel for the respondent, the two courts below have made the same findings in H respect of exhibit '7A', appellant's confessional statement. These are concurrent findings which this Court is very hesitant to interfere with unless they are shown not to have arisen from the evidence on which the findings hang. In the case at hand, exhibit '7A', the appellant's

statement, exhibit ‘6’ the statement of appellant’s co-traveler in crime and the evidence of PW4 and PW5 all go to establish the fact of the death of Kemi David and that same is in consequence of the reprehensible act of persons including the appellant. The appellant himself, see exhibit ‘7A’, has put himself at the scene of and avers further
 B that he participated in the rape and killing of the deceased. The inferences the trial court drew from these pieces of evidence, which findings the lower court affirmed are beyond reproach.

It is a fruitless exercise for the appellant to insist otherwise.
 C Again, I must emphasize that whether or not exhibit ‘7A’ is a confessional statement remains a question of fact. The proof of these facts draws largely from the evidence of PW4 and PW5 who recorded the statement as given during the trial-within-trial to ascertain the voluntariness of the very statement. Where credibility of the witnesses
 D whose evidence is evaluated to draw the required inferences is involved, the trial court which saw these witnesses remain better suited for the task except where it fails to take advantage of that special position. In the case at hand, appellant has failed to show to us that this is the case with the inferences of the trial court which the lower
 E court affirmed.

Lastly, beyond exhibit ‘7A’ is enormous magnitude of corroborative evidence establishing the two offences the appellant is convicted for. This Court cannot interfere given the state of the cases of
 F both sides. See *Sule v. State* (2009) 17 NWLR (part 1169) 33 at 53 - 54 and *Akalezi v. State* (1993) 2 NWLR (part 273) 1 at 13.

It is for the foregoing and the fuller reasons contained in the succinct lead judgment of my learned brother Muntaka-Coomassie, JSC, that I find this appeal entirely worthless. I dismiss same and
 G affirm the judgment of the court below.