

SUPREME COURT OF NIGERIA
FRIDAY 14TH JUNE, 2013. SC. 81/2012
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC**

YEKINI AFOSI APPELLANT
V.
THE STATE RESPONDENT

MURDER - Definition of - The offence is defined as the taking of human life - By a person with malicious and willful intent to kill - Or is wickedly reckless as to the consequences of his act upon his victim (H1)

MURDER - Ingredients - Proof - To secure conviction for murder - Prosecution must prove that deceased died - As a result of act of accused - Which was intentional (H2)

CRIMINAL LAW & PROCEDURE - Self defence - Sustainability - The defence is available to an accused - Who proved that he was victim of unprovoked assault - Which caused him reasonable apprehension of death or grievous harm (H3)

MURDER - Self defence - Implication of - This presupposes that accused committed the offence in self defence - As the action he took was unavoidable (H4)

CRIMINAL LAW & PROCEDURE - Provocation - Defence of - Ingredients - The defence can avail accused where his act in the heat of passion - Was caused by sudden provocation - With no time for passion to cool - And his resentment proportionate to the provocation (H5)

FACTS

Accused/appellant was arrested and arraigned before the High Court of Ogun State, Ijebu-Igbo Judicial Division for murder contrary to section 319(1) of Criminal Code Law of Ogun State. Appel-

lant had while the deceased tried to settle a dispute between him (appellant) and PW3 – one Musibau Elesin, stabbed the deceased at the back. The deceased fell on the ground and the alarm raised by people around attracted the attention of PW2 (deceased’s brother). PW2 was also stabbed by appellant while he attempted to hold appellant. The deceased and PW2 were then rushed to the hospital where the deceased subsequently gave up the ghost.

PW4 – a medical doctor confirmed the death of the deceased following a post mortem examination conducted on the corpse. At the trial, appellant raised the defences of provocation and self defence. The court however rejected the defences as raised by appellant. Appellant was therefore found guilty as charged and was sentenced accordingly. His appeal to the Court of Appeal, Ibadan Division was not successful, as it was dismissed by the court. Hence, appellant lodged appeal at Supreme Court challenging the decision of the Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether the lower Court was right in holding that the Prosecution has proved murder against the Appellant beyond reasonable doubt with credible evidence.

2. Whether the lower Court was right in its holding that the defence of self defence and/or provocation will not avail Appellant.

HELD (Unanimously dismissing the appeal per **ARIWOOLA JSC**)

MURDER - Definition of

1. Murder as an offence is defined as the taking of human life by a person who either;

(a) has a malicious and willful intent to kill or do grievous bodily harm; or

(b) is wickedly reckless as to the consequences of his act upon his victim.

Therefore, for murder, there must be an evil intent, that is, a criminal intent, although it is not necessary that there should be an intent to kill. (p. 2599 D)

MURDER - Ingredients - Proof

2. It is already settled law, that for the prosecution to secure conviction for murder, the following must be proved beyond reasonable doubt;

- (a) That the deceased had died;**
- (b) that the death of the person was caused by the accused person;**
- (c) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence. In the instant case, there is ample credible evidence that the Appellant when he used the weapon he admitted using to stab the deceased at the back on the night of 23/8/1997, he knew that there was a serious risk that, if not death, at least grievous bodily harm would ensue from his act of stabbing the deceased at the back. What is more, he committed the act deliberately and without lawful excuse.**

On the strength of the pieces of evidence from PW1 and PW4, that is, the wife of the deceased and the Medical Officer who performed Post-Mortem examination on the deceased and confirmed his death and cause of same, the Court below affirmed the findings of the trial Court that the deceased died of the stab wound inflicted on him by the Appellant with intention to cause him grievous bodily harm. Without any further ado, I hold that the Court below rightly affirmed the decision of the trial Court that the Prosecution had proved the case of murder against the Appellant beyond reasonable doubt. Issue No.1 is accordingly resolved against the Appellant.

(pp. 2599 F/2603 B/E)

CRIMINAL LAW - Self defence - Sustainability

3. It is the law that the defence of self defence is open and available only to an accused person who is able to prove that he was a victim of an unprovoked assault causing him reasonable apprehension of death or grievous harm. It is his entitlement to use and apply such force to defend himself as he believes on reasonable grounds to be necessary to preserve himself from the danger, and this he is entitled to do even though

such force may cause death or grievous harm. However, if the act said to be a self defence is committed after all danger from the assailant is past and by way of revenge, then the defence will not be available to such an accused person.

Similarly, the position of the law is that where an accused person has not expressly raised issue of self defence this issue could only be considered if from the available evidence the defence avails him so that the Court will advert to.

The plea of self defence may afford a defence where the party raising it uses force, into merely to counter an actual attack, but mainly to ward off or prevent an attack which he has honestly and reasonably anticipated. In that case, the anticipated attack must be imminent. (p. 2604 G)

D MURDER - Self defence - Implication of

4. Generally, raising defence of self defence by an accused person charged with murder presupposes that the Appellant committed the offence. The reason is that in the administration of Criminal justice, self defence admits of the offence by the accused. All the accused person says is that he committed the offence in self defence. In other words, he says he had no choice in the matter than to commit the offence, the reason being that if he did not do that, the deceased could have killed him. Ordinarily, self defence that will have any impact on a case to favour an accused person must be such that the action taken by the accused was unavoidable. (p. 2605 D)

CRIMINAL LAW - Provocation - Defence of - Ingredients

G 5. It is settled law that to avail himself of the defence of provocation, the Appellant must have done the act for which he is charged:

- (i) In the heat of passion;**
- (ii) The act must have been caused by sudden provocation;**
- (iii) The act must have been committed before there was time for passion to cool;**
- (iv) The mode of resentment must be proportionate to the provocation offered.**

These four requirements must co-exist before the defence can succeed.

In other words, in order to establish the defence of provocation, it is the duty of the accused person to adduce credible and positive evidence to support the allegation of provocation. Where an accused person fails to adduce such required credible evidence in support of his defence of provocation, the trial Court is entitled to rely on the evidence before it as adduced by the Prosecution. (p. 2607 A)

NOTABLE POINT OF INTEREST

ARIWOOLA JSC

1. Self defence – Ingredients of

The following are the ingredients of self defence:-

(a) the accused must be free from fault in bringing about the encounter.

(b) There must be present an impending peril to life or of great bodily harm either real or so apparent as to create honest belief of an existing necessity.

(c) there must be no safe or reasonable mode of escape by retreat, and

(d) there must have been a necessity for taking life.

In order to sustain the defence of self defence, all the above ingredients must exist and be established. (p. 2605 G)

REPRESENTATION

Chief M. Abayomi Aliyu, for the Appellant

Ademola Bakre Esq., C. N. Atalor (Mrs.) and S. F. Soyemi (Miss), for the Respondent

CASES REFERRED TO

Enewoh v. State (1990) 4 NWLR (pt. 145) 469

Ukoh v. State (1972) 5 SC 135

Kada v. State (1991) 8 NWLR (pt. 208) 134

Njoku v. State (1992) 8 NWLR (pt. 262) 714

Omotola v. State (2009) 37 NSCQR (pt. 2) 963

Omoregie v. State (2008) 36 NSCQR (pt. 11) 1309

Baridam v. State (1994) 1 NWLR (pt. 320) 250

Onwe v. State (1975) 9-10 SC 23

Omogodo v. State (1981) 5 SC 5

Okpere v. State (1971) 1 ALL NLR 1

R. v. Afonja (1955) 15 WACA 26

B Maiyaki v. State (2008) 11 SCM 49

Edolu v. State (2010) 6 SCM 52

Awopejo v. State (2001) 18 NWLR (pt. 745) 430

Adaje v. State (1979) 6-9 SC 18

C ***STATUTES REFERRED TO***

Criminal Code Law Cap 29 Laws of Ogun State 1978, ss. 32(3), 286, 319(1)

Evidence Act LFN 2004, s. 149(d)

D

LEAD JUDGMENT BY ARIWOOLA JSC

This is an appeal against the judgment of Ibadan Division of the Court of Appeal, herein after referred to as Court below, delivered on the 7th day of June, 2011 which affirmed the conviction and sentence of the Appellant by the Ogun State High Court, sitting in Ijebu-Igbo given on 15th December, 1999.

The Appellant had been charged with the offence of murder of one Mufutau Amusa on or about the 23rd day of August, 1997 at No.22 Idesan Street, Oke-Agbo, Ijebu-Igbo, in Ijebu-Igbo Judicial Division, contrary to Section 319(1) of the Criminal Code Law, Cap 29, Laws of Ogun State of Nigeria, 1978.

Upon arraignment, the Appellant pleaded not guilty to the charge, and the case proceeded to hearing. To prove its case, the Prosecution called six witnesses while the Appellant testified in defence and called one witness. The case of the Prosecution goes thus:

At about 9.30 pm on 23/8/1997 in front of his house, the deceased tried to intervene in a quarrel between the Appellant and the 3rd PW - one Musibau Elesin, whom the Appellant had accused of shining torchlight on his face. In the course of trying to pacify them, Appellant turned choleric. He cursed the deceased ceaselessly in the presence of the 1st PW, the wife of the deceased. Within a jiffy, the Appellant rushed into his house which was close by. He emerged with a dagger with which he stabbed the deceased in the back. The

deceased slumped with the attack and fell down. The people around raised alarm which woke the 2nd PW, the deceased's brother, from sleep and came out to the scene.

On seeing his brother on the ground, PW2 attempted to hold the Appellant who turned and stabbed him in the arm with same knife he had used on the deceased. The deceased and PW2 were rushed to the hospital where the deceased later died at about 2.00am in the early hour of the following morning. The death of the deceased was confirmed by PW4, a medical practitioner, after a post-mortem examination was carried out on the deceased's body on 24/8/1997.

However, the Appellant's own story was slightly different. It briefly goes thus - He, the Appellant had had a brawl with the deceased in the night of 23/8/1997 when the deceased smashed his gasoline lantern and pounced on him with some other persons from which he, the Appellant sustained injuries in the back of his head, while the deceased received his own injury on his back. He was not sure the deceased died from the encounter. The Appellant found himself in the hospital to receive treatment for the injury he sustained.

In his defence, the Appellant had proffered the defences of provocation and self defence but these were rejected by the trial Court. At the conclusion of the trial, the Court found the Appellant guilty as charged. He was convicted and sentenced accordingly.

On appeal to the Court below, the appeal was found unmeritorious and was dismissed. The conviction and sentence of the trial Court was affirmed. That decision has led to the instant appeal before us commenced with a Notice of Appeal with nine (9) Grounds of Appeal.

Pursuant to the rules of this Court, upon being served with the record of proceedings, parties duly filed and exchanged their respective brief of argument.

When the appeal came up for hearing on 21/3/2013, Learned Counsel for the Appellant, Chief Abayomi Aliyu adopted the Appellant's brief of argument filed on 27/3/2012 and relied on same to urge the Court to allow the appeal, discharge and acquit the Appellant based on the arguments proffered in the said brief of argument.

For the Respondent, Mr. J. K. Omotoso, learned Deputy Di-

rector of Public Prosecution of Ogun State adopted and relied on the Respondent's brief of argument filed on 29/6/2012 to urge the Court to dismiss the appeal.

From the nine Grounds of Appeal earlier filed, the Appellant distilled the following two issues for determination of the appeal.

B Issues for Determination:

1. Whether the lower Court was right in holding that the Prosecution has proved murder against the Appellant beyond reasonable doubt with credible evidence (Grounds 1, 3, 4, 5 and 6).

C 2. Whether the lower Court was right in its holding that the defence of self defence and/or provocation will not avail the Appellant (Grounds 2, 7, 8 and 9).

From the same Grounds of Appeal filed by the Appellant, the Respondent also formulated two issues for determination of the D appeal. Upon careful reading of the Respondent's two issues, it is clear that they are the same with those of the Appellant's issues, though slightly differently couched. As a result I shall use the two issues formulated by the Appellant to determine this appeal.

In arguing Issue No. 1 Learned Appellant's Counsel referred E to the ingredients of the offence of murder and submitted that all the ingredients, especially, the proof that the deceased died, is absent in this case. It was contended that the Prosecution failed to prove that Mufutau Amusa actually died, either by direct or circumstantial evidence and the lower Court merely affirmed the trial Judge's reliance F on hearsay evidence to convict the Appellant.

Learned counsel referred to the testimony of the wife of the deceased - PW1, that her husband when he was allegedly attacked was taken to Olad Hospital, Ijebu-Igbo. He contended that PW1 did G not give the name of other hospital her husband was taken after the alleged attack, even though she was the only eye witness to the fight between her husband and the Appellant. Yet PW4, a Medical Doctor testified that the corpse of the deceased was brought to him at the General Hospital, Ijebu-Igbo where he was working and one Soyemi H Aderounmu identified the corpse to him.

Learned Counsel further referred to the testimony of PW5 - a Police Corporal - one Arowojolu who testified that he carried a corpse from Olad Hospital to the General Hospital with Soyemi Aderounmu. He however contended that the witness never stated

that he knew the person who died before or that anybody identified the body to him as that of Mufutau Amusa.

Learned Counsel referred to Exhibits F-G2 being the photographs and negatives that were taken of the stab wound by PW5 and contended that the said pictures were not shown to any of PW1-PW3 who were said to be relatives of the deceased to be identified by them as that of Mufutau Amusa. B

Learned Counsel submitted that Exhibits F-G2 were withheld from PW1-PW3 because their evidence would not have supported the Prosecution's case thereby causing a big shadow of doubt on whether Mufutau Amusa actually died. He urged the Court to invoke Section 149(d) of the Evidence Act, 2004, (Section 167(d), Evidence Act, 2011 to the instant case. C

Learned Counsel contended that the failure of the Prosecution to call Soyemi Aderounmu who allegedly identified the corpse to PW4, the doctor, should be considered material against the Prosecution's case and resolved in favour of the Appellant. He submitted that there was no credible or legally admissible evidence before the trial Court as to whether Mufutau Amusa was the corpse identified to PW4 who conducted the post-mortem or that he even actually died. He therefore concluded that the affirmation of the finding of the trial Court by the Court below that Soyemi Aderounmu identified the corpse to PW4 is perverse and should be held to be so. E

On the legal requirement in murder cases for the Prosecution to prove that the victim died and that it was in respect of his body that an autopsy was performed, Learned Counsel relied on the following: *Enewoh v. State* (1990) 4 NWLR (Pt. 145) 469 at 477; *Elijah Ukoh v. State* (1972) 5 SC 135; *Kada v. State* (1991) 8 NWLR (pt. 208) 134 at 146. F

Learned Counsel conceded that the law permits the Prosecution to use circumstantial evidence to prove the identification of a deceased. He submitted, however, that such circumstantial evidence to be admissible must be cogent, direct and unequivocal relying on *Abraham Njoku v. The State* (1992) 8 NWLR (pt. 262) 714 at 723, *Omotola v. The State* (2009) 37 NSCQR (pt. 2) 963 at 994. G

Learned Counsel submitted that with the material contradictions identified in the testimonies of the six witnesses called by the Prosecution to prove its case, their evidence are manifestly unreli-

able.

Learned Counsel referred to the evidence adduced by the Prosecution on the use of knife. He contended that it was in evidence that both the deceased and the Appellant were said to be butchers by trade and use knife in their business as tool. Coupled with the fact
B that the Appellant also sustained injury on his head which injury was confirmed by DW2, a Doctor as injury that could not have been self inflicted. Learned Counsel submitted that DW2 was cross-examined on this testimony on oath.

Learned Counsel further referred to testimonies of PW1, PW4
C and PW5 on how many wounds were found on the body of the corpse presented to PW4 who claimed to have carried out an autopsy and in which hospital the body of the deceased was taken to where the autopsy took place. Similarly, on which weapon was used
D to inflict the injury found on the deceased. Whether it was a knife or machete? He submitted that there were contradictions in the evidence adduced by the Prosecution on the cause of death of the deceased. And that the cause of death must be ascertained by the Court and not speculate on it. He submitted that machete wound is different
E from wound from knife stab.

Learned Counsel submitted that where material contradictions are neither explained nor resolved, the evidence of the Prosecution witnesses become unreliable and should lead to the accused being acquitted.
F

Learned Counsel submitted that the trial Judge was not circumspect in the reception of the evidence of PW1-PW3 who are relatives of the deceased, Mufutau Amusa, and that this led to miscarriage of justice by believing the testimony of the said Prosecution
G witnesses as against that of the Appellant who said that the deceased fought with him after he smashed Appellant's lantern and brought out a knife which he used to stab the Appellant. And that the Appellant wrestled the knife from the deceased and in the course of the fight, stabbed the deceased on the back. He urged the Court to re-
H solve the first issue in favour of the Appellant.

The second issue is whether the lower Court was right in its holding that the defences of self defence and/or provocation will not avail the Appellant.

Learned Counsel referred to the testimony of PW1, both

under examination-in-chief and cross-examination and the defence of self defence by the Appellant. He submitted that the onus is not on an accused in the position of the Appellant to establish his plea of self defence but that the onus is on the Prosecution to disprove the defence of self defence put up by an accused person. He relied on *Omoregie v. State* (2008) 36 NSCQR (pt. 11) 1309 at 1327 - 1328; *Baridam v. State* (1994) 1 NWLR (pt. 320) 250 at 262, *Onwe v. State* (1975) 9-10 SC 23. B

Learned Counsel referred to Exhibits B, B1 and H, H1, the statements of the Appellant to the police made on 24/08/1997 and 27/8/97 and his oral testimony in Court and contended that the Appellant was consistent on what transpired on the night in question. He also referred to the testimony of PW1 - PW3 on the same event and contended that same were full of contradictions rendering them unreliable. He submitted that the evidence of the Appellant accords with reasoning, probable and more cogent and consistent. He urged the Court to accept and believe same as against the evidence of the Prosecution witnesses. C D

Learned Counsel referred to the Appellant's testimony in defence on how he got to the hospital and the rejection of the evidence by the Court based on discrepancy. He submitted that the discrepancy was not enough to lead to the rejection of the Appellant's testimony that he was first wounded by the deceased with a knife which he (the Appellant) later used on the deceased in self defence. He relied on *Omogodo v. The State* (1981) 5 SC 5 at 21, *Okpere v. The State* (1971) 1 ALL NLR 1. E F

He urged the Court to absolve the Appellant of the offence of murder on the ground of self defence.

On the defence of provocation, Learned Counsel referred to the finding of the trial Court as affirmed by the Court below and contended that there was a misconception on what actually provoked the Appellant. He referred to the statements of the Appellant made to the police on 24/8/1997, the second day of the alleged incident which led to the fight between the deceased and the Appellant. G H

He submitted that when the Court is considering whether there is provocation, in law, the Judge must approach the issue on a view of the evidence most favourable to the accused. He cited; *R. v. Afonja* (1955) 15 WACA 26 on what will amount to provocation as series of

acts done by the deceased to the accused.

He contended that the finding of the trial judge that the Appellant's passion had time to cool was based on the believe of the evidence of PW1, wife of the deceased on how the Appellant was alleged to have rushed to his house and later emerged with a knife
 B he used to stab the deceased on the back. He contended further that being the wife of the deceased, the PW1 had interest to serve.

He urged the Court to hold that the Appellant acted in the heat of passion having been provoked by the deceased, hence urged
 C the Court to commute the sentence to imprisonment for a term of years to start from the date of arrest.

He finally urged the Court to allow the appeal.

On Issue No.1 above, the Respondent also referred and stated the three ingredients the Prosecution is required to prove to succeed
 D on a charge of murder. He relied on Maiyaki v. The State (2008) 11 SCM 49 at 59 - 60; Edolu v. The State (2010) 6 SCM 52 at 69; Ochেমaje v. The State 10 SCM 103 at 120.

Learned Counsel picked the ingredients one after the other. On ingredient No.1, reference was made to 23/8/1997 when the
 E evidence showed that the Appellant stabbed the deceased with a knife at the back in two different places and that the deceased died as a result of the injuries. He referred to the evidence of PW1, PW2, PW4 and PW5 along with Exhibit A - the Medical Report tendered
 F by the Medical Officer of the General Hospital (PW4) who performed a post-mortem examination on the deceased upon proper identification of the deceased as Mufutau Amusa.

Learned Counsel referred to the Appellant's statements made to the police which were admitted and marked Exhibits B, B1 and H,
 G H1 and contended that the Appellant admitted that he stabbed the deceased in the back and that the injuries he sustained led to his death.

Learned Counsel conceded that although it is desirable that the Prosecution should call as witness in a murder trial, the person
 H who identified the victim's dead body to the doctor who performed the autopsy, this will only be necessary in circumstances where the identity of the corpse examined by the doctor is shrouded in doubt. He contended that, where the identity of the deceased is not in doubt, such other evidence is not essential. He cited Awopejo v. The State

(2001) 18 NWLR (pt. 745) 430 at 440.

He referred to the record of appeal which shows that one Soyemi Aderounmu who identified the corpse of the deceased to the Medical Doctor was the Appellant's in-law who visited him in the hospital. He submitted that the Respondent's discretion not to call the Appellant's in-law as a witness for the Prosecution was exercised judiciously, relying on Kwabena A. T. Ankrah v. The Queen (1955) 14 WACA 673 at 675; Regina v. K. Yeboa (1954) 14 WACA 484/486, Adaje v. The State (1979) 6-9 SC 18. B

In the alternative, Learned Counsel submitted that medical evidence is dispensable in this case. He referred to the facts surrounding the event of 23/8/97 at about 9.30 pm and how after the deceased was stabbed on his back and rushed to Olad Hospital, where he died about 4 hours 30 minutes later at 2.00am on 24/8/97. He referred to the testimony of PW1, the wife of the deceased who reported the matter to the police after the death of the deceased. Also Exhibit A, the statement of the Appellant made to the police the day after the incident, which at the point of being tendered was not objected to. C

Reference was made to pages 41 - 42 of the record to show how the trial Court considered the testimonies of PW1, PW2, PW4 and PW5 along with Exhibits A, B, B1, H and H1 and rightly affirmed that Mufutau Amusa (the deceased) had died. He contended that the trial Court also considered the absence of Soyemi Aderounmu who identified the corpse of the deceased to the doctor for post-mortem examination and rightly concluded that his absence was not fatal to the Prosecution's case. E

On the issue that the death of the deceased had resulted from the act or omission of the Appellant, Learned Counsel referred to the testimony of PW1, PW2 and PW4, and Exhibits B, B1, H and H1. He once again contended that no objection was raised to the tendering and admissibility of the statements of the Appellant to the police. He submitted that the statements are confessional and they stand as admission in civil procedure. Cited Akpa v. The State (2008) 8 SCM 68 at 79 - 82. F

He submitted that the death of the deceased had resulted from the act of the Appellant and it was also established by the fact that the death of the deceased was as a result of the injury sustained H

from the weapon used by the Appellant.

On the issue that the act or omission of the Appellant which caused the death of the deceased was intentional with the full knowledge that death or grievous bodily harm was its probable consequences, Learned Counsel referred to the testimony of PW1, PW2 and PW4 which was corroborated by Exhibit A.

Learned Counsel contended that bearing in mind the nature of the weapon used by the Appellant and the severity of the injury caused by the use of the knife, there can be no doubt that the Appellant either intended to kill the deceased or cause him grievous bodily harm. He submitted that, Appellant's intention is inferred from his overt acts. He cited *Uwagboe v. State* 8 QCCR 1 at 16

On the contention by the Appellant, that PW1, PW2 and PW3 were tainted witnesses because they are relatives of the deceased, Learned Counsel submitted firstly, that the fact that a witness is a blood relation of the victim of the crime will not mean that they are not competent witnesses. Secondly, a case is not lost on the ground that those who are witnesses are members of the same family or community. What is important is their credibility. Thirdly, the evidence of a relation can be accepted, cogent enough to rule out the probability of deliberate falsehood and bias. Fourthly, there is no law which prohibits blood relation from testifying for the Prosecution where such a relation is victim of the crime committed. He relied on *Omotola & Ors. v. The State* (2009) 3 SCM 127 at 147 - 148, *Ademola v. The State* (1988) 1 NWLR (Pt.73) 683.

Learned Counsel submitted that the evidence of PW1 and PW2 are cogent and credible and trial Court was right in believing their testimony and convicting on the testimony.

On the alleged contradictions in the Prosecution's case with regard to whether there was light, location of the houses, number of wounds inflicted on the deceased, the use of knife or cutlass, Learned Counsel submitted that the so called contradictions are not related to the ingredients of the offence of murder. He contended that for contradiction to be material, it must relate to the substance and indeed the vital ingredients of the offence charged. He cited, *Isele v. the State* 1 SCNJ 15 at 22 - 23; *Musa v. The State* (2010) 4 SCM 63 at 77.

Learned Counsel submitted that what is of paramount interest is whether the Prosecution has proved the ingredients of murder.

He contended that it is the law, that the ascription of probative value on the evidence adduced by witnesses at a trial rests with the trial Court and it is not the function of an appellate Court to do so or to interfere with the findings of the facts of the trial Court except such findings are undoubtedly seen to be perverse relying on *Uwagbuse v. State* 8 QCCR 1 at 16; *Sule v. State* (2009) 8 SCM 177 at 193-194. B

He urged the Court to resolve this issue against the Appellant and hold that the Prosecution proved the case beyond reasonable doubt and the Court below was right in affirming so against the Appellant. C

Second issue is whether the lower Court was right in holding that the defences of self defence and/or provocation will not avail the Appellant. Learned Counsel to the Respondent referred to the conditions required to be met jointly for the plea of self defence to avail an accused person. He contended that available on the records is D evidence that it was the Appellant that went to the house of the deceased and initiated the encounter which led to the deceased's death.

Learned Counsel referred to the testimony of PW1, PW3 and Exhibits B, B1, H and H1 to show that it was the Appellant who went out of his way to harass PW3 who had come to visit PW2 in the deceased's house. He contended that it was when PW1 and the deceased heard the Appellant cursing PW3 that they came out to inter- E vene. That, as evident in records, at the time PW1 and the deceased intervened, there was no impending danger of any sort as the de- F ceased and the Appellant did not have any hot argument. Learned Counsel contended further that it should be noted that in Exhibits B, B1, H and H1, the Appellant admitted that he collected the cutlass from the deceased, stabbed him in the back and fled from the scene only to re-appear at the hospital. But there is no evidence on record G how the Appellant got to the hospital. He submitted that the plea of self defence as raised by the Appellant is an admission that he did the act for which he was charged, convicted and sentenced. He submit- H ted further that the plea of self defence implies that the Appellant admitted that his act led to the death of the deceased but contends that it was justified. He urged the Court to hold that the Court below was right in affirming that the evidence of the Appellant was an after-thought.

Learned Counsel contended that in raising a plea of self de-

fence, the degree of force used by the Appellant must be proportionate to the attack, relying on *Musa v. State* (supra) at pages 89 - 90. He referred to Exhibits A, F2, G-G2 and concluded that assuming without conceding that the Appellant was attacked, the degree of force used by him was not proportionate.

B Learned Counsel referred to the testimony of PW4 which clearly shows that the deceased was stabbed from the back and at the back in two different points, and contended that, that shows that the deceased either attempted to run away from the Appellant or
C was caught unaware. He submitted that with the scenario of stabbing at the back, the Appellant cannot be heard to say that there was no safe or reasonable mode of escape by retreat for him. He submitted that the plea of self defence will not avail the Appellant and urged the Court to affirm the judgment of the Court below in this regard.

D On the defence of provocation, the Appellant had sought that it should avail him and lead to the reduction of the offence to manslaughter. Learned Counsel referred to the two conditions that must be satisfied for the defence of provocation to avail an accused person. He contended that these elements being read conjunctively
E demand that the Appellant would have acted on the spur of the moment or the act of sudden provocation which left him no time for cooling off his passion. He stated that in the instant case, there was evidence that the Appellant went back to his house before he came
F to attack the deceased.

Learned Counsel referred to Section 139 of the Evidence Act, 2011 and submitted that the burden of proving his entitlement to the defence of provocation rests on the Appellant. He cited *Musa v. State* (supra) at 91.

G He contended that the Appellant failed to discharge the burden, as evidence available on record revealed from the moment he attacked PW3, to the moment he stabbed the deceased and PW2.

Learned Counsel contended further that provocation, like self defence is an implied admission by the Appellant, that he committed the offence with which he was charged, tried and sentenced,
H but he did it in the heat of passion. He relied on *Edoho v. State* (2010) 6 SCM 52.

Learned Counsel submitted that, assuming without conceding that the Appellant was provoked, the heat of passion had cooled

or passed when he left the scene and went to his house, took the knife and came back to stab the deceased at the back. The Court below was therefore right in affirming the rejection of the defence of the Appellant by the trial Court as the testimony of the Appellant as to the chain of events on that night could not be corroborated by any other person. B

Learned Counsel submitted that the trial Court having rejected the evidence of the Appellant as incredible as it relates to the defence raised by him, his evidence has no evidential value of any kind. He finally urged the Court to dismiss the appeal in its entirety and affirm the judgment of the Court below. C

As I stated earlier, the Appellant herein was charged with the offence of murder. He was duly tried, found guilty, convicted and finally sentenced to death in accordance with the law pursuant to which the charge was preferred. D

Murder as an offence is defined as the taking of human life by a person who either;

(a) has a malicious and willful intent to kill or do grievous bodily harm; or

(b) is wickedly reckless as to the consequences of his act upon his victim. E

Therefore, for murder, there must be an evil intent, that is, a criminal intent, although it is not necessary that there should be an intent to kill. See R. v. Viockers (1957) 2 All ER 741 at 744. F

It is already settled law, that for the prosecution to secure conviction for murder, the following must be proved beyond reasonable doubt;

(a) That the deceased had died; G

(b) that the death of the person was caused by the accused person;

(c) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence. H

See Ogba v. The State (1992) 2 NWLR (Pt. 222) 163; Monday Nweze v. The State (1996) 2 NWLR (Pt. 428) 1 at 11; Uchenna Nwachukwu v. The State (2002) 12 SCM 143 at 159; Silas Sowe v. The State (2009) 8 SCM 177 at 190.

Let me now deal with the issues formulated by the Appellant for determination of the appeal.

Issue No 1 -

Whether the lower Court was right in holding that the Prosecution proved murder against the Appellant beyond reasonable doubt with credible evidence.

As earlier alluded to in this judgment, the Appellant had contended that the Prosecution failed to show that the deceased, Mufutau Amusa whom he was accused to have killed or caused to die actually died. It is therefore important to see how the Prosecution attempted to discharge the burden on it to show or establish that the person of Mufutau Amusa actually died, that the death resulted from the act of the Appellant and that the act of the Appellant was intentional with the knowledge that death or grievous bodily harm was its probable consequence.

The Prosecution called six witnesses amongst whom were PW1, PW2, PW4 and PW5. PW1, Yetunde Amusa is the wife of Mufutau Amusa. In her testimony, she had described how in her presence, her husband was stabbed on his back with a knife by the Appellant. She narrated how her husband fell down in the pool of his blood after he was stabbed and later died in Olad Hospital in the early hour of the following day.

PW2 is one Talubi Amusa, younger brother of Mufutau Amusa. He testified that he came out of the house upon hearing the shout of his brother, Mufutau Amusa and found that he was stabbed on his back and was lying in the pool of his blood. An attempt to hold the Appellant down for having stabbed Mufutau earned him a stab on his arm by the Appellant with the same knife he had stabbed Mufutau. He confirmed that his brother later died.

PW4 is Dr. Akin Olugbenga Oyefeso a Senior Medical Officer at the General Hospital, Ijebu Igbo. He testified that a corpse was brought to him in the hospital by Corporal Arowojolu in company of Soyemi Aderounmu who identified the corpse to him as that of Mufutau Amusa. He performed Post-Mortem examination on the corpse. His findings included that the deceased sustained a deep stab wound at the back and another penetrating injuries between the 9th and 10th ribs at the back. He died as a result of that injury. The post-mortem examination report was tendered and admitted without ob-

jection and marked Exhibit A.

PW5 was Corporal Akinola Arowojulu a police officer No.85176 then attached to Nigeria Police Station, Ijebu Igbo. He testified as the police officer who handled the case from the time PW1 reported same to the police. He obtained statements from witnesses. He found the corpse of the deceased at Olad Hospital but transferred it to the General Hospital. The corpse had earlier been identified to him as that of Mufutau Amusa. He tendered the statements of the Appellant which were admitted without objection and marked Exhibits B and B1.

In his statements made to the police on the following morning on 24/8/97, the Appellant stated categorically, although alleging that it was in retaliation or self defence, that he stabbed Mufutau Amusa at the back and he later died in Olad Hospital.

On this point, the trial Court found as follows:

“in my view, there is sufficient evidence before the Court as to the identity of the deceased before the Post-Mortem examination. The absence of the evidence of the person who identified the corpse to the doctor (in this case Soyemi) though if present would have strengthened the Prosecution’s case and it is not a necessity and so its exclusion is not fatal to this case.”

The trial Court therefore rejected the submission of the Learned Counsel to the Appellant that the Prosecution did not prove that the victim died.

The Court below upon consideration of the evidence adduced by the Prosecution on this point came to the following conclusion that:

“The above pieces of evidence proved to the letter the identity of the deceased, Mufutau Amusa as the victim of the knife attack on whose body the 4th PW performed Post-Mortem examination confirming his death in consequence.....

Further, the strong evidence adduced by the Respondent proved beyond reasonable doubt the death of the deceased from a stab wound inflicted on him by the Appellant.”

There is no doubt, the fact that the Prosecution did not call Soyemi Aderounmu who identified the deceased to the Doctor who performed Post-Mortem Examination was not material to the identity of the deceased as Mufutau Amusa whom the Appellant agreed

he used a weapon to stab at the back from which injury he died.

On how the testimony of Soyemi Aderonmu, on the identity of the deceased is not indispensable, this Court has held that such a witness may not be called by the Prosecution after all, to prove that a victim died.

B In *Ukwa Egbe Enewoh v. The State* (1990) 4 NWLR (Pt.145) 469 at 482 this court stated thus:

C *"The position however, is that where there are facts from which it can be inferred that the corpse examined by the Doctor was that of the deceased, the evidence of the person dead or alive, said to have identified the corpse is not indispensable. Indeed, a conviction for murder can be made without the recovery of the dead body if there is positive evidence that the deceased has been killed. In effect the need for anyone to identify the body of the deceased to a doctor is not a sine qua non in all murder cases."* See also *Edim v. The State* (1972) 4 SC 160.

E From the above, it is no longer in doubt that the victim of the attack by the Appellant, Mufutau Amusa, died. In the same vein, the death has been proved to have resulted from the injury sustained from the stab wound inflicted on him by the Appellant.

F However, the one point left is the intention, which it is necessary to impute to the Appellant in order to find him guilty of the crime of murder. Therefore, the following had long been proposed in answer to the above question of general importance.

"(1) Before an act can be murder, it must be aimed at someone and must in addition be an act committed with one of the following intentions, the test of which is always subjective to the actual accused person.

G *(i) the intention to cause death:*

(ii) the intention to cause grievous bodily harm, that is, really serious injury;

H *(iii) where the accused person knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstance whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential*

victim other than the one who succumbed. See *Director of Public Prosecution v. Smith* (1960) 3 All ER 161.

(2) Without an intention of one of these three types the mere fact that the accused conduct is done in the knowledge that grievous bodily harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.”^B See *Hyam v. Director of Public Prosecution* (1974) 2 All ER 41 at 43, 56, per Lord Hailsham of St. Maryebone.

In the instant case, there is ample credible evidence that the Appellant when he used the weapon he admitted using to stab the deceased at the back on the night of 23/8/1997, he knew that there was a serious risk that, if not death, at least grievous bodily harm would ensue from his act of stabbing the deceased at the back. What is more, he committed the act deliberately and without lawful excuse. In particular when the Appellant in his statement stated that the deceased was the first to use the same weapon, which belonged to the deceased in hitting him on the head. He stated in his statement, inter alia, as follows:

“I am not the owner of the cutlass which I used in killing Mufutau Amusa. He was the one who brought it out from his house and used it to cut my head, and equally collected it and used it on his back which caused his death.”^E

On the strength of the pieces of evidence from PW1 and PW4, that is, the wife of the deceased and the Medical Officer who performed Post-Mortem examination on the deceased and confirmed his death and cause of same, the Court below affirmed the findings of the trial Court that the deceased died of the stab wound inflicted on him by the Appellant with intention to cause him grievous bodily harm. Without any further ado, I hold that the Court below rightly affirmed the decision of the trial Court that the Prosecution had proved the case of murder against the Appellant beyond reasonable doubt. Issue No.1 is accordingly resolved against the Appellant.^F

The second issue is whether the lower Court was right in its holding that the defence of self defence and/or provocation will not avail the Appellant.^H

The defences of provocation and self defence were put forward by the Appellant before the trial Court and they were consid-

ered, leading to the holding that they failed to avail the Appellant. The Court below agreed with the findings of the trial Court and affirmed the decision that the said defences could not avail the Appellant. That led to the instant appeal.

Firstly, on the defence of self defence, Sections 32(3) and B 286 of the Criminal Code provide as follows:

“32. A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances...

C *3. When the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence... But this protection does not extend to an act or omission which would constitute an offence of which grievous harm to the person or another or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful assistance or conspiracy rendered himself liable to have such threats made to him...”*

“286 When a person is unlawfully assaulted, it is lawful for him to use such force to the assailant as is reasonably necessary to E make effectual defence against the assault.

Provided that the force used is not intended, and is not such as likely to cause death or grievous harm.

If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by F way of defence believes on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence even though such force may cause death or grievous G harm.”

It is the law that the defence of self defence is open and available only to an accused person who is able to prove that he was a victim of an unprovoked assault causing him reasonable apprehension of death or grievous harm. It is his H entitlement to use and apply such force to defend himself as he believes on reasonable grounds to be necessary to preserve himself from the danger, and this he is entitled to do even though such force may cause death or grievous harm. However, if the act said to be a self defence is committed after

all danger from the assailant is past and by way of revenge, then the defence will not be available to such an accused person. See R. v. Dummeni (1955) 15 WACA 75.

Similarly, the position of the law is that where an accused person has not expressly raised issue of self defence this issue could only be considered if from the available evidence the defence avails him so that the Court will advert to. See Ehot v. State (1993) 4 WLR (Pt. 290) 644; Frank Uwagboe v. The State (2008) 7 SCM 152 at 162-163.

The plea of self defence may afford a defence where the party raising it uses force, into merely to counter an actual attack, but mainly to ward off or prevent an attack which he has honestly and reasonably anticipated. In that case, the anticipated attack must be imminent. See R. v. Chisam (1963) 47 Cr App. R. 130 at 134, Iheanyighiehi Apugo v. The State (2006) 12 SCM (Pt.1) 148 at 168.

Generally, raising defence of self defence by an accused person charged with murder presupposes that the Appellant committed the offence. The reason is that in the administration of Criminal justice, self defence admits of the offence by the accused. All the accused person says is that he committed the offence in self defence. In other words, he says he had no choice in the matter than to commit the offence, the reason being that if he did not do that, the deceased could have killed him. See Silas Sule v. The State (2009) 8 SCM 177. ***Ordinarily, self defence that will have any impact on a case to favour an accused person must be such that the action taken by the accused was unavoidable.***

The following are the ingredients of self defence:-

(a) the accused must be free from fault in bringing about the encounter.

(b) There must be present an impending peril to life or of great bodily harm either real or so apparent as to create honest belief of an existing necessity.

(c) there must be no safe or reasonable mode of escape by retreat, and

(d) there must have been a necessity for taking life. See Rtd. Captain Jairo Musel Liya v. The State (1998) 2 NWLR (Pt. 538) 397.

In order to sustain the defence of self defence, all the above ingredients must exist and be established. See Kwaghsir v. State (1995) 3 NWLR (Pt.386) 651, Nwambe v. State (1945) 3 NWLR (Pt. 384) 385, Omoregie v. The State (2008) 12 SCM (Pt. 2) 599 at 613.

B In the instant case, the Appellant raised the defence of self defence before the trial Court. His defence was that he attacked the deceased after he was first attacked and wounded by the deceased. It is in evidence that the Appellant clearly admitted that he stabbed the deceased at his back which led to his death. On this defence the trial C Court opined as follows:

“There is evidence that the accused left the scene only to return with a knife or machete with which he attacked the deceased. If an attack is all over and no sort of point remains then the employment of force may be by way of revenge or punishment or by way of D paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence.”

The trial Court rejected the defence of self defence unequivocally. The Appellant also raised the defence of provocation before the trial Court. On this point the trial Court had opined as follows:

E *“The accused tried to establish that he was provoked when the deceased got the lantern from him and smashed it. The question is “will this insult be defended or replied with stabbing or macheting.” The answer is no. I also hold that the provocation is not sudden as F the accused went home only to return to the scene and did the havoc. Was his action proportionate to the insult? No reasonable tribunal will hold that it was proportionate.*

I therefore hold that there was no provocative act and even if there was one, the act of the accused was not done in the heat of G passion and before there was time to cool and that the mode of retaliation was not proportionate to the provocation.”

On this point, the Court below found as follows:

H *“From the stand point of the evidence for the Respondent, the deceased did not offer any provocation to the Appellant, the Appellant did not act on the spur of the moment, Appellant left and came back to launch the fatal attack on the deceased showing (even if there was any provocation) Appellant had sufficient time or interval to cool down; and the deadly reaction of Appellant was also disproportionate to the circumstances of the encounter.”*

It is settled law that to avail himself of the defence of provocation, the Appellant must have done the act for which he is charged:

(i) In the heat of passion;

(ii) The act must have been caused by sudden provocation; B

(iii) The act must have been committed before there was time for passion to cool;

(iv) The mode of resentment must be proportionate to the provocation offered. C

These four requirements must co-exist before the defence can succeed. See *Oladipupo v. The State* (1993) 6 SCNJ 233 at 239; *Shande v. The State* (2005) 8 SCM 128; (2005) 6 SCNJ 124 at 131.

In other words, in order to establish the defence of provocation, it is the duty of the accused person to adduce credible and positive evidence to support the allegation of provocation. Where an accused person fails to adduce such required credible evidence in support of his defence of provocation, the trial Court is entitled to rely on the evidence before it as adduced by the Prosecution. See *Okon N. Edoho v. The State* (2010) 6 SCM 52. D E

The Court below had held that the alleged act of smashing the Appellant's lantern could not have been sufficient provocation to a reasonable person to deprive the deceased of his life. F

There is no doubt, there are concurrent findings by the two Courts below that the two defences of self defence and provocation put forward by the Appellant were not available to avail him. The second issue is therefore resolved against the Appellant. G

It is worthy of note that the Learned Appellant's Counsel in his brief of argument had, in the alternative to allowing the appeal by setting aside the judgment of the Court below, urged the Court to allow the defence of self defence by acquitting the Appellant of murder or allow the defence of provocation and sentence the Appellant to a term of imprisonment for manslaughter to start from the date of his arrest. H

Therefore, having come to the conclusion that the two defences of self defence and provocation could not avail the Appellant,

it follows that the Court below was right in so holding and its conclusion is unassailable. This Court will therefore not disturb the concurrent findings of the Courts below as there is no perversion of justice in any form in its decision.

B In the final analysis, this appeal fails for lacking in merit and substance. It is accordingly dismissed. The judgment of the Court below delivered on 7th June, 2011 is affirmed.

ONNOGHEN JSC

C I have had the benefit of reading in draft the lead judgment of my learned brother ARIWOOLA, JSC, just delivered.

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

D My learned brother has exhaustively dealt with the issues canvassed before us and I have nothing useful to add.

I therefore dismiss the appeal.

MUNTAKA-COOMASSIE JSC

E This is an appeal against the decision of the Court of Appeal, Ibadan Division hereinafter called lower Court. The judgment was delivered on 7th day of June, 2011 in which the conviction and sentence of the Appellant by the Ogun State High Court sitting in Ijebu-Igbo was affirmed. The Appellant was not happy with the decision of the lower Court, and as a result, he again appealed to the Supreme Court.

F On 21/3/2013 the appeal was heard by this Court parties through their respective Counsel adopted their Briefs of Argument. The Appellant's Counsel urged this Court to allow the appeal and to discharge and acquit the Appellant. Learned Counsel for the Respondent, Deputy Director of Public Prosecution of Ogun state also adopted their brief of argument and asked this Court to dismiss the appeal.

H My learned brother Olukayode Ariwoola, JSC permitted me to read in advance his lead judgment delivered today. I completely agree with his lordship that the appeal is devoid of any merit. No other defence can be used to at least extenuate the sentence. That

being the case, the decision of the lower Court delivered on 7th June, 2011 is correct and I affirm same.

NGWUTA JSC

I read in draft the lead judgment just delivered by My Lord, B
Olu Ariwoola, JSC.

I adopt His Lordship's lucid reasoning and conclusion reached that the appeal lacks merit. Consequently, I also dismiss the appeal and affirm the judgment delivered by the lower Court on 7th June, C
2011. Appeal dismissed.

MUHAMMAD JSC

I was obliged a preview of the lead judgment of my learned D
brother Ariwoola JSC, with whose reasoning and conclusion I entirely agree. I am unable to improve his lordship's detailed consideration of the issues the appeal raised. I adopt the judgment as mine in dismissing the unmeritorious appeal and abiding by the consequential E
orders made therein.

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