

SUPREME COURT OF NIGERIA
FRIDAY 14TH JUNE, 2013. SC. 104/2011
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, J. A. FABIYI, N. S. NGWUTA,
M. D. MUHAMMAD, JJSC**

MAIKUDI ALIYU APPELLANT
V.
THE STATE RESPONDENT

ALIBI - Plea of - Investigation - Appellant did not fully disclose his whereabouts at the time of the incident to police - To warrant any investigation of his plea by the police (H1)

ALIBI - Plea of - Failure to investigate - Prosecution's case is not made fatal by every failure of police to investigate alibi - As accused alibi is demolished - Where there are sufficient evidence fixing him at crime scene at the material time (H2)

CRIMINAL PROCEDURE - Proof - Number of witness - Prosecution is not bound to call a host of witnesses - As single witness believed by court - Can establish a crime even in murder charge (H3)

CRIMINAL PROCEDURE - Proof - Vital witness - Where prosecution failed to call a particular witness considered vital - Accused is at liberty to call such witness (H4)

CRIMINAL PROCEDURE - Conviction - Identification parade - Appellant was not solely convicted on evidence obtained at the parade - As court relied on testimony of PW1 - That linked appellant with the offence (H5)

CRIMINAL PROCEDURE - Identification parade - Correctness of - PW6 was not cross examined on the propriety or otherwise of the parade - And there is presumption of regularity of the parade under Evidence Act s. 168(1) (H6)

MURDER - Ingredients - Prosecution must prove that there is death

- Which was caused by the accused - And that the act of accused was intentional (H7)

FACTS

Accused/appellant was arraigned before the High Court of Katsina State for the offence of culpable homicide punishable with death under section 221 of the Penal Code. The case against appellant is that while engaged in a struggle with PW1, he used a knife to stab and kill the deceased who had come to rescue PW1. Appellant ran away having seen the effect of his action. The matter was then reported to the police who later arrested appellant. Appellant raised the issue of alibi. However, PW1 clearly identified appellant as the culprit.

At the trial, prosecution/respondent adduced relevant evidence including that of PW1 to prove the guilt of appellant. After having heard evidence adduced by both sides in proof of their cases, the learned trial Judge found appellant guilty as charged. He was therefore convicted and sentenced to death by hanging. In disagreement with the judgment, appellant filed appeal at the Court of Appeal Kaduna Division. The court heard and dismissed the appeal. Aggrieved further, appellant appealed to Supreme Court, contending among other things that his plea of alibi was not properly investigated to warrant his conviction.

ISSUES FOR DETERMINATION

“(i) Considering the state of evidence before it, whether the lower court was not wrong in resolving the issue (or defence) of alibi against the appellant.

“(ii) Having regard to the manner in which the identification parade was conducted in this case, whether or not the lower court was right upholding the conviction and sentencing of the appellant by the trial court based on the evidence procured therefrom.

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

ALIBI - Plea of - Investigation

1. Alibi, literally, means elsewhere. It is the duty of the ac-

cused to furnish the particulars of his alibi in full detail to the Police at the earliest opportunity. He must furnish his whereabouts and those present with him at the material time of the incident. It is then left for the prosecution to disprove same. Failure to investigate can lead to the acquittal of the accused person.

It is clear from the evidence placed before the trial court and with which the court below was at one, that the appellant did not fully disclose to the Police that he was with DW5 at about 5.30am on the date of the incident to warrant and facilitate any investigation by the Police of the plea of alibi put up by him.

It should be stressed that for a defence of alibi to be worthy of investigation, it should be precise and specific in terms of the place that the accused was at the material time of the incident. The Police should not be involved in a wild goose chase for the whereabouts of the accused person at the time the crime was committed. (pp. 2881 D/2882 F)

ALIBI - Plea of - Failure to investigate

2. It should be further reiterated that it is not every failure of the Police to investigate an alibi raised by an accused person that will be fatal to the case of the prosecution. There is nothing esoteric or extraordinary in a plea of alibi which postulates that the accused could not have been at the scene of the crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi or attempt to do so, there is no inflexible and/or invariable way of doing this. If the prosecution adduces sufficient and acceptable evidence to fix the accused person at the scene of the crime at the material time, his alibi is thereby logically and physically demolished.

It is clear that the prosecution adduced sufficient and acceptable evidence to fix the accused person at the locus criminis, at the material time, as the trial court found same in the evidence adduced by the P.W.1. The alibi was thereby logically and physically demolished. (pp. 2881 F/2883 A)

CRIMINAL PROCEDURE - Proof - Number of witness

3. It should be noted at this point that learned counsel for the appellant strenuously harped on the point that the prosecution failed to call one Wali as a witness. He even contended that the provision of the law should be invoked against the prosecution for failure to call Wali to testify; being a vital witness. The appellant should appreciate that it has been held variously by this court that the prosecution, in criminal cases, is not bound to call a host of witnesses. It is only obliged to call enough witnesses to adduce evidence in discharge of the onus of proof incumbent on it to prove the case beyond reasonable doubt. The section of the law has to do with withholding of evidence and not failure to call a particular witness. In this regard, PW.1 who was a direct victim and who had interaction with the appellant at the material time testified. That was alright.

It is now settled that in criminal trials, the prosecution is not obliged to call a host of witnesses to prove its case. A single witness, if believed by the court, can establish a criminal case even if it is a murder charge. The decisive factor is the quality of the evidence preferred at the trial in the discharge of the burden of proof on the prosecution. (pp. 2883 F/2884 E)

CRIMINAL PROCEDURE - Proof - Vital witness

4. It should also be reiterated here that where the prosecution failed to call a particular witness considered vital, the accused is at liberty to call him. (p. 2884 B)

Conviction - Identification parade

5. It should be noted right away that the conviction and sentence of the appellant by the trial court which was affirmed by the court below was not based solely on the evidence obtained at the identification parade of 19th October, 1993. The court below found that identification parade was superfluous as PW1 who had a long encounter with the appellant during the material time could identify him anywhere and at anytime. The testimony of P.W.1 which the trial court found to be cogent and compelling linked the appellant with the offence charged. No

doubt, identification parade is not a sine qua non to conviction. (p. 2886 E)

CRIMINAL PROCEDURE - Identification parade - Correctness of

**6. On behalf of the appellant, learned counsel tried to prop
the issue of the police aiding PW.1 to identify the appellant at
the identification parade. PW6 who conducted the parade was
not cross-examined on the vital point at the trial court. PW6
tendered Exhibits D1, D2 and D3 which point to the direction
that the requisite procedure for the parade was complied with.
Even then, based on the provision of section 168(1) of the
Evidence Act, there is a presumption of regularity of the pa-
rade more especially as p.W6 was not cross-examined over
the propriety or otherwise of the conduct of the parade.**
(p. 2886 H)

MURDER - Ingredients

**7. It is further necessary to state it that the appellant was
charged for the offence of culpable homicide punishable with
death under section 221 (b) of the Penal Code. The ingredi-
ents of the offence are:-**

- 1. That the death of a human being has actually taken
place;**
- 2. That the death was caused by the accused person;**
- 3. That the act that caused the death of the deceased
was done by the accused with intention of causing death, or
that the accused knew that death would be probable conse-
quence of his act. It is not in contest that Junaidu Bala, the
victim of the offence charged, is dead. The death was con-
firmed in Exhibit 'A' by PW3 - a Medical Officer who testified
that the cause of death of the deceased is because of stop-
page of heart from action as a result of bleeding. It is on record
that the appellant caused the death by striking the deceased
with a knife on the neck at the material time on the fateful day.
The appellant knew that death would be the probable conse-
quence of his act.**

**Let me finally make the last point and I shall be done. The
prosecution, no doubt, proved the case beyond reasonable**

doubt as dictated by section 138 (1) of the Evidence Act. All the essential ingredients of the offence charged have been clearly established. (pp. 2888 A/2888 G)

REPRESENTATION

- B P. H. Ogbale with P. A. Ogwuchi; B. Bassey; O. Abanum; P. C. Ashikeka; M. A. Hadiza (Miss) and A. A. Malik, for the Appellant
S. B. Umar (Mrs.) DPP Katsina State with S. Y. Wurma (SSC) and A. K. Abba (Mrs.) SSC, for the Respondent

CASES REFERRED TO

- Ifejirika v. State (1999) 3 NWLR (pt. 593) 59
Aiguoreghian v. State (2004) All FWLR (pt. 195) 716
Ozaki v. State (1990) 1 NWLR (pt. 124) 92
D Onafowokan v. State (1997) 3 NWLR (pt. 61) 538
Ochemaje v. State (2008) 15 NWLR (pt. 109) 57
Nkebisi v. State (2010) 5 NWLR (pt. 1188) 471
Omotola v. State (2009) 7 NWLR (pt. 1139) 148
Olaiya v. State (2010) 3 NWLR (pt. 1181) 423
E Atta v. State (2010) 10 NWLR (pt. 1201) 190
Queen v. Turner (1957) WRNLR 34
Bello v. Police (1956) SCNLR 113
Yanor v. State (1965) NMLR 337
Gachi v. State (1973) 1 NMLR 331
F Odu v. State (2001) 5 SCNJ 115
Njovens v. State (1973) 1 NMLR 331

STATUTES REFERRED TO

- G Penal Code, s. 221
Evidence Act Cap. E14 LFN 2004, ss. 138(1), 149(d), 168(1)

LEAD JUDGMENT BY FABIYI JSC

- This is an appeal against the judgment of the Court of Appeal,
H Kaduna Division (the court below) delivered on 14th July, 2006.
Therein, the conviction and sentence of the appellant to death by hanging based on a charge of culpable homicide punishable under section 221 of the Penal Code by the trial judge of Katsina State High Court of Justice on 19th May, 1997, was affirmed.

It is apt to state briefly the relevant facts, which form the bedrock of this appeal. By a charge dated 5th day of December, 1994, the respondent arraigned the appellant before the trial High Court of Katsina State presided over by Yusuf Ibrahim, J. for the offence of culpable homicide punishable with death under section 221 of the Penal Code on 4th July, 1995. The charge was duly read and explained to the appellant and he accordingly pleaded not guilty. The facts as given by the prosecution are that the appellant, on or about 11th May, 1993 at about 5.30am, caused the death of one Junaidu Bala at Ingawa, Inagawa Local Government Area of Katsina State by stabbing him on the neck with a knife and caused him bodily injury which resulted in the passing on, of the deceased. At about 5.30 am on the stated date, the deceased in company of P.W.1 and P.W.2 and some others were on night patrol as members of a vigilante group. They confronted the appellant who, P.W.1 had earlier seen with some loads on his head but he disappeared. He was rearrested but as he was being taken to the Police Station, somewhere in a market place, the appellant dropped the loads he had on him down and ran away. P.W.1 pursued him and later apprehended him. During a struggle, the appellant brought out a knife and as he was cutting P.W.1, the deceased joined to rescue him despite warning by P.W.1 to deceased that the appellant had a knife. The appellant later used the knife to cut the deceased on his neck and he died immediately while the appellant ran away. The matter was reported to the police who later arrested him on 12th May, 1993 at Bindawa town, based on the information earlier supplied.

At the trial High Court, both sides adduced evidence. The trial judge was duly addressed by counsel on relevant issues. In the judgment delivered on 19th May, 1997, the appellant was found guilty. He was convicted and sentenced to death by hanging. The appellant felt unhappy with the stance of the trial court. He appealed to the court below which heard the appeal and dismissed it on 14th July, 2006. Still dissatisfied with the decision of the court below, the appellant has finally appealed to this court.

In compliance with the Rules of this court, briefs of argument were filed and exchanged by the parties. On 21st March, 2013 when the appeal was heard, learned counsel to the appellant adopted the brief of argument deemed filed on 18th April, 2012 and urged that

the appeal be allowed. On behalf of the respondent, learned DPP, Katsina State Ministry of Justice adopted the respondent's brief and urged that the appeal be dismissed.

On behalf of the appellant, two (2) issues were formulated for determination of the appeal. They read as follows:-

B “(i) *Considering the state of evidence before it, whether the lower court was not wrong in resolving the issue (or defence) of alibi against the appellant. Grounds 4 and 5.*

C “(ii) *Having regard to the manner in which the identification parade was conducted in this case, whether or not the lower court was right upholding the conviction and sentencing of the appellant by the trial court based on the evidence procured therefrom. Grounds 2 and 3.”*

D The respondent adopted the two issues decoded for determination by the appellant and replied to same seriatim.

E Arguing issue 1 which relates to the plea of alibi, learned counsel to the appellant submitted that the issue of alibi which was raised timeously was not properly evaluated by the courts below. He felt that the whereabouts of the appellant on the 11th of May, 1993 up to 4.00am was properly accounted for by defence witnesses. He felt that the burden of proof is not on the accused and that the onus of proof is on the prosecution to disprove the alibi. He cited the cases of Ifejirika v. The State (1999) 3 NWLR (Pt.593) 59 at 78; Aiguoreghian v. The State (2004) All FWLR (Pt.195) 716 at 737; F Ozaki v. The state (1990) 1 NWLR (Pt.124) 92 at 109 and Onafowokan v. The State (1997) 3 NWLR (Pt.61) 538.

G Learned counsel maintained that the prosecution failed to fully investigate the plea of alibi raised by the appellant. He submitted that the appellant was entitled to an order of acquittal.

H On behalf of the respondent, learned DPP submitted that contrary to the appellant's contention, the courts below properly evaluated the plea of alibi raised by the appellant. She submitted that the appellant did not supply to the Police full particulars, time and place of his whereabouts to enable the Police investigate and find out the truth or otherwise of the said alibi. She opined that for a defence of alibi to be worthy of investigation, it should be precise and specific in terms of the place that the accused was, the particular person or persons that he was in his company and possibly what he was doing

at the material time. She cited the case of Ochemaje v. The State (2008) 15 NWLR (Pt.109) 57 at page 90.

Learned DPP maintained that the appellant failed to identify the evidence that was not properly evaluated. She referred to Nkebisi v. The State (2010) 5 NWLR (Pt. 1188) 471 at 492. She asserted further that the issue of alibi is based on credibility. She felt that once the evidence called by the accused person in support of the defence is rejected as being incredible and the evidence of the prosecution witnesses fixing the accused at the scene of crime is accepted, the defence of alibi crumbles. She cited Omotola v. The state (2009) 7 NWLR (Pt.1139) 148 at 175; Olaiya v. The State (2010) 3 NWLR (Pt.1181) 423 at 346 and Atta v. The State (2010) 10 NWLR (Pt.1201) 190 at 216 - 217.

She urged the court to hold that the lower court was not wrong in resolving the issue of alibi against the appellant and in favour of the respondent.

Alibi, literally, means elsewhere. It is the duty of the accused to furnish the particulars of his alibi in full detail to the Police at the earliest opportunity. He must furnish his whereabouts and those present with him at the material time of the incident. It is then left for the prosecution to disprove same. Failure to investigate can lead to the acquittal of the accused person. See: Queen v. Turner (1957) WRNLR 34; Bello v. Police (1956) SCNLR 113; Yanor v. The State (1965) NMLR 337; Gachi v. The State (1973) 1 NMLR 331 and Odu & Anr. v. The State (2001) 5 SCNJ 115 at 120; (2001) 10 NWLR (Pt.772) 668.

It should be further reiterated that it is not every failure of the Police to investigate an alibi raised by an accused person that will be fatal to the case of the prosecution. There is nothing esoteric or extraordinary in a plea of alibi which postulates that the accused could not have been at the scene of the crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi or attempt to do so, there is no inflexible and/or invariable way of doing this. If the prosecution adduces sufficient and acceptable evidence to fix the accused person at the scene of the crime at the material time, his alibi is thereby logically and physically demolished. See: Patrick Njovens & Ors. v. The

State (1973) 1 NMLR 331; Ochemaje v. The State (supra) at page 78; and The State v. Ezekiel Adekunle (1989) 1 CLRN 348. It is not in doubt that in this case, the appellant raised the defence of alibi. He called DW2, DW3 and DW4 who all testified that at various times between 8.00pm on 10th May, 1993 and 2.00am on 11th May, 1993, the appellant was in their company viewing television. The appellant stayed with the night watchman for a while and later went to sleep in front of his house. DW5, one Rabe Yahaya said at about 3.30pm, he met the accused lying in front of his house. As he was sleeping, he woke him up so that he may go to the mosque, the accused stood up and went to perform his ablution. According to DW5, they went to the mosque and prayed together until about 5.00am. On the contrary, the appellant said he performed ablution and prayed in his house. He did not go to the mosque to pray. He did not mention anything like that in Exhibits B and C to the Police.

After reviewing the evidence on oath of the defence witnesses, the trial judge found as follows:-

“Therefore in view of the contradictions in the evidence of the defence witnesses and even the evidence of the accused himself, I could not say that the defence had discharged its evidential burden placed upon the accused.”

The court below, on its part, found that the learned trial judge was right in disbelieving the testimony of DW5 on the whereabouts of the appellant between 2.00 am and 5.30 am on the date in question.

It is clear from the evidence placed before the trial court and with which the court below was at one, that the appellant did not fully disclose to the Police that he was with DW5 at about 5.30am on the date of the incident to warrant and facilitate any investigation by the Police of the plea of alibi put up by him.

It should be stressed that for a defence of alibi to be worthy of investigation, it should be precise and specific in terms of the place that the accused was at the material time of the incident. The Police should not be involved in a wild goose chase for the whereabouts of the accused person at the time the crime was committed. See Ochemaje v. The State (supra) at page 90.

It is clear that the prosecution adduced sufficient and acceptable evidence to fix the accused person at the locus criminis, at the material time, as the trial court found same in the evidence adduced by the P.W.1. The alibi was thereby logically and physically demolished. See: Patrick Njovens & Ors. v. The State (supra); Omotola v. The State (supra) at page 174; Olaiya v. The State (supra) at page 435-436; Atta v. The State (supra) at pages 216-217; and Monday Odu & Anr. v. The State (supra) at page 120; (2001) 6 SCM 153 at 156-157.

I am of the considered view that the two lower courts were right in the stance taken by them. This issue is resolved against the appellant and in favour of the respondent.

I now move to issue 2 which relates to the identification of the appellant. In this respect, learned counsel to the appellant submitted that it was not only P.W.1 who encountered the appellant. He maintained that one Wali who had ample opportunity of encountering the appellant was not called to testify. He referred to section 149(d) of the Evidence Act, Cap. E14, Laws of the Federation, 2004. He urged that the provision of the law should be invoked against the prosecution which failed to call Wali to testify. He cited the case of Okumzua v. Amosu (1992) 6 NWLR (Pt.248) 416.

In this respect, learned DPP submitted that the failure to call the said Wali did not amount to withholding evidence. She cited the case of Igri v. The State (2012) 16 NWLR (Pt.1327) 522 at Page 555.

It should be noted at this point that learned counsel for the appellant strenuously harped on the point that the prosecution failed to call one Wali as a witness. He even contended that the provision of the law should be invoked against the prosecution for failure to call Wali to testify; being a vital witness. The appellant should appreciate that it has been held variously by this court that the prosecution, in criminal cases, is not bound to call a host of witnesses. It is only obliged to call enough witnesses to adduce evidence in discharge of the onus of proof incumbent on it to prove the case beyond reasonable doubt. The section of the law has to do with withholding of evidence and not failure to call a particular witness. In this regard, P.W.1 who was a direct victim and who had interaction with the appellant at the material time testified. That

was alright. See: Akalonu v. The State (2002) 6 SCNJ 332 at 337; Ekpenyong v. The State (1991) 6 NWLR (Pt. 200) 683; Asariyu v. The State (1987) 4 NWLR (Pt.67) 709 at 716; Udo v. The State (2006) 15 NWLR (Pt.1001) 179 at 195; Oduneye v. The State (2001) 2 NWLR (Pt.2001) 2 NWLR (Pt.697) 311; Alonge v. Police (1959) B SCNLR 203 and Igri v. The State (supra) at Page 555.

It should also be reiterated here that where the prosecution failed to call a particular witness considered vital, the accused is at liberty to call him. See Ekpenyong v. The State (supra). C

Learned counsel for the appellant further observed that it was only PW.1 who testified in this case of culpable homicide punishable with death. He maintained that other eye witnesses like Wali were not called.

D In reply, learned DPP submitted that there is no law which precludes a judge from convicting an accused person based on the evidence of one eye witnesses. She maintained that the clear position of the law is to the effect that the evidence of a sole witness, if found truthful and believed by the court, is sufficient to ground the conviction of an accused person. She referred to the cases of Ilodigine v. E The State (2012) 18 NWLR (Pt.1331) 1 at 41 and Akindipe v. The State (2012) 16 NWLR (Pt. 1325) 94 at 116.

It is now settled that in criminal trials, the prosecution is not obliged to call a host of witnesses to prove its case. A single witness, if believed by the court, can establish a criminal case even if it is a murder charge. The decisive factor is the quality of the evidence preferred at the trial in the discharge of the burden of proof on the prosecution. There should F
G be no further illusion or misgiving in respect of this point, that has been settled by the decision of this court in Ilodigine V. The State (supra) at page 41 and Akindipe v. The State (supra) at page 116.

Learned counsel to the appellant submitted that the identification parade was done without reference to the considerations governing a proper conduct of identification parade. He referred to Okeke H v. The State (1995) 4 NWLR (Pt.392) 676 at 708 and R v. Turnbull & Ors. (1976) 3 WLR 445 at 447; Sunday Ndidi v. The State (2007) All FWLR (Pt.381) 1617 at 1639-1640.

Learned counsel submitted further that it was obligatory on

the part of the prosecution to establish that soon after the incident and the arrest of the appellant, he was put up for identification along with several others with similar features. He maintained that identification parade was conducted 24 weeks after the arrest of the appellant despite the availability of PW1 nine (9) days after the arrest of the appellant. He referred to the case of Commissioner of Police v. Alao (1959) WNLR 19. B

Learned counsel further observed that the appellant maintained that he shook hands with PW.1 before the identification parade and that PW.1 was aided by a police officer in pointing him out during the parade. Learned counsel submitted that such irregularity should be resolved in favour of the appellant. He cited *Bozin v. The State* (1985) NSCC 1087 at 1099; *Wakala V. The State* (1991) NWLR (Pt.211) 552 at 565-566; *Ojukwu v. The State* (2002) 4 NWLR (Pt.756) 80 at 91. C

Learned counsel submitted that the trial judge should have warned himself to take special regard for caution before convicting the accused in the circumstance of this matter. He cited *Alabi v. The State* (1993) 7 NWLR (Pt. 307) 511 at 527. He opined that an identification parade conducted where just one witness identified the appellant ought to be corroborated. He cited *Dogo v. The State* (2001) 1 SCNJ 315. Learned counsel felt that this appeal ought to succeed. D

On behalf of the respondent, learned DPP submitted that the conviction and sentence of the appellant by the trial court which was affirmed by the lower court was not based solely on the evidence obtained at the identification parade. She observed that the lower court felt that identification parade in this case was superfluous as PW1 could identify the appellant anywhere and at anytime. She submitted that identification parade is not a sine qua non to conviction. She cited *Ukpabi v. The State* (2004) 11 NWLR (Pt. 884) 439; *Sowemimo v. The State* (2012) 2 NWLR (Pt.1284) 372 at 405; *Atta v. The State* (supra) at page 225. She maintained that the testimony of PW1 which was cogent, convincing and compelling, linked the appellant with the offence charged. E

On the issue of the Police aiding PW.1 during identification parade, learned DPP submitted that it was not properly proved before the trial court. She observed that the lower court at page 146 of the records stated that it will be difficult to believe that PW.1 who F

caught and held appellant on his trouser for a long time will need any assistance from anybody to identify the appellant. She maintained that P.W.1 had a long encounter with the appellant and same made identification parade superfluous and unnecessary.

B Learned DPP went further to submit that if identification parade was necessary, the Police, as can be seen from the testimony of P.W.6 and that of P.W.7, complied with the procedure and considerations required. She opined that since P.W.1 testified, it was not necessary to tender his statement made to the police. She cited *Ndidi v. The State* (2005) 17 NWLR (Pt. 953) 17 at 31.

C Learned DPP opined that issue of aiding P.W.1 by the Police during the identification parade was not proved by the appellant at the trial court. She observed that P.W.6 and P.W.7 were not cross-examined as to their conduct at the identification parade. She cited *D Nwobodo v. Onoh* (1954) 1 SCNLR 1 at 88.

E Learned DPP submitted that based on the provision of section 168(1) of the Evidence Act, there is a presumption of regularity as to the conduct of the parade more especially as P.W.6, who tendered Exhibits D1, D2 and D3 was not cross-examined as to the propriety or otherwise of the conduct of the identification parade.

F ***It should be noted right away that the conviction and sentence of the appellant by the trial court which was affirmed by the court below was not based solely on the evidence obtained at the identification parade of 19th October, 1993. The court below found that identification parade was superfluous as P.W.1 who had a long encounter with the appellant during the material time could identify him anywhere and at anytime. The testimony of P.W.1 which the trial court found to be cogent and compelling linked the appellant with the offence charged. No doubt, identification parade is not a sine qua non to conviction.*** The decisions in the cases of *Ukpabi v. The State* (supra) *Sowemimo v. The State* (supra) and *Atta v. The State* (supra) clearly demonstrate the point.

H ***On behalf of the appellant, learned counsel tried to prop the issue of the police aiding P.W.1 to identify the appellant at the identification parade. P.W.6 who conducted the parade was not cross-examined on the vital point at the trial court. P.W.6 tendered Exhibits D1, D2 and D3 which point to the direction***

that the requisite procedure for the parade was complied with. Even then, based on the provision of section 168(1) of the Evidence Act, there is a presumption of regularity of the parade more especially as p.W6 was not cross-examined over the propriety or otherwise of the conduct of the parade. This much should be stated in clear terms. B

Put clearly, ordinarily, identification parade is not a sine qua non for identification in all cases where there has been a fleeting encounter with the victim of a crime if there is yet other evidence leading conclusively to the identity of the perpetrator of the offence. In this matter, the P.W.1 had a long encounter with the appellant. P.W.1 was an eye witness to the commission of the offence. He was in company of the deceased before and until the incident. He testified that in the early hours of 11th May, 1993, the appellant he had earlier arrested, cut him with a knife and stabbed the deceased on the neck. He stated how he led the appellant through the market place to the charge office before he disappeared and was re-arrested. He had a long stay with the appellant. P.W.1, during his encounter with the appellant, held his trouser for a long time. The court below per Ariwoola, JCA (as he then was) concluded as follows at page 150 of the records - C D E

“From the narration of his testimony on oath, it is clear that the witness had full opportunity to observe the appellant closely. Even though the witness did not know the appellant before, and the first acquaintance was during the commission of the offence, yet as a result of the long period of time they spent together, it cannot be doubted that the witness would identify the accused anywhere and at anytime without any assistance. Identification parade in the circumstance became superfluous — In the result, I am satisfied that the appellant was validly identified by the witness as the person who stabbed the deceased, Junaidu.” F G

The above confirmed the position taken by the trial court. It is hard to fault the stance taken by the two lower courts; taking into consideration the whole gamut of the cold evidence adduced by P.W.1 which remains uncontradicted; accepted by the trial court and further confirmed by the court below. H

Without further ado, this issue is resolved against the appellant and in favour of the respondent.

It is further necessary to state it that the appellant was charged for the offence of culpable homicide punishable with death under section 221 (b) of the Penal Code. The ingredients of the offence are:-

1. That the death of a human being has actually taken place;

2. That the death was caused by the accused person;

3. That the act that caused the death of the deceased was done by the accused with intention of causing death, or that the accused knew that death would be probable consequence of his act. See: Ubani & Ors. v. The State (2003) 16 NSCQR 265; Tunde Adava v. The State (2006) 9 NWLR (Pt. 984) 152.

It is not in contest that Junaidu Bala, the victim of the offence charged, is dead. The death was confirmed in Exhibit 'A' by PW3 - a Medical Officer who testified that the cause of death of the deceased is because of stoppage of heart from action as a result of bleeding. It is on record that the appellant caused the death by striking the deceased with a knife on the neck at the material time on the fateful day. The appellant knew that death would be the probable consequence of his act.

In passing it should be stated that the findings made by the two courts below are concurrent in their entire ramification. They have not been shown to be perverse or run contrary to the current of evidence adduced. They are supported by credible evidence. I cannot interfere in the prevailing circumstance. See: Haruna v. Attorney General of Federation (2012) 9 NWLR (pt.1306) 448; Shorumo v. The State (2012) 12 SC (Pt.1) 73 at 96; 102; Igwe v. The State (1982) 9 SC 114.

Let me finally make the last point and I shall be done. The prosecution, no doubt, proved the case beyond reasonable doubt as dictated by section 138(1) of the Evidence Act. See: Nasiru v. The State (1999) 1 NWLR (Pt.589) 87 at 98. ***All the essential ingredients of the offence charged have been clearly established.*** See: Abogede v. The State (1996) 5 NWLR (Pt.448) 270.

In conclusion, this appeal is devoid of merit. It is hereby dismissed. The decision of the court below which affirmed the convic-

tion and sentence of the appellant by the trial court is hereby confirmed.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother **FABIYI, JSC** just delivered. I agree with his reasoning and conclusion that the appeal is devoid of merit and should be dismissed. B

PW1 was an eyewitness who was wounded by appellant during the incident before inflicting the fatal injuries on the deceased which resulted in his death. The testimony of **PW1** on the relevant facts is positive and very cogent and was believed by the trial judge. C

Once the evidence of an eyewitness to any crime fixes an accused/appellant at the scene of crime and identifies him/her as the perpetrator of the crime, there can be no defence of alibi in the circumstance. The defence of alibi simply means that the accused/appellant was somewhere else when the alleged crime was being committed and as such he could not have been the one committing the said crime. In short, that a person cannot physically be in two places at the same time. D

In the instant case the evidence of **PW1** puts the appellant squarely at the scene of crime which makes it impossible for any reasonable court or tribunal to hold that the accused/appellant was at a different location other than at the scene of crime. E

Secondly, with the testimony of **PW1** which is very positive in detail, there was no need at all for a formal identification parade - it was in the circumstance very superfluous. F

In the circumstance I agree that the appeal be and is hereby G dismissed by me. Appeal dismissed for lack of merit.

MUNTAKA-COOMASSIE JSC

I read in advance the lead judgment of my learned brother **Fabiyi, JSC** just rendered. The reasons and conclusion reached by my brother is agreeable to me I adopt them as mine. I don't intend to add anything. I find myself totally agreeing with his lordship that the appeal lacks merit and same deserved to be dismissed. I too dismiss H

NGWUTA JSC

B I have had the opportunity of reading in draft the lead judgment just delivered by My Lord, Fabiyi, JSC and I abide by the reasoning and conclusion therein. I will, however, add a few observations.

C The evidential burden of proof beyond reasonable doubt cast on the prosecution is discharged not on the quantity, but on the quality, of the evidence led. See *Joseph v. The State* (2011) All FWLR (pt. 599) 1006 SC; *Oduneye v. The State* (2001) 1 SCNJ 7; *Theophilus v. The State* (1996) 1 SCNJ 79.

D Section 167 (d) of the Evidence Act 2011 which reproduced Section 149 (d) of the Evidence Act, 2009 is not concerned with the failure to call any particular witness. It is concerned with “evidence which could be and is not produced” which the Court will hold will be unfavourable, if produced, to the party who withholds it.

E There is evidence, accepted by the trial Court and affirmed by the Court below, that the appellant attacked the PW1 when the latter attempted to apprehend him after his escape. The deceased attempted to rescue the PW1 from the appellant whereupon the appellant killed the deceased. It was a direct and testimonial evidence given by the PW1 - a witness who had personal knowledge of the facts to which he testified. See *Sule Ahmed v. The State* (2001) 92 LRCN 346 at 3477.

G The evidence of PW1 places the appellant at the scene and time of the incident. The incident at which the appellant stabbed the PW1 and killed the deceased was not a fleeting encounter by the PW1 with the appellant. In the circumstance, and the question of police identification parade was a mere formality.

H In any case, appellant’s Counsel did not cross-examine the witness who tendered the evidence of the identification parade. He is deemed to have accepted same as correct. See *Alhaji Abdulai Baba v. Nigerian College of Civil Aviation Zaria* (1991) 5 SCNJ 78 at 184.

The law is settled that this Court will not disturb the concurrent findings of fact by the trial Court and the Court below where there is sufficient evidence, as in this case, to support them. See *Njoku*

& ors v. Eme & ors (1973) 5 SC 293 at 306; Kale v. Coker (1982) 12 SC 252 at 271; Efe v. State (1976) 11 SC 75.

For the above and the fuller reasons in the lead judgment, I also dismiss the appeal as bereft of merit and affirm the decision of the Court below which affirmed the decision of the trial Court. Appeal dismissed. B

MUHAMMAD JSC

I read in draft the lead judgment of my learned brother Fabiyi JSC, just delivered. I entirely agree with his lordship's reasoning and eventual conclusion that the appeal is devoid of any merit and that same be dismissed. In doing so in my own words, and purely for the sake of emphasis I shall rely on the facts of the case that brought the appeal so lucidly captured in the lead judgment. D

The crucial issue the appeal raises is that of appellant's alibi. It is argued that the defence so raised and wrongly resolved by the trial court is erroneously affirmed by the lower court. Learned appellant counsel argues with relish that appellant was not at Ingawa, Ingawa Local Government Area of Katsina State the scene of the crime on or about 11th May 1993 at about 5:30 when Junaidu Bala was stabbed with a knife on the neck the bodily injury that led to latter's death. The respondent's failure to investigate appellant's alibi that was timely raised and the failure of the two courts to hold this failure as fatal to respondent's case having occasioned injustice necessitates an interference by this court with the lower court's wrong judgment. Learned appellant's counsel relies heavily on, among others, Aiguoreghian v. The State (2004) ALL FWLR (Pt.195) 716 at 737 and Ozaki v. State (1990) 1 NWLR (Pt.124) 92 at 109. F G

Further arguing the appeal under their 2nd issue, learned appellant counsel contends that Respondent's failure to call all the witnesses who saw the appellant when he was committing the offence should have been invoked against the respondent and in favour of the appellant as required by section 149(d) of the Evidence Act. H

Not surprisingly, learned respondent counsel disagrees. He submits that respondent is not obliged to call every witness it has; that respondent discharges its duty once all the ingredients of the offence the appellant is charged for are established even through a single

witness. Learned counsel asserts that the defence of alibi, as rightly found by the two lower courts, does not avail the appellant. The appellant who did not supply the respondent the full particulars of his whereabouts as at the time the offence he was charged for was being committed, cannot expect the prosecution to embark on a
 B meaningless, unrewarding chase for nonexistent facts. Besides, by the evidence led by the respondent, which evidence the two courts preferred to that called by the appellant, the latter is fixed at the scene of crime. Relying inter-alia on *Nkebisi v. The State* (2010) 5
 C NWLR (Pt.1188) 471 at 492, *Omotola v. The State* (2009) 7 NWLR (Pt 1139) 148, *Ochemaje v. The State* (2008) 15 NWLR (Pt 109) 57 at 90 and *Olaiya v. The State* (2010) 3 NWLR (Pt.1181) 423 at 346 learned respondent counsel submits that appellant has neither brought himself squarely under the defence of alibi nor shown the error in
 D the evaluation of the evidence done by the trial court as affirmed by the court below which entitles this Court to allow his appeal. Learned counsel urges that the two issues raised by the appeal be resolved against the appellant and the appeal dismissed.

It must outrightly be pointed out that the two complaints
 E raised by the appeal as circumscribed by the issues formulated by the appellant, the defence of alibi as well as the effect of respondent's failure to call more witnesses to the ones it did, turn on facts.

Appellant's contention is simply that in spite of the evidence
 F led, the respondent has not discharged its burden of firstly putting the appellant at the scene of the offence as and when Junaidu Bala was being killed; that respondent did not establish beyond reasonable doubt the fact that it was the appellant who indeed unlawfully killed the said Junaidu Bala. Put differently, appellant argues that the
 G respondent who failed to disprove appellant's defence of alibi and establish beyond doubt appellant's guilt, is not entitled to the concurrent verdict of the two lower courts to the contrary.

Respondent's position remains that not only has it fixed appellant, by cogent evidence, at the scene of the offence, but appellant
 H has further been established to have unlawfully caused the death of Junaidu Bala.

It is the primary function of the trial court to evaluate evidence and ascribe probative value to it having had the advantage of seeing and observing the witnesses as they testified. Where the trial court

fails to discharge that primary duty or does so unsatisfactorily by drawing the wrong inferences from the evidence led, the appellate court has duty of interfering with the view to doing the justice any of the parties richly and manifestly deserves. See *Kwajaffa v. BON Ltd* (2004) 13 NWLR (Pt 889) 374 and *State v. Onyeukwu* (2004) 14 NWLR (Pt. 893) 340 SC. B

In the instant case it is not in doubt that the two lower courts have made concurrent findings of facts in relation to the defence of alibi and the burden of proof the appellant alleges the respondent has failed to discharge. The law is not any different if it is shown that the findings of the two courts are perverse, as the law requires they be set aside. C

In *Daniel Bassil & anor v. Chief Lasisi Fajebe and anor* NSCQLR (vol. 6) (2001) 269 and similar cases this court has restated the principle and the rationale behind it in details: that appeals are held by way of rehearing rather than rehearing and taking of fresh evidence; that though a rehearing on the record imposes the attendant duty on the appellate court to evaluate the evidence and draw inference from primary facts, the appellate court's powers is however still limited in the sense that it is not activated where the findings of facts appealed against do not turn on the credibility of oral evidence. In that situation, the appellate court acknowledges the advantageous position of the trial court by not usurping the function of the trial court of ascribing that credibility to the evidence of the witnesses the former never saw and heard. The principle which gives due cognizance to concurrent findings of facts by two lower courts in the event of a further appeal is thus founded on the understanding that the facts that have been deliberated on by the two courts carefully before arriving at certain conclusions ordinarily should persist once shown to have drawn from the evidence on record. A higher court only interferes where the findings are shown to be perverse in having not evolved from the evidence on record. Non-interference by the higher court, in such an instance, only means a replication of the perversity in the decisions of the two lower courts. D E F G H

In the case at hand, the appellant who denies being on the spot of the offence when his victim was being unlawfully killed also led evidence through Dw2, Dw3, Dw4 and Dw5 in addition to what he himself told the trial Court in support of the alibi he raised. After

all, that is what alibi means: that the accused was not at the scene of the crime and at the time the crime he is charged for was being committed. However the respondent's emphasis on the fact of the inherent contradictions in the testimonies of Dw2, Dw3, Dw4 and Dw5 as well as appellant's failure to timeously raise the same defence in Exhibits B and C, his statements to the police, constitute the most devastating blows to appellant's case. The trial court which in addition to availing itself the content of Exhibits B and C also saw and heard Dw2, Dw3, Dw4 and Dw5 in relation to all the evidence on the point. In disbelieving the evidence led by the appellant, the court preferred the one led by the respondent. It is this finding which the court below affirmed.

On the authorities, this court is incapable of interfering with these concurrent findings of facts which turn on the credibility of oral evidence and which findings appellant failed to show to be perverse.

Lastly, I am also unable to agree with learned appellant counsel that the respondent is only able to discharge the burden of establishing appellant's guilt by calling a multitude of witnesses. That is not the law. Even with a single witness, once the testimony of that sole witness dwells on all the ingredients of the offence the appellant is charged and convicted for, the appellate court would lack the jurisdiction of interfering and annulling a decision that is so founded.

In the instant case the evidence of Pw1 has inextricably linked the appellant with the unlawful murder of Junaidu Bala. The witness had had sufficient encounter with the appellant at the scene of the crime. He witnessed the appellant stab the deceased on the neck, an injury that led to the latter's death. The trial court's findings that it was the appellant who stabbed and caused the death of Junaidu Bala as affirmed, see page 150 of the record, by the court below remain unassailable. These findings of facts as to:

- (a) the death of a human being, Junaidu Bala
- (b) Act of the appellant intentionally causing the death clearly drew from the evidence available to both courts. It is for this particular reason that I resolve the two issues the appeal raised against the appellant. I further adopt the fuller reasons adumbrated in the lead judgment as mine to dismiss the unmeritorious appeal. I abide by the consequential orders made in the lead judgment as well.