

SUPREME COURT OF NIGERIA
FRIDAY 21ST JUNE, 2013. SC. 369/2011
CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,
S. GALADIMA, C. B. OGUNBIYI, S. S. ALAGOA, JJSC

WASIU BABATUNDE APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Appeals - Concurrent findings - Appellant failed to displace the findings - As there is no proof of how the circumstantial evidence was weakened - By any co existing circumstances in the matter (H1)

SUPREME COURT - Evidence - Evaluation - SC does not make primary findings of fact as to credibility of witnesses - But is entitled to draw inferences from accepted facts (H2)

APPEALS - Evidence - Reevaluation - Where credibility of witnesses is not involved - But complaint is on improper evaluation - Appellate court is in a good position as trial court - To do its own evaluation (H3)

MURDER - Ingredients - Proof - To secure conviction prosecution must prove that deceased died - That the death was caused by accused - Whose act was intentional with knowledge that death will occur (H4)

MURDER - Circumstantial evidence - Weight - In absence of confession or eye witness account - Prosecution rightly resorted to circumstantial evidence to discharge onus of proof on it (H5)

MURDER - Evidence - Inconsistencies - Effect - Minor discrepancies in evidence of PW3 - Did not destroy inferences from the circumstantial evidence - That culminated in conclusive findings that appellant killed the deceased (H6)

MURDER - Proof - Circumstantial evidence - From the evidence it

can be conclusively deduced that appellant intentionally killed the deceased - By inflicting grievous bodily harm on him (H7)

FAIR HEARING - Fundamentality of - Constitution s. 36(1) -It is a right embedded in the Constitution - And its infringement renders the proceedings a nullity ab initio (H8)

COURTS - Crime - Pretrial - CPL s. 340(2)(b) - A Judge is enjoined by the provision to examine proofs of evidence of offence - So as to determine whether or not the offence is one requiring to put accused on trial (H9)

COURTS - Crime - Pretrial - Fair hearing - Breach - Fair hearing cannot be raised against quasi judicial function of a Judge - Being performed under CPL s. 340(2)(b) - As such does not constitute a trial (H10)

FACTS

Accused/appellant was arraigned before the High Court of Oyo State sitting at Ibadan for the offence of murder contrary to and punishable under section 319(1) of the Criminal Code Cap. 30 Vol. II Laws of Oyo State 1978. Appellant pleaded not guilty to the charge. Prosecution's/respondent's case against appellant is that the latter murdered the deceased in his home at Ibadan. It was alleged from the circumstances that appellant killed the deceased shortly after he (the deceased) was driven home by appellant from a shopping mall. Respondent stated that appellant who was a driver to the deceased utilized the opportunity presented by the temporary absence of PW3 (deceased's gateman) at the gate, to commit the crime. Respondent went further to state that appellant in an attempt to cover up his crime, cleverly drove out of the premises in pretence of delivering a mattress to an unknown lady at Mokola area of Ibadan.

It was also stated that appellant who wanted to be fully disassociated from the crime, had upon his return from the said delivery, asked PW3 to collect the car key of the deceased. PW3 refused to pick the key as it was not the usual practice. Appellant therefore proceeded to the main house apparently to hand over the key to the deceased but ran out shortly, beckoning on PW3 to come into the

house. PW3 met the deceased lying lifelessly on the floor of the house. The incident was eventually reported to the police. After the investigation in the matter, appellant alone was arraigned before the court for the murder. At the trial, respondent relied mainly on circumstantial evidence from the surrounding facts to prove his case against appellant. Appellant testified in his own defence. In its judgment, the court believed the evidence of circumstances presented by respondent, convicted appellant and sentenced him to death by hanging. Appellant was not satisfied. Hence, he appealed to the Court of Appeal Ibadan. The court dismissed the appeal and affirmed the judgment of the trial court. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

“(i) Was the circumstantial evidence relied upon by the Court of Appeal in upholding the conviction of the appellant cogent, strong and compelling enough as to lead to the irresistible conclusion; that the appellant killed the deceased?

(ii) Whether the trial judge did not breach appellant’s right to a fair hearing by giving consent for the information to be filed against him and trying him for the same offence at the trial of the matter?

HELD (Unanimously dismissing the appeal per
CHUKWUMA-ENEH JSC)

Appeals - Concurrent findings

1. In other words the appellant is saying unequivocally that the onus in this case on the appellant based on balance of probabilities is to establish that the concurrent findings both in law and facts in this matter are perverse as they are not based on the accepted evidence before the trial court as confirmed by the lower court and so has occasioned a serious miscarriage of justice entitling him to be acquitted and discharged of the offence of murder. I must confess that the onus on the appellant in this regard to displace the instant concurrent findings is not an easy one. Ordinarily concurrent findings by the two lower courts can be challenged on the grounds that the findings are perverse or have not been founded on legal evidence before the trial court or where it is shown that

the trial court has taken into account extraneous matters which it ought not to have taken into account. The appellant here has clearly predicated his case in this regard on the findings not having been founded on legal evidence before the trial court and thus has occasioned a miscarriage of justice in the matter.

In this respect I say pre-emptorily that the appellant has failed upon an overview of his case on this crucial issue to show how the instant circumstantial evidence has been so weakened or destroyed by any co-existing circumstances in the matter be it in the nature of want of legal evidence acted upon by the trial court vis-à-vis his conviction before the trial court or on a miscarriage of justice in the matter. Simply put, the appellant has not discharged the said onus. This is so notwithstanding that the appellant has over flogged to no effect the issues of the opportunity which has availed PW3 to commit the crime and particularly so on his case on the immaterial inconsistencies arising from PW3's extra judicial statements vis-à-vis his viva voce testimonies at the trial court.

(p. 2911 G)

Evidence - Evaluation

2. The truth of the matter as I must point out is that it is not the business of this court to make primary findings of fact i.e. as to the credibility of witnesses as it is the place of the trial court that has seen, heard and watched their demeanours to do so. This court, however, is entitled to draw inferences from accepted facts and the lower court has rightly upheld the accepted facts in this matter, and I have seen no cause to do otherwise hence my preemptory conclusion reached above on the appellant's guilt of the offence. (p. 2913 B)

Evidence - Reevaluation

3. In view of the line of the appellant's argument as skewed in this regard I must also add that where evaluation of evidence does not involve the credibility of witnesses but the complaint is against non-evaluation or improper evaluation of evidence by the trial court an appellate court (as this court) is in a good

position as the trial court to do its own evaluation. But that situation has not arisen here. (p. 2913 D)

MURDER - Ingredients - Proof

4. It is against the foregoing preamble that I have to come to this matter viewed from its basics. It is settled law that for the prosecution to secure a conviction for murder as in such matters as the instant one it must establish beyond reasonable doubt the cumulative presence of the following factors/ingredients of the offence:

(1) That the deceased died.

(2) That the death was caused by the accused arraigned before the court (in the instance the appellant).

(3) That the act or omission of the accused which caused the death was intentional with knowledge that death or grievous bodily harm was the probable consequence.

The onus on the prosecution in proving the cumulative presence of these ingredients as in this matter cannot be compromised in any respect; meaning that the onus does not shift at all as it rests squarely on the prosecution throughout the case. Where the prosecution fails to prove any of the three ingredients as set out above, the offence of murder has not been established beyond reasonable doubt and the accused person is entitled to be acquitted and discharged. (p. 2913 F)

MURDER - Circumstantial evidence - Weight

5. In this matter, it must be noted that there is no confessional statement of the crime, nor an eye witness(s) account of how the deceased has been murdered in his house in this matter. The prosecution therefore has rightly resorted to proving its case against the instant appellant by circumstantial evidence which is a proper and an effective means albeit in proving crimes of this nature beyond reasonable doubt. The effectiveness of circumstantial evidence in the hands of the prosecution in proving any criminal case for that matter and upon having discharged the onus of proof on it, that is to say beyond reasonable doubt, cannot be put any higher than in the words as per the case of R. v. Taylor & Ors. (1928) 21 CAR

20 at 21 wherein the court stated:

"It has been said that the evidence against the applicant is circumstantial, so it is, but circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial" per Hon. Justice Herwart, Lord Chief Justice of England.

I am at one with the foregoing notable pronouncement and its aptness coupled with its applicability to the peculiar facts of this matter is beyond reproach and therefore I rely on it and follow it in dealing with the prosecution's case in this matter and to resolve issue one. (p. 2914 G)

D *Evidence - Inconsistencies - Effect*

6. The foregoing abstracts of inconsistencies amongst other minor alleged inconsistencies have been highlighted by the appellant in this appeal, as well as in the two lower courts. These abstracts have been held out as serious inconsistencies otherwise fatal to prosecution's case that have dented and altered the irresistible conclusion of his guilt. I must observe that the two lower courts have not been persuaded by these submissions. His submissions thereof have no basis. It is the appellant's example of making a mountain out of a mole hill; accordingly they are rejected. Although the above co-existing circumstances are there on the record, they have in my view neither weakened nor destroyed the irresistible inference arising from the circumstantial evidence based upon the unbroken chain of events which if I may emphasise has culminated in the conclusive and compelling finding of fact that the appellant killed the deceased. The law on the question of inconsistencies is well settled. This position must not be confused with the case of minor discrepancies in details between two pieces of evidence from the same witness. (p. 2921 B)

MURDER - Proof - Circumstantial evidence

7. In that regard having given due consideration to the totality of the appellant's case in the appeal I have not the slightest

doubt in my mind in coming to the irresistible conclusion based on the circumstantial evidence which has proved beyond reasonable doubt the guilt of the appellant in this crime and that he has killed the deceased. It follows that the appellant's guilt is conclusively premised on the finding that the deceased is dead and that the appellant killed him and that his death has been caused by the grievous bodily injuries inflicted on him by the appellant from which his death has resulted. I entertain no iota of doubt that the appellant intended to kill the deceased and has killed him even though irrelevant in law we may never know the motive for the offence, which is not evident from the facts of this case. However, is settled law that the appellant in the circumstances is presumed to intend the natural and probable consequences of his dastardly act. Finally, having established the cumulative presence of the above three ingredients as per the case of *Ogba v. The State* (supra) in this matter; it is conclusive again if I may repeat that there is no miscarriage of justice in this matter as I find that the appellant has unlawfully killed the deceased and so I also find him guilty as per the charge. Issue one is therefore resolved against the appellant. (p. 2923 C)

FAIR HEARING - Fundamentality of

8. The principle of fair hearing is a right embedded in the Constitution as an entrenched constitutional right and so its infringement renders the proceedings a nullity ab initio being unconstitutional. And based on a plethora of the cases of this court that have expounded on the provisions of section 36(1) (supra) this right to fair hearing has arisen where a person as the appellant here is by law to be heard or given the opportunity of being heard in exercise of his right to fair hearing. And it is always the case that its infringement leads to miscarriage of justice. (p. 2924 D)

COURTS - Crime - Pretrial - CPL s. 340(2)(b)

9. If I have understood well the appellant's case here he is not contending that the provisions of section 340 are unconstitutional and so should be declared unconstitutional by this court

rather the question that has to be resolved under this issue is whether an accused person as the appellant here has a right to be given a fair hearing i.e. an opportunity of being heard before a judge (as Esua J.) could legally exercise the quasi judicial function conferred on him by section 340(1) (supra).
 B In this regard all that section 340 (2) (b) has enjoined the Judge to do is to examine the proofs of evidence of an offence submitted to him not in the open court and to say whether or not the offence as per the proofs of evidence is an arraignable
 C offence on having raised the circumstances requiring to put an accused person as the appellant here on his trial before a trial court. This exercise does not at that stage require the quality and quantum of evidence that can lead to the irresistible inference that the accused as the appellant here has
 D committed an offence. (p. 2924 G)

COURTS - Crime - Pretrial - Fair hearing - Breach

10. This court's pronouncement in the above cited case in *Effiom v. The State* (1995) 1 NWLR (Pt. 373) 507 at 582 - 583
 E paras. H - A is to the effect that:
"A trial of an accused person commences when his plea is taken... So the right to fair hearing will commence from the time an accused person is brought before a court and his plea is taken. The period does not include the pre-trial stage to
 F *wit: the period covering the time he was arrested to the time he was arraigned in court and his plea taken".*

The foregoing dictum per Wali, JSC still stands and has completely resolved the complaint alleged in issue 2 in the
 G appellant's brief in the appeal. It has showed that the question of fair hearing cannot be raised against the quasi judicial function of a judge being performed under section 340(2) (b) (supra) as it does not constitute a trial within the intendment of the said provisions of the Criminal Procedure Law under
 H which the consent of a Judge to prefer a charge is predicated and the same reasoning goes for the instant question in this matter. (p. 2926 A)

NOTABLE POINT OF INTEREST

CHUKWUMA-ENEH.JSC

1. Contradictory and inconsistent statements - Difference

It is not contested that where an extra judicial statement and the testimonies in the trial court are in material conflict because of contradictions in them the court is not disposed to pick and choose what to believe or not but ordinarily to discard both statements. This is different from situations where the court has accepted part of the witness's testimony and rejected the other part. This is so as the question of contradiction/inconsistency is not in issue thereof in such cases. In any event this is not the case here where I must say also that neither the appellant nor his counsel has taken on PW3 on the alleged inconsistencies in the statement he has made on oath and the others he has made extra judicially by cross-examining PW3 on the specific inconsistencies in the two statements as in my view it is only, after PW3 has failed to explain the inconsistencies that his evidence has to be discarded on grounds of inconsistency but where a statement contradicts another statement in a material particular the two statements are rejected. There lies the difference between contradictory and inconsistent statements in our Law of Evidence. (p. 2921 G)

REPRESENTATION

M. J. Onigbanjo, Esq. with Lawan Bunyamba, for the Appellant
O. Akinboro, Esq., for the Respondent

CASES REFERRED TO

Adepetu v. State (1998) 9 NWLR (pt. 565) 185
Uwagboe v. State (2008) 12 NWLR (pt. 1102) 621
Agbo v. State (2006) 6 NWLR (pt. 977) 545
Kwagshir v. State (1994) 2 NWLR (pt. 328) 592
Igbele v. State (2004) 15 NWLR (pt. 896) 314
Orji v. State (2008) 10 NWLR (pt. 1094) 31
Gabriel v. State (1989) 5 NWLR (pt. 122) 457
Ikomi v. State (1986) 3 NWLR (pt. 28) 340
Akpa v. State (2007) 2 NWLR (pt. 1019) 500
Adio v. State (1986) 2 NWLR (pt. 24) 581
Emeka v. State (2001) 14 NWLR (pt. 734) 666

Ogba v. State (1992) 2 NWLR (pt. 222) 164

Effiom v. State (1995) 1 NWLR (pt. 373) 507

Okulate v. Awosanya (2000) 1 SC 107

Silli v. Mosoka (1997) 1 NWLR (pt. 479) 98

B STATUTES REFERRED TO

Criminal Code Cap. 30 vol. II Laws of Oyo State of Nigeria 1978, s. 319(1)

Criminal Procedure Law Cap. 31 Laws of Oyo State of Nigeria 1978, s. 340(1)(2)

C Constitution of the Federal Republic of Nigeria 1999, s. 36(1)

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

This appeal is against the decision of the Court of Appeal Ibadan Division that has affirmed the trial court's decision convicting the appellant herein of the offence of murder contrary to and punishable under section 319(1) of the Criminal Code, Cap. 30, Volume II, Laws of Oyo State of Nigeria, 1978. The appellant has been accordingly sentenced to death by the trial court and confirmed by the lower court.

Aggrieved by the decision, the appellant has filed a notice of appeal on 9/6/2011 challenging the said decision of the Court of Appeal. The appeal is predicated on four grounds of appeal. In the appellant's brief of argument filed in the appeal, the appellant has formulated two issues for determination by this court. The respondent has also filed its brief of argument in response to the appellant's case as contained in the appellant's brief of argument and therein has raised three issues for determination.

The appellant's issues for determination are as follows:

"(i) Was the circumstantial evidence relied upon by the Court of Appeal in upholding the conviction of the appellant cogent, strong and compelling enough as to lead to the irresistible conclusion; that the appellant killed the deceased?"

(ii) Whether the trial judge did not breach appellant's right to a fair hearing by giving consent for the information to be filed against him and trying him for the same offence at the trial of the matter?"

The respondent's issues for determination are set out as follows:-

“(i) Whether the circumstantial evidence relied upon by the Court of Appeal in upholding the conviction of the appellant, (sic, was) cogent, strong and compelling enough as to lead to the irresistible conclusion; that the appellant killed the deceased.

(ii) Whether the trial judge breached appellant’s right to a fair hearing by giving consent for the information to be filed against him and trying him for the same offence at the trial of the matter? B

(iii) Whether the totality of the evidence adduced supports the conviction of the appellant for the offence of the murder and also the upholding of the said conviction by the Court of Appeal Ibadan Division in its judgment delivered on 12th May 2011 by Honourable Justice Modupe Fasanmi JCA.” C

It is common ground to the parties that on 17/6/2002 one John Oladipo Oladitan (the deceased) was murdered at No. 6, Mosu close, Onikere GRA, Ibadan Oyo state. The injuries inflicted on the deceased as set out in the evidence of PW2 and exhibit the autopsy report are of horrendous proportions. This is a case with no eye witness(s) of the offence. Hence the case as can be seen from the facts and events herein has rested on circumstantial evidence. The story as found by the trial court is that the appellant at all material times was the driver of the deceased, who on the fateful date had driven the deceased back from a shopping complex to the above-mentioned address at about 2.00 p.m. The deceased on arrival home granted PW3 - the security guard at the gate of the aforesaid premises permission to go on his break, and had asked the appellant, his driver to man the gate pending PW3’s return from his break to his duty post. PW3 on his return from his break did not meet the appellant at the gate - the appellant was not at the gate and after knocking several times on the gate without any response from the appellant, PW3 managed to let himself into the premises only to see the appellant coming towards him from the rear of the premises cleaning his wet hands. The appellant told PW3 that he was not at the gate because the deceased had asked him to wash his plates in the kitchen. The appellant then informed PW3 that he had been asked to drop a mattress already loaded in the deceased’s car a red coloured Gulf to an unnamed lady at Mokola Area of Ibadan. Having opened the gate the appellant then drove out. But before then PW3 had asked him as to the whereabouts’ of the deceased and was told in reply by D E F G H

the appellant that the deceased was sleeping and had directed that he should not to be disturbed. The appellant returned in about 1 hour 30 minutes later back to the house after dropping the mattress. After his return from having dropped the mattress the appellant parked the car and came to PW3 to drop the car keys with him and PW3
B refused to collect the same as it was not the usual practice to do so as the keys had always been handed to the deceased himself by the driver personally.

The appellant proceeded to the house apparently to hand over the car keys to the deceased but ran out shortly, calling PW3's attention to come into house and PW3 did, only to see that the deceased was lying facing the floor motionless. After the deceased failed to respond to their calls, the next-door neighbour was alerted of the incident and he later took PW3 and the appellant to PW1 (a close
D friend of the deceased), who called a medical doctor who later certified the deceased as dead from strangulation/asphyxiation and he issued a medical certificate exhibit B. PW1 put out a call to the family members of the deceased and PW2 the deceased's daughter arrived the next day and having seen what happened, the matter was reported to the police. The police arrested the appellant, PW3 and
E PW6 (the appellant's wife). However, at the conclusion of the police investigation, the appellant alone was arraigned before the trial court charged with the murder of the deceased. PW3 in his statement had said that he had not set his eyes on the deceased alive since he was
F driven back to the premises (i.e. from the shopping complex in Ibadan) at 2.00 p.m. on 17/6/2002. More facts will become evident later in the body of the judgment.

Coming at this point to the issues for determination as raised in the briefs of argument of the appellant and respondent, clearly issues
G 1 and 2 raised in both briefs are in pari materia with each other. The third issue raised by the respondent appears to me as having been captured in all material particulars by issue one in both briefs. It is by all appearances a surplusage which at best ought to be taken together along with issue one to avoid being unduly repetitive of myself in discussing the complaint raised in issue one. In this regard I
H propose to deal with this appeal upon the two issues raised by the appellant.

The appellant's case on issue one as distilled from grounds 1, 2

and 4 is that the court below having rightly appraised itself of the ingredients/factors to prove the offence of murder in this matter has failed all the same to apply these principles to the accepted facts of the case hence the two lower courts have erred in convicting him. And that the situation in the instant matter has been exacerbated by the absence of eye witness(es) of the deceased's murder and that the trial court as affirmed by the court below has therefore wrongly relied substantially on fabricated circumstantial evidence to convict the appellant herein. He has cited the case of *Adepetu v. The State* (1998) 9 NWLR (Pt. 565) 185 at 207 D-E to opine that where the trial court has to rely on circumstantial evidence to convict, nay an accused person, it must firstly caution itself as regards the nature circumstantial evidence which by that fact may be easily fabricated to cast suspicion on innocent persons and so must be narrowly examined to see that they clearly and forcibly lead irresistibly to the guilt of the accused person. In this regard he has listed the findings of facts arising from the trial court's judgment casting mere suspicion on him but which the court below erroneously has found as having culminated in a complete and unbroken chain of evidence conclusively incriminating the appellant. The appellant however, has castigated the inference drawn from the said circumstantial evidence as weak pointing out that underserved weight has been put by the two lower courts on the circumstantial evidence as given by the prosecution to the exclusion of so many co-existing circumstantial events that have weakened the inference of guilt. The appellant has alluded to the tepid treatment given to the explanation of the appellant's absence at the gate at the time of PW3's return from his break and the consequent letting himself into the premises after knocking for some time he has managed to unlock the gate. Furthermore that commensurate credibility and consideration have not been given to his explanation of having been asked by the deceased to wash the plates in his kitchen. The appellant has also referred to the obvious inconsistencies between PW3's evidence as per his proof of evidence on the record and his *viva voce* testimony at the trial. He contends in that regard that the wrong inference drawn from the circumstantial evidence by the trial court as affirmed by the court below juxtaposed against the foregoing background of his case has contradicted the respondent's case against him fundamentally and so he has vehemently complained

of not having gotten adequate consideration of his case by the two lower courts albeit hi a criminal trial. He has referred for example to the case of *Uwagboe v. The state* (2008) 12 NWLR (Pt.1102) 621 at 647 A-C to submit that the contradictions as between where PW3's *viva voce* testimonies at the trial court have gone far beyond the
 B extra judicial statements he has made to the police i.e. as per the proof of evidence as to warrant being expunged from the record. He posits that regard as per *Agbo v. The State* (2006) 6 NWLR (Pt.977) 545 at 571-572 H-F that the court ought to have treated such evidence as most unreliable and that having shown the entire evidence
 C as being most unreliable it ought to be rejected. See *Kwagshir v. The State* (1994) 2 NWLR (Pt.328) 592. He has adverted to the inference drawn from the findings that he has not fought with his wife as perverse in regard to the scratches found on his body (i.e. as not
 D having been inflicted on him by his wife during a fight). He also referred to PW6's evidence that she is a girl friend and not his wife and to add that both PW3 and PW6 have contradicted themselves lively to avoid being prosecuted along with him in this matter.

On the stories surrounding the mattress he has dropped at to
 E Mokola to an unnamed lady he has contended that these stories amongst other facts cannot but have aroused mere suspicion and no more. See: *Igabelle v. The State* (2004) 15 NWLR (Pt.896) 314 at 334B and *Orji v. The State* (2008) 10 NWLR (Pt.1094) 31 at 47 H,
 F and 55 B-C and so that they cannot constitute proper grounds from which to infer of his trying to close his tracks in the crime. He has attacked PW3's evidence that nobody has visited the premises of the deceased on that fateful date as baseless as PW3 has been out on his break for some reasonable time and has no means of knowing whether
 G or not anyone has really visited the house in his absence. He has also made a heavy weather of PW3's opportunity of being the killer as that presumption has not been refuted. And that PW3 has remained in the premises during the space of time the appellant has had to drive out to drop the mattress at Mokola hence the police has recom-
 H mended to charge the two of them i.e. the appellant and PW3 with the murder of the deceased.

From the foregoing facts situation the appellant has urged the circumstantial evidence vis-à-vis the unbroken chain of events as opined by the prosecution from which the inference of his has been drawn

as at best made up of fabricated stories that have cast mere suspicion on him and have not attained the legal standard of proof as laid down in *Adepetu v. The State* (supra) at 215 C-E to sustain the instant charge of murder against him i.e. based on proof beyond reasonable doubt. He has therefore urged the court to uphold his case as per the foregoing and therefore, that his conviction cannot stand, on the shifty circumstantial evidence of the prosecution's case. And so that issue one ought to be resolved in his favour. B

The respondent on its part having asserted that it is settled law that the court could rely on circumstantial evidence to convict an accused person as here, provided it is both cogent and compelling, has also opined that in the instant case although there is no eye witness(s) to the offence that the respondent has nonetheless proved the charge of murder against the appellant, by proving beyond reasonable doubt the actus reus and mens rea of the crime that is to say, by the evidence of PW1- PW8 and also by the unbroken chain of facts albeit amounting to the circumstantial evidence that has linked the appellant conclusively to the instant crime. And also as having showed that the appellant and no other person has killed the deceased. Consequently, that it behooves the appellant to provide some explanation otherwise the inference of his having killed the deceased as established by the prosecution stands as conclusive. It is the respondent's case that the accused person has failed in this regard hence he has been rightly convicted of the said offence. See: *Gabriel v. The State* (1989) 5 NWLR (Pt.122) at 457. *Ikomi v. The State* (1986) 3 NWLR (Pt. 28) at 340, *Akpa v. The State* (2007) 2 NWLR (Pt. 1019) P500, *Adio v. The State* (1986) 2 NWLR (Pt.24) 581 at 584 & 593, *Emeka v. The State* (2001) 14 NWLR (Pt.734) 666 and *Igbele v. The State* (2006) 6 NWLR (Pt.975) 100, *Adepetu v. The State* (supra). C D E F G

The respondent has gone on to set out the unbroken chain of events established by circumstantial evidence, cogent and compelling as having proved its case against the appellant beyond reasonable doubt. And thus that the irresistible conclusion of the appellant's guilt of this offence as charged is well grounded. I shall come to these links in the chain of events anon. It was submitted that in refuting the unbroken chain of events the appellant has specifically attempted to make mountain out of the opportunity that PW3 has had to commit H

the offence and so to infer that it is PW3 that has killed the deceased. In that regard the respondent has clearly debunked the said allegation by positing that the appellant has committed the crime long before PW3's return to his duty post after his break and that the appellant has compounded his story by alleging that the deceased has
 B gone to sleep and has directed not to be disturbed. Thus the appellant has succeeded in concealing the death and time of the deceased's death. The respondent has also submitted that the circumstantial evidence has showed that the appellant has tried to clean the mess in
 C the house; which has arisen from a struggle between the appellant and the deceased leading consequently to the disarray of many household items in the house and the white walls of the dinning room having been splattered with egusi soup. All these have belied the appellant's acts to maintaining an uneasy calm in the premises that
 D fateful day albeit in furtherance of the crime. Further that these acts of commotions in the house underlie the fact of the appellant's absence to man the gate as directed by the deceased on PW3's return from his break.

Furthermore that the appellant has failed to take the police to
 E the spot where he has dropped off the mattress and the unnamed lady at whose instance it has been removed from the house. On the alleged inconsistencies of PW3, the respondent has refuted the same by pointing out that it is the appellant's statements that have been
 F materially inconsistent and contradictory as borne out from the above facts, situation and his extra judicial statements.

The respondent has therefore urged that the appellant on the accepted evidence by the trial court has not discharged the burden of proof on him based on balance of probabilities. And so, that the
 G prima facie case made out by the prosecution's case against the appellant linking him by necessary implication that has arisen from the circumstances of the instant crime has not been rebutted. And so, based on the surrounding circumstances of the crime and as buttressed by the evidence of PW1- PW8 it has established an unbroken
 H chain of events leading up to the irresistible conclusion of the appellant having killed the deceased. And therefore that there can be no doubt that it is the appellant and no other person that has killed the deceased. The court is urged to resolve this issue in the respondent's favour and to uphold the conviction.

Having set out above the background of their respective cases in the appeal it appears from the appellant's stance in this appeal that he is still challenging vehemently the findings of the two lower courts on the identity of the person who killed the deceased and in this matter rightly predicated on the circumstantial evidence pointing conclusively to the fact that it is the appellant and no other person that has murdered the deceased in a most gruesome manner. In this regard he has thus challenged the irresistible inference as drawn from the unbroken chain of events howbeit vis-à-vis the circumstantial evidence in this matter and upon which the two lower courts again rightly have based to convict the appellant of having killed the deceased. In other words the appellant is saying that the prosecution has not made out a prima facie case from the circumstantial evidence in this matter to warrant drawing the necessary inference that it is the appellant alone and no other person that has killed the deceased. This is so notwithstanding that the trial court as well as the lower court has found the circumstantial evidence as being cogent, strong and compelling and irresistibly linking the appellant to the murder of the deceased and in that regard to require the appellant as a matter of law to make a rebuttal of the presumption howbeit on balance of probabilities. In this regard the appellant's explanation has alleged that there are co-existing circumstances as I will come to anon, which have weakened or have destroyed the said chain of circumstantial evidence linking him to the crime. In that wise he has also maintained that the prosecution therefore, has failed to prove its case against him beyond reasonable doubt, consequently that the two lower courts have erred in convicting him of the crime and that their concurrent findings of facts and law ought to be set aside being perverse in the circumstances.

In other words the appellant is saying unequivocally that the onus in this case on the appellant based on balance of probabilities is to establish that the concurrent findings both in law and facts in this matter are perverse as they are not based on the accepted evidence before the trial court as confirmed by the lower court and so has occasioned a serious miscarriage of justice entitling him to be acquitted and discharged of the offence of murder. I must confess that the onus on the appellant in this regard to displace the instant concur-

rent findings is not an easy one. Ordinarily concurrent findings by the two lower courts can be challenged on the grounds that the findings are perverse or have not been founded on legal evidence before the trial court or where it is shown that the trial court has taken into account extraneous matters which it ought not to have taken into account. See: Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360 and Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) 1 or has occasioned a miscarriage of justice. See: Okulate v. Awosanya (2000) 1 SC 107 & Enang v. Agu 11-12 SC 17 reported as Okulate v. Awosanya (2000) 2 NWLR (Pt. 646) 530. **The appellant here has clearly predicated his case in this regard on the findings not having been founded on legal evidence before the trial court and thus has occasioned a miscarriage of justice in the matter.**

In this respect I say pre-emptorily that the appellant has failed upon an overview of his case on this crucial issue to show how the instant circumstantial evidence has been so weakened or destroyed by any co-existing circumstances in the matter be it in the nature of want of legal evidence acted upon by the trial court vis-à-vis his conviction before the trial court or on a miscarriage of justice in the matter. Simply put, the appellant has not discharged the said onus. This is so notwithstanding that the appellant has over flogged to no effect the issues of the opportunity which has availed PW3 to commit the crime and particularly so on his case on the immaterial inconsistencies arising from PW3's extra judicial statements vis-à-vis his viva voce testimonies at the trial court.

Meaning that the appellant is contesting the finding of unbroken chain of legal evidence leading irresistibly to the conclusion of the appellant's guilt in this matter. Clearly also he has predicated his stance in this regard on the failure of both lower courts to give due credence or credibility to his case as founded on the evidence before the trial court including that the deceased has asked him to wash the plates in the kitchen of his house and the evidence to drop off the mattress at Mokola to an unnamed lady who has called earlier on at the house and importantly on the opportunity that has availed PW3 to commit the crime. His regret that these pieces of evidence have remained unconsidered by the lower courts is totally misplaced in the

light of my reasoning herein. They have been duly considered and rejected by the two lower courts. And so it is wrong to surmise that the instant circumstantial evidence cannot constitute a complete and unbroken chain of facts nailing him squarely to the crime and as having established conclusively that no one else but the appellant has killed the deceased. B

The truth of the matter as I must point out is that it is not the business of this court to make primary findings of fact i.e. as to the credibility of witnesses as it is the place of the trial court that has seen, heard and watched their demeanours to do so. This court, however, is entitled to draw inferences from accepted facts and the lower court has rightly upheld the accepted facts in this matter, and I have seen no cause to do otherwise hence my preemptory conclusion reached above on the appellant's guilt of the offence. In view of the line of the appellant's argument as skewed in this regard I must also add that where evaluation of evidence does not involve the credibility of witnesses but the complaint is against non-evaluation or improper evaluation of evidence by the trial court an appellate court (as this court) is in a good position as the trial court to do its own evaluation. See: *Narumal & Sons (Nig.) Ltd. v. Niger Benue Transport Co. Ltd.* (1989) 2 NWLR (Pt.106) 730 at 742 & *Silli v. Mosoka* (1997) 1 NWLR (Pt. 479) 98. ***But that situation has not arisen here.*** C
D
E

It is against the foregoing preamble that I have to come to this matter viewed from its basics. It is settled law that for the prosecution to secure a conviction for murder as in such matters as the instant one it must establish beyond reasonable doubt the cumulative presence of the following factors/ingredients of the offence: F

- (1) *That the deceased died.*
- (2) *That the death was caused by the accused arraigned before the court (in the instance the appellant).*

(3) *That the act or omission of the accused which caused the death was intentional with knowledge that death or grievous bodily harm was the probable consequence.* See *Ogba v. The State* (1992) 2 NWLR (Pt. 222) 164. H

The onus on the prosecution in proving the cumulative

presence of these ingredients as in this matter cannot be compromised in any respect; meaning that the onus does not shift at all as it rests squarely on the prosecution throughout the case. Where the prosecution fails to prove any of the three ingredients as set out above, the offence of murder has not
 B **been established beyond reasonable doubt and the accused person is entitled to be acquitted and discharged.** See: Adekunle v. I-G of Police (1955/56) WRNLR 16; R. v. Lawrence (1933) 11 NLR 6, 1933 AC 699.

C From the nature of the peculiar facts of this case based on the complaint to be resolved as per issue one even though it is common ground that the deceased in this case is dead at the locus criminis the prosecution nonetheless has to prove the same beyond reasonable doubt and has done so in this regard in this matter through exhibit 8,
 D the autopsy report of the deceased's death from the medical doctor, and which has been tendered in evidence by PW5 as the Doctor has been on a sabbatical leave. Based on the extent of the massive injuries apparent on the deceased's body it cannot be in any doubt that death or grievous harm as has resulted from the attack is intended.

E A closer examination of the appellant's issue one in this appeal has posed the question whether the lower court has erred in upholding the appellant's conviction when the circumstantial evidence upon which the conviction has been based is not cogent, strong, compelling and therefore cannot lead to the irresistible conclusion of the
 F appellant and no one else being guilty of the deceased's murder. The findings of the two lower courts rightly are to the effect that based on the circumstantial evidence that the appellant and no one has killed the deceased. The appellant in this court is seeking the upturn of
 G these findings.

In this matter, it must be noted that there is no confessional statement of the crime, nor an eye witness(s) account of how the deceased has been murdered in his house in this matter. The prosecution therefore has rightly resorted to proving
 H **its case against the instant appellant by circumstantial evidence which is a proper and an effective means albeit in proving crimes of this nature beyond reasonable doubt.** See: Oka v. The State (1975) 9-11 SC 17. **The effectiveness of circumstantial evidence in the hands of the prosecution in proving**

any criminal case for that matter and upon having discharged the onus of proof on it, that is to say beyond reasonable doubt, cannot be put any higher than in the words as per the case of R. v. Taylor & Ors. (1928) 21 CAR 20 at 21 wherein the court stated:

“It has been said that the evidence against the applicant is circumstantial, so it is, but circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial” per Hon. Justice Herwart, Lord Chief Justice of England. B
C

I am at one with the foregoing notable pronouncement and its aptness coupled with its applicability to the peculiar facts of this matter is beyond reproach and therefore I rely on it and follow it in dealing with the prosecution’s case in this matter and to resolve issue one. D

It is also true that in these proceedings the appellant has launched all severe attacks against the respective PW3’s and PW6’s evidence in regard to the unbroken chain of events constituting the circumstantial evidence in this matter as having been founded on a tissue of lies and kindles of contradictions which at best has raised mere suspicion against the appellant and as having not established the respondent’s case beyond reasonable doubt. All the same, let me in the words of this court in the case of Adio v. The State (1986) 2 NWLR (Pt. 24) 581 at 593 paras. G-H emphasise that: E
F

“It is often said that witness can lie, but circumstances do not, so in that sense, circumstantial evidence afford better proof beyond reasonable doubt.” G

I intend to examine the findings of facts in the chain of events establishing the circumstantial evidence herein and as found and relied on by the two lower courts in linking the appellant to the crime to see if truly the prosecution has so proved its case against the appellant beyond reasonable doubt to justify the irresistible conclusion of the appellant being guilty of this offence. And it is only proper that any court in doing so has firstly to caution itself of the inherent dangers associated with such evidence as per the case of Adepetu v. The State (supra) wherein this court has admonished that circumstantial H

evidence must be narrowly examined by courts that is to say strictly scrutinized “as this type of evidence may be fabricated to cast suspicion on innocent persons”, and in that regard to make doubly “sure that there are no other co-existing circumstances which could weaken or destroy the inference...” being drawn therefrom of countervailing effect on an accused’s guilt of the offence as charged.

I now proceed to re-examine the unbroken chain of events linking the appellant to the crime as established by the lower court’s judgment and thereafter to consider whether the circumstantial evidence arising there from is cogent, strong and compelling enough against the background if any, of any other co-existing circumstances or findings to weaken or destroy the irresistible inference that the appellant is guilty of the offence. In this regard the lower court has rightly reduced the unbroken chain of facts albeit on the crucial consideration of the instant circumstantial evidence to the following:

“(a) The appellant was the driver of the deceased while PW3 was the gate man.

(b) The deceased lived alone.

(c) On the morning of 17/6/2002 the appellant took the deceased out and returned at about 2p.m.

(d) At around 2pm or thereabout on the same 17/6/2002 the deceased permitted PW3 to proceed on break while the appellant replaced PW3 to man the gate.

(e) PW3 returned from his break and did not meet the appellant who was supposed to be manning by staying at the gate.

(f) PW3 called on the appellant several times to open the gate but the appellant was not available and PW3 had to open the gate all by himself.

(g) On entering the premises PW3 saw the appellant emerging from the back of the house and also a mattress inside one of the cars of the deceased.

(h) The appellant explained to PW3 that he was not at the gate to open it because the deceased instructed him to wash plates inside the house.

(i) The appellant further informed PW3 that the deceased had instructed him to carry the mattress in the car to a lady at Mokola.

(j) The appellant further informed PW3 that the deceased was sleeping and did not want to be disturbed.

(k) Appellant drove out while PW3 remained at the gate.

(l) According to PW3 no one visited the premises.

(m) At about one and half hours later, the appellant returned into the house with the car, and asked PW3 to collect the keys and return same to the deceased.

(n) PW3 refused to collect the car keys from the appellant as it was never the practice for him to return car keys to the deceased, ^B

(o) The appellant then entered the house and came out shortly afterwards to call PW3.

(p) PW3 entered the house and found the deceased lying motionless on the floor of one of the rooms. ^C

(q) PW1, a long time friend of the deceased was invited to the scene who sent for the family of the deceased and reported the matter to the police.

(r) PW2, PW4 and PW5 noticed that the deceased had some massive injuries on his body. ^D

(s) Stains or splatter of egusi soup were noticed on the white walls of the dining room while broken pieces of glass were noticed on the floor.

(t) There were also signs that someone had tried to clean up the place, while there were washed plates and cutlery beside the kitchen sink and a big metal object underneath the kitchen sink. There was also a clean knife on top of the refrigerator. ^E

(u) The eye glasses of the deceased were broken and mattress on the bed inside the room, which floor the deceased was lying was missing. ^F

(v) PW2, PW4 and PW5 noticed fresh scratch marks and bruises on the neck, body and bands of the appellant.

(w) The appellant claimed that he sustained the scratch marks and bruises as a result of physical fight he had with his wife shortly before the incident.

(x) The wife of the appellant in her testimony in court denied having had any physical fight with the appellant.

(y) The appellant could not lead the police to where he dropped the mattress or whom he gave the mattress. ^H

The foregoing events and facts having arisen from accepted facts as found by the trial court in this case and as itemized by the lower court in its judgment have showed a careful traversing of this

matter by the lower court and is highly commendable. The pertinent question that necessarily follows is whether the summation of the foregoing proved and accepted evidence/facts vis-à-vis the findings of unbroken chain of events by the two lower courts lead to only one irresistible inference of the appellant's guilt based on the fact that it has been proved beyond reasonable doubt by the prosecution of the presence of the aforesaid three ingredients of murder in this matter. I have no doubt in my mind that the three ingredients of murder as charged have been so proved. Firstly, by exhibit 8, the autopsy report, the death of the deceased has been established beyond reasonable doubt. It is also in evidence that the deceased died at the spot of the locus criminis. PW2 whose evidence has been accepted by the trial court has also given *viva voce* evidence of the extensive and massive injuries she has noticed on the deceased's body at the locus criminis causing the instant death of the deceased in his house. I now go on to establish the presence of the other ingredients, save to add that it is not in doubt again from the extent of the massive injuries as evidenced in exhibit B the autopsy' report and PW2's evidence that death or grievous bodily harm has been the intention of the deceased attacker. It has been established that the appellant has been alone in the premises with the deceased in the house at all material times of the offence. In fact the appellant is the last person to have seen the deceased alive. It is noteworthy that the mattress which has been loaded in one the deceased's cars has been the very one removed from the room in which the deceased's body has been found. The appellant has remove the said mattress and delivered it to an unknown lady and place obviously to serve as a ploy and to cover his tracks in executing crime and so to give a lie that PW3 left behind in the premises had enough opportunity to commit the offence and so to raise founded doubt that the deceased's death could have been caused by some one else and not the appellant. And in law the immediate consequence of having provoked such doubts, is implicit in the principle of giving an accused the benefit of doubt. The principle holds sway in such instances. The circumstances of this matter have generated no inkling of doubt whatsoever. However, the appellant has misconceived the implication of what he has said when asked by PW3 on his return from his break about the whereabouts of the deceased and the appellant's reply that he has been sleeping

and has asked not be disturbed. In other words in the context of what has manifested later - let sleeping dogs lie; and thus the appellant has intended not to provoke any occasion of looking for the deceased before he, the appellant, has had the opportunity of leaving the premises. This episode has followed soon after the PW3's return from his break. There is evidence that no one i.e. a visitor has called at the house that day. Inside the deceased's house there has been apparent signs/evidence of attempted cleaning up of the mess found in the aforesaid room where the deceased's body has been lifted vis-à-vis the appellant's cleaning of his wet hands as observed by PW3. There is evidence of the appellant's complicity in the crime as he has fresh injuries on his neck and chest consistent with having struggled with another person i.e. the appellant as found by trial court and which injuries the appellant has failed to explain away satisfactorily save to say that they have been inflicted on him by his wife in a fight with her. The wife has come out to deny ever fighting with the appellant and plainly has denied causing him the said injuries. This is a damning evidence. And there are signs of extensive struggle in the house which has led to the displacement of most household items from their usual positions in the house as given by PW2 in her evidence. In this regard some items in the house displaced from their normal positions have included some glasses hence the presence of broken glasses on the floor. And if I may repeat as rightly found by the two lower courts the injuries on the deceased's body are consistent with having struggled with another person in this case obviously with the appellant. To further cover his tracks the appellant has attempted to hand the car keys to PW3 who by that time has returned from his break clearly to put PW3 on the spot and PW3 has refused to receive the keys from the appellant as it has not been the usual practice of handing the keys through him to the deceased. This incident has happened after the appellant has returned from dropping off the mattress. All these clever acts of the appellant have been aimed at avoiding being connected with the deceased's death. It is very material that the appellant has failed to take the investigating police officer to where he has left the mattress nor has the appellant identified any person(s) including the unnamed lady to whom that mattress has been delivered. One can only read from these devious acts in the circumstances as amounting to a coordinated attempts by the

appellant to enable him plead his absence from the scene of the crime and being somewhere else at all the material times to the crime and thereby to put PW3 on the spot or to suggest that someone else has committed the crime. The prosecution's case as captured from the foregoing unequivocally has presented an unbroken chain of events amounting to the circumstantial evidence in this matter, which in my view construed strictly as rightly found by the two lower courts is cogent, strong, and compelling; thus justifying by the irresistible conclusion as pointing to the appellant and no one else as having killed the deceased. There can be no doubt that the evidence tendered by the prosecution in this matter has raised a strong prima facie case deserving an explanation from the appellant.

The appellant to meet this case has raised the issue of a miscarriage of justice premised on the fact that the two lower courts have misconstrued certain co-existing circumstances that have destroyed or indeed so weakened the links in the said chain of events that it is unsafe for the two lower courts to have found the appellant guilty of the offence. In this regard the appellant has challenged the weight given to his case and the adverse findings on his absence at the gate on PW3's return from break as against the countervailing fact of his satisfactory explanation that the appellant has been asked to wash the plates in the kitchen of the house by the appellant hence the cleaning of his wet hands. Even more importantly is the absence of the appellant from the premises to drop off the mattress at Mokola and the opportunity for someone else to have committed the offence in the interim. He has castigated the levity with which this evidence has been treated by the two lower courts; of course, I do not think there are any grounds for the appellant's grievances in these respects and they are rejected. And also so on the alleged contradictions in the evidence of PW3 (the prosecution's star witness), particularly between his extra judicial statements made to the police and his *viva voce* evidence rendered on oath in the oral testimony at the trial and has exemplified them thus "*though Waisu has early (sic) told me that Baba has gone to sleep*" i.e. as per his extra-judicial statement as against the *viva voce* evidence on oath in court where he said: "*He told me the deceased was asleep and did not want to be disturbed*" as at P.26 of the record and also his extra judicial statement that:

"He parked the car and he went to tell Baba that he was going,

he entered and ran back so that I should come”.

As against his evidence at the trial court as follows:

“Waisu later parked his car and come and sat with me at the gate he was complaining that Baba does not want to come and collect his keys to his car. I replied that I was not the right person to hear the complaint, I suggested to him that he should go in person and give the key to Baba. He left to Baba’s house to deliver the keys”.

The foregoing abstracts of inconsistencies amongst other minor alleged inconsistencies have been highlighted by the appellant in this appeal, as well as in the two lower courts. These abstracts have been held out as serious inconsistencies otherwise fatal to prosecution’s case that have dented and altered the irresistible conclusion of his guilt. I must observe that the two lower courts have not been persuaded by these submissions. His submissions thereof have no basis. It is the appellant’s example of making a mountain out of a mole hill; accordingly they are rejected. Although the above co-existing circumstances are there on the record, they have in my view neither weakened nor destroyed the irresistible inference arising from the circumstantial evidence based upon the unbroken chain of events which if I may emphasise has culminated in the conclusive and compelling finding of fact that the appellant killed the deceased. The law on the question of inconsistencies is well settled. This position must not be confused with the case of minor discrepancies in details between two pieces of evidence from the same witness. See: Gabriel v. The State (1989) 5 NWLR (Pt. 22) 457 & Ogoala v. The State (1991) 2 NWLR (Pt. 175) 509. And if I may mention, it is expounded as per the cases of Amusa v. The State (2002) 2 NWLR (Pt. 750) 73; Okafor v. The State (2006) 4 NWLR (Pt. 969) 1 and Maigari v. The State (2010) 16 NWLR (Pt. 1220) 439 at 479 - 480 H-A. It is not contested that where an extra judicial statement and the testimonies in the trial court are in material conflict because of contradictions in them the court is not disposed to pick and choose what to believe or not but ordinarily to discard both statements. This is different from situations where the court has accepted part of the witness’s testimony and rejected the other part. This is so as the question of contradiction/inconsistency is not in issue thereof in such cases. In any

event this is not the case here where I must say also that neither the appellant nor his counsel has taken on PW3 on the alleged inconsistencies in the statement he has made on oath and the others he has made extra judicially by cross-examining PW3 on the specific inconsistencies in the two statements as in my view it is only, after PW3 has failed to explain the inconsistencies that his evidence has to be discarded on grounds of inconsistency but where a statement contradicts another statement in a material particular the two statements are rejected. There lies the difference between contradictory and inconsistent statements in our Law of Evidence.

It is to be noted that the instant statements on oath at the trial court have arisen from the cross-examination by the appellant's Counsel and so has raised a question as to details in regard to the witness's statements. It is not being suggested as having arisen from any prompting. Besides, the alleged inconsistencies in this case are mere inconsistencies and have arisen from the expatiation in details of PW3's evidence of what has transpired between PW3 and the appellant and having arisen from the cross examination by the appellant's; counsel and have not been challenged as having affected the mind of the trial court so as to weaken the necessary inference drawn from the unbroken chain of events in this matter. I refer with approval to the case of Henry Nwokearu v. The State (2010) 15 NWLR (Pt. 1215) 1 at 12. Besides, the inconsistency rule has not in my view been breached as PW3 has not been given the chance to explain the inconsistencies here at the trial. See: Ogudo v. The State (2011) 202 LRCN 9, (2011) 18 NWLR (Pt. 1278) 1 & Onubogu v. The State (1974) 9 SC. 1. Let me now come to the doctrine of last seen that has arisen from the overwhelming circumstantial evidence in this case and that as found by the two lower courts has evincingly pointed to the murder of the deceased by the appellant. The appellant has been the last person to have been seen with the deceased alive and as rightly held he has to account for his sudden death in the house where both of them have stayed before his death. See: Emeka v. The State (supra), Igabele v. The State (supra) and Maigari v. The State (supra). The appellant has been inside the house with the deceased at all material times. And if I may emphasise, the deceased has been discovered dead after the appellant has emerged from the said house. Therefore, there is a strong prima facie case that the appellant has killed the deceased.

After all the deceased looked hale and hearty when he returned to his house from the shopping complex. He, the appellant has not rebutted that presumption of guilt arising from the finding of a prima facie case against the Appellant and based on the circumstances of this case he is rightly convicted for having killed the deceased.

The next question is whether in the circumstances the appellant's conviction on the available circumstantial evidence the trial court has occasioned any miscarriage of justice. Such a conclusion cannot hold against the background of the foregoing reasoning and conclusive findings of both the two lower courts and this court and so whether the lower court rightly has affirmed the vision of the trial court in this regard in my view is conclusively in the affirmative.

In that regard having given due consideration to the totality of the appellant's case in the appeal I have not the slightest doubt in my mind in coming to the irresistible conclusion based on the circumstantial evidence which has proved beyond reasonable doubt the guilt of the appellant in this crime and that he has killed the deceased. It follows that the appellant's guilt is conclusively premised on the finding that the deceased is dead and that the appellant killed him and that his death has been caused by the grievous bodily injuries inflicted on him by the appellant from which his death has resulted. I entertain no iota of doubt that the appellant intended to kill the deceased and has killed him even though irrelevant in law we may never know the motive for the offence, which is not evident from the facts of this case. However, is settled law that the appellant in the circumstances is presumed to intend the natural and probable consequences of his dastardly act. See: Irek v. the State (1976) 4 SC. 65 at 67. Finally, having established the cumulative presence of the above three ingredients as per the case of Ogba v. The State (supra) in this matter; it is conclusive again if I may repeat that there is no miscarriage of justice in this matter as I find that the appellant has unlawfully killed the deceased and so I also find him guilty as per the charge. Issue one is therefore resolved against the appellant.

On Issue Two:

The appellant has challenged the charge preferred against him at the trial court as having been fundamentally undermined by the

fact that the Judge (Esau J.) who in furtherance of the provisions of section 340(2) (b) of the CPL of Oyo State Cap. 31 1978 (Amendment) No. 2 Edict 1994 has consented to charging the appellant with the offence of murder without the Chief Judge re-assigning the case to him for determination on the merits. And the same, he has presided over the trial leading to the eventual conviction of the appellant of the offence of murder hence the instant appeal. Thus, the appellant has contended that his rights to fair hearing under section 36(1) of the 1999 Constitution (as amended) has been seriously breached. In the true sense of the matter that the trial Judge having had a foreknowledge of the facts of the matter in the process of having to give the said consent has raised a real or likelihood of bias against the appellant thus raising the likelihood that he has formed before hand the mind to find the appellant guilty as charged. Indeed he has found him guilty as charged in this matter. This objection has been raised on the ground of breaching the appellant's right to fair hearing under section 36(1) of the 1999 Constitution as amended that is otherwise also known as breaching his right to fair trial.

The principle of fair hearing is a right embedded in the Constitution as an entrenched constitutional right and so its infringement renders the proceedings a nullity ab initio being unconstitutional. And based on a plethora of the cases of this court that have expounded on the provisions of section 36(1) (supra) this right to fair hearing has arisen where a person as the appellant here is by law to be heard or given the opportunity of being heard in exercise of his right to fair hearing. And it is always the case that its infringement leads to miscarriage of justice.

If I have understood well the appellant's case here he is not contending that the provisions of section 340 are unconstitutional and so should be declared unconstitutional by this court rather the question that has to be resolved under this issue is whether an accused person as the appellant here has a right to be given a fair hearing i.e. an opportunity of being heard before a judge (as Esua J.) could legally exercise the quasi judicial function conferred on him by section 340(1) (supra). In this regard all that section 340 (2) (b) has enjoined the Judge to do is to examine the proofs of evidence of an

offence submitted to him not in the open court and to say whether or not the offence as per the proofs of evidence is an arraignable offence on having raised the circumstances requiring to put an accused person as the appellant here on his trial before a trial court. This exercise does not at that stage require the quality and quantum of evidence that can lead to the irresistible inference that the accused as the appellant here has committed an offence. My view in this regard, is in sync with this court's view in the case of Ikomi v. The State (1986)3 NWLR (Pt. 28) 340 at 362 paras. E-F to the effect that:

"...once there are circumstances from which it can be justly inferred that the accused person could have committed the offence, he should be put on his trial. Whether there are other co-existing circumstances which would weaken that inference or whether the evidence leads irresistibly to accused person's guilt, can only be determined at the trial". Per Nnamani JSC (of blessed memory).

It goes without much ado that the cases like State Civil Service Commission v. Buzugbe (1984) 7 SC 19 at 43 - 44 and Metropolitan Properties v. Lannon (1969) 1 QB, 577 at 559 heavily relied upon by the instant appellant are non sequitur as they principally have dealt with matters pertaining to interests ranging from pecuniary or otherwise vis-à-vis the questions of real or likelihood of bias and so are clearly not pertinent in the context of the instant issue to be resolved in this case. So also the case of Akoh v. Abuh (1988) 3 NWLR (Pt. 85) 696 at 720 B-C which has dealt on the question of a Magistrate or Judge who has any interest which could be pecuniary or otherwise in the case brought before him in the course of dispensing a quasi-judicial function, again, which is not the case here. The same consideration applies to the case of J. O. Abbey v. A. H. Lamptey (1947)12 WACA 156. It must be noticed that none of the cases relied on by appellant as cited above in challenging the instant exercise under section 340 (2) (b) are on all fours with the instant matter and so they are discountenanced.

My view in this regard is further informed by the case of Effiom v. The State (1995) 1 NWLR (Pt.373) 507 at 582 - 583 H to the effect that the accused's right to fair hearing comes into force on having been arraigned before a competent trial court and not before then.

This court’s pronouncement in the above cited case in Effiom v. The State (1995) 1 NWLR (Pt. 373) 507 at 582 - 583 paras. H - A is to the effect that:

“A trial of an accused person commences when his plea is taken... So the right to fair hearing will commence from the time an accused person is brought before a court and his plea is taken. The period does not include the pre-trial stage to wit: the period covering the time he was arrested to the time he was arraigned in court and his plea taken”.

The foregoing dictum per Wali, JSC still stands and has completely resolved the complaint alleged in issue 2 in the appellant’s brief in the appeal. It has showed that the question of fair hearing cannot be raised against the quasi judicial function of a judge being performed under section 340(2) (b) (supra) as it does not constitute a trial within the intendment of the said provisions of the Criminal Procedure Law under which the consent of a Judge to prefer a charge is predicated and the same reasoning goes for the instant question in this matter.

In the final analysis I find the appeal most unmeritorious and it should be dismissed and it is accordingly dismissed. The judgment of the two lower courts in this matter are hereby affirmed. Appeal dismissed.

F _____

MUHAMMAD JSC

My learned brother, C.M. Chukwuma-Eneh, JSC, permitted me to read in draft his lead judgment just delivered. I agree with him in his reasoning and conclusion that the appeal lacks merit and it should be dismissed.

My Lords, what I have noted is that the findings of fact on this case are concurrent and it requires special reasons or circumstances to make this court interfere with same. See: Amadi v. Nwosu (1992) 23 NSCC (Pt. 2) 93, (1992) 5 NWLR (Pt. 241) 273; Secondly, the learned trial judge found that the circumstantial evidence leading to the conclusion that the accused person committed the offence are cogent and compelling.

In his submission, the learned counsel for the appellant, while

quoting the decision of this court in *Adepetu v. State* (1998) 9 NWLR (Pt. 565) 185 at 207 D-E, per Ogundare, JSC (now late), stated that in drawing an inference of guilt of an accused person from circumstantial evidence, great care must be taken not to fall into serious error and that circumstantial evidence must always be narrowly examined and must clearly and forcibly suggest that the accused was the person who committed the offence and no one else could have been the offender. The court must also be sure that there are no other co-existing circumstances which could weaken or destroy the inference.

But the trial court, my Lords, in its summation and evaluation, was of the following view:

"It was the contention of the learned counsel for the accused that there were four possibilities as to how the deceased died. That the gate man PW3, the visitor of the deceased, an intruder who could have jumped into the compound and the accused had the opportunity to kill the deceased. Now let me consider these possibilities. As to the gateman PW3, although there was a tune when PW3 was left alone in the premises, there is no evidence before the court that PW3 entered the house until he was called in by the accused to see the corpse of the deceased. As regards the lady visitor, I believe the evidence of PW3 that no visitor came to the house and what is more, the accused contradicted himself on whether or not PW3 was around when the lady visited the premises. As regards the possibility of an intruder jumping into the premises all the pieces of evidence do not suggest that an intruder entered the premises. PW3 and the accused both stated before this court that while they were in the premises there was no distress or alarm from the deceased. All these pieces of evidence before the court point irresistibly to the guilt of the accused person."

The only irresistible inference I can make from the circumstances presented by the evidence is that the accused person killed the deceased. I can find no other reasonable inference. It is my view that the accused person, while inside the house of the deceased struggled with him. Thereafter, the accused washed the plates used by the deceased and tried to clean up in order to cover his tracks. Furthermore, he carried away the mattress so as to leave PW3 alone in the premises before PW3 discovered the crime."

The court below, in its review of proceedings placed before it made the following findings:

“in the case at hand on the second ingredient, the following facts emerged from the evidence accepted and founded upon by me learned trial judge:

B (a) *The appellant was the driver of the deceased while PW3 was the gate man*

(b) *The deceased lived alone*

C (c) *On the morning of 17/6/2002 the appellant took the deceased out and returned at about 2p.m.*

(d) *At around 2p.m. or thereabout on the same 17/6/2002 the deceased permitted PW3 to proceed on break while the appellant replaced PW3 to man the gate.*

D (e) *PW3 returned from his break and did not meet the appellant who was supposed to be manning the gate by staying at the gate.*

(f) *PW3 called on the appellant several times to open the gate but the appellant was not available and PW3 had to open the gate all by himself.*

E (g) *On entering the premises PW3 saw the appellant emerging from the back of the house and also a mattress inside one of the cars of the deceased.*

F (h) *The appellant explained to PW3 that he was not at the gate to open it because the deceased instructed him to wash plates inside the house.*

(i) *The appellant further informed PW3 that the deceased had instructed him to carry the mattress in the car to a lady at Mokola.*

G (j) *The appellant further informed PW3 that the deceased was sleeping and did not want to be disturbed.*

(k) *Appellant drove out while PW3 remained at the gate.*

(l) *According to PW3 no one visited the premises.*

H (m) *At about one and half hours later, the appellant returned into the house with the car, parked the car and asked PW3 to collect the keys and return same to the deceased.*

(n) *PW3 refused to collect the car keys from the appellant as it was never the practice for him to return car keys to the deceased.*

(o) *The appellant then entered the house and came out shortly afterwards to call PW3.*

(p) PW3 entered the house and found the deceased lying motionless on the floor of one of the rooms.

(q) PW1, a long time friend of the deceased was invited to the scene who sent for the family of the deceased and reported the matter to the police.

(r) PW2, PW4 and PW5 noticed that the deceased had some massive injuries on his body. B

(s) Stains or splatter of egusi soup were noticed on the white walls of the dinning room while, broken pieces of glass were noticed on the floor.

(t) There were also signs that someone had tried to clean up the place, while there were washed plates and cutlery beside the kitchen sink and a big metal object underneath the kitchen sink. There was also a clean knife on top of the refrigerator. C

(u) The eye glasses of the deceased were broken and the mattress on the bed inside the room, which floor the deceased was lying was missing. D

(v) PW2, PW4 and PW5 noticed fresh scratch marks and bruises on the neck, body and hands of the appellant.

(w) The appellant claimed that he sustained the scratch marks and bruises as a result of physical fight he had with his wife shortly before the incident. E

(x) The wife of the appellant in her testimony in court denied having had any physical fight with the appellant.

(y) The appellant could not lead the police to where he dropped the mattress or whom he gave the mattress. F

From the facts stated above as contained on the record, there is a complete and unbroken chain of evidence disclosing circumstances which nearly and forcibly suggest that it was the appellant that killed the deceased. Appellant was the only person with the deceased when PW3 went on break. After PW3 returned from break, there was no visitor into the house. Appellant's explanations as to what happened at the period that PW3 was not around was contradictory. Appellant completely changed story in his evidence on oath from what he had down in his extra judicial statement exhibits C-C 1. All the inconsistencies were identified by the learned trial judge during his evaluation of evidence at pages 115 - 116 of the record." G H

The court below, finally came to the following conclusion:

“Thus where an accused person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other safe conclusion, then there is no room for acquittal. It is the duty of the accused person in such damning circumstances to give an explanation relating to how the deceased met his or her death.

B In the absence of such an explanation as in the instant case, surely and certainly, a trial court and even an appellate court will be perfectly justified drawing the necessary inference that the appellant must have killed the deceased as rightly found by the learned trial judge in the instant case.

C In the instant case, the circumstantial evidence relied upon by the learned trial Judge has not occasioned miscarriage of justice. The important question is whether taken as a whole, those snippets of circumstantial evidence point unequivocally to the direction of the D guilt of the appellant for the crime charged. My answer to this is in the positive. Where direct testimony of eye witnesses is not available, the court is permitted to infer from the facts proved, the evidence of others that may be logically inferred. See the cases of Akpa v. State (2008) 14 NWLR (Pt. 1106) at 12; Ahmed v. State (2001) 18 NWLR E (Pt. 746) at 622 and Omonga v. State (2006) 14 NWLR (Pt. 1000) at 532.

Appellant was the only person with the deceased when PW3 the security man went on break and after PW3 returned from break. There was no visitor into the house. On normal days, appellant used F to return the car keys himself but on this particular day, appellant attempted to hand over the car keys to PW3 who refused to take it on the ground that it was not the usual practice, appellant could not take the police to the storey building beside AP in Mokola where he G allegedly dropped the mattress from the house of the deceased. Appellant failed to give explanations to the apparent damning facts established against him. I am therefore of the view and also hold that an inference was properly and reasonably made against the appellant in the circumstance. The circumstantial evidence is cogent, complete, unequivocal, compelling and lead to the irresistible conclusion H that the appellant and no one else was the murderer. I am on one with the findings of the learned trial judge that the respondent has proved the second ingredient of the offence, i.e. act of the appellant caused the death of the deceased beyond reasonable doubt.”

My Lords, the law has for long been settled that where circumstantial evidence is cogent and compelling, pointing irresistibly to the accused as the only person who committed the act, then such an evidence can ground a conviction. See: Gabriel v. State (1989) 5 NWLR (Pt.122) 457; Ikomi v. State . (1986) 3 NWLR (Pt.28) 340; Akpa v. The State (2007) 2 NWLR (Pt.1019) 500; Adio v. The State (1986)2 NWLR (Pt. 24) 581 at 584; Emeka v. The State (2001) 14 NWLR (Pt.734) 666; Igabele v. The State (2006) 6 NWLR (Pt.975) 100; Oka v. The State (1975) 9 -11 SC 17.

In his characteristics, Lord Heward, the Lord Chief Justice of England, in the case of R v. Taylor & Ors (1928) CAR 20 at P21, did observe as follows:

“it has been said that the evidence against the applicant is circumstantial, so it is, but circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which by under- signed coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

Even at our own level here, this court, in Adio v. The State (1986) 2 NWLR (Pt.24) 581 at 593 para. G, held:

“It is often said that witnesses can lie, but circumstances do not, so in that sense, circumstantial evidence affords better proof beyond reasonable doubt.”

The conviction and sentence of the appellant on the circumstantial evidence alone, as found by the trial court, is potent enough to justify the sentence on the appellant.

For this and the fuller reasons given by my learned brother Chukwuma-Eneh, JSC, I, too, dismiss the appeal. I affirm the judgment of the court below.

GALADIMA JSC

I have had the benefit of reading in draft the leading judgment of my brother, CHUKWUMA-ENEH, JSC just delivered. I agree with his reasoning and conclusion leading to his dismissal of this appeal, for lacking in merit.

The findings of the two courts below on this case are concurrent. The trial court found that the circumstantial evidence leading to

the conclusion that the appellant committed the offence are cogent and compelling. Indeed there were no other circumstances which could weaken or destroy the irresistible inference that the appellant killed the deceased. The trial court summed up the evidence before it thus:

B *“On the record, there is a complete and unbroken chain of evidence disclosing circumstances which nearly (sic) and forcibly suggest that it was the appellant that killed the deceased. Appellant was the only person with the deceased when PW3 went on break. After*
 C *PW3 returned from break, there was no visitor into the house. Appellant’s explanation as to what happened at the period the PW3 was not around was contradictory. Appellant completely changed story in his evidence on oath from what he had done in his extra judicial statement exhibits, C - G.*

D *All the inconsistencies were identified by the learned trial Judge during his evaluation of evidence at pages 115-116 of the record.”*

Finally the court concluded that:

“Thus where an accused person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads
 E *to no other safe conclusion than there is no room for acquittal...”*

In sum, the circumstantial evidence is cogent and compelling pointing irresistibly that the appellant, and no other person, caused the death of the deceased. He cannot in the circumstance of this case
 F escape the hangman’s noose.

It is for the above reasons and for more detailed reasons contained in the leading judgment, that I too dismiss the appeal and affirm the judgment of the court below.

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OGUNBIYI JSC

This is an appeal against the judgment of the Court of Appeal, Ibadan Division, delivered on the 12th May, 2011 upholding the conviction of the appellant for the offence of murder contrary and punishable under S. 319(1) of the Criminal Code and thereby affirming
 H the death sentence passed on the appellant by the trial Court Ibadan.

The fact of this case is very disturbing and unfortunate. The appellant was the driver to the deceased while P.W.3 was the gateman. On the morning of the fateful day being the 17th June, 2002, the

appellant went out in company of the deceased in his car and they duly returned to the deceased's residence in the afternoon.

On their return, the deceased permitted the gateman (P.W.3) to go on break while the appellant was instructed to man the gate. On return of P.W.3, he did not meet the appellant at the gate.

It is the evidence of P.W.3 that upon his return, the appellant was not at the gate post, and after fruitless knocking on the gate without any response he had to let himself in; that it was only at this point that he saw the appellant coming from the rear of the premises cleaning his hands. That the appellant informed him that the deceased had asked him to wash some plate in the kitchen and hence his absence from the gatepost. Appellant also claimed the deceased asked him to drop a mattress for a lady in Mokola, area of Ibadan. Appellant drove out in one of the deceased's vehicles. On his return he tried to drop the key to the car with P.W.3, who declined to receive same.

The appellant entered the house but immediately came out and called P.W.3 to witness the deceased who was found lying down motionless on the floor. The appellant was eventually charged with the offence of murder of the deceased. At the trial court he pleaded not guilty to the charge levied against him.

During the trial, the prosecution called a total of 9 witnesses; the appellant testified in his defence but did not call any witness. On the 29th November, 2006, the trial court delivered its judgment; the appellant was convicted for the murder of the deceased and sentenced to death by hanging.

The appellant was dissatisfied with the trial court's judgment and filed an appeal to the Court of Appeal which dismissed the appeal and affirmed the conviction and sentence of the appellant. The appeal now before us is against the said lower court's judgment and the appellant has raised two issues for determination as follows:-

(1) Was the circumstantial evidence relied upon by the Court of Appeal in upholding the conviction of the appellant, cogent, strong and compelling enough as to lead to the irresistible conclusion that the appellant killed the deceased?

2. Whether the trial judge did not breach appellant's right to a fair hearing by giving consent for the information to be filed against him and trying for the same offence at the trial of the matter?

On the entire perusal and community reading of the record of appeal before us, there is nowhere suggestive of eye witness evidence to the incident that led to the deceased's death. The law is also trite that for the prosecution to prove the charge against the accused, the proof must either be by direct and credible, evidence; or on circumstantial evidence; or even on the confessional statement of the accused himself.

The grouse of the appeal before us is whether the circumstantial evidence put forward and relied upon by the prosecution had in fact proved that it was the appellant and no one else could have killed the deceased?

The law is trite and well settled that the burden of proof lies on the prosecution to prove its case beyond reasonable doubt either by direct evidence or indirect means through circumstantial evidence linking the accused person with the crime. I must say on the onset that circumstantial evidence is one of the ways or methods of proving the guilt of an accused person. On the side of caution however, the law is settled also that before drawing the inference of guilt from circumstantial evidence, it is necessary to ensure that there are no other co-existing circumstances which would weaken or destroy the inference. See *R. v. Ororosekode* (1960) 5 FSC 280 reported as *Ororosekode v. Queen* (1960) SCNLR 151, *Igabelo v. State* (2006) 6 NWLR (Pt. 975) 100 at 109. In the absence of any direct eye witness therefore, the most relevant evidence supporting prosecution's case is that of P.W.3, the gateman and which should be taken alongside exhibit B, the medical report, which informed that the deceased died as a result of multiple injuries, with strangulation/asphyxia.

With reference drawn to page 116 of the record of appeal, learned trial court judge held and said:-

"The only irresistible inference I can make from circumstances presented by the evidence is that accused person killed the deceased. I can find no other reasonable inference. It is my view that the accused person, while inside the house of the deceased attacked the deceased while the deceased was having his meal, I am also of the view that the scratches found on the body of the accused were sustained when the deceased struggled with him. There after, the accused washed the plates used by the deceased and tried to clean up, in order to cover his tracks. Furthermore he carried away the mat-

tress so as to leave P.W. 3 alone in the premises and he attempted to return the car keys through P.W. 3 so that he would have left the premises before P.W. 3 discovered the crime."

There cannot certainly be a better way of putting the incident than the careful analysis made by the trial court. As rightly deduced by the lower court therefore, the following conclusion arrived at page 178 of the record is very conclusive and supportive of the trial court's findings *supra*. Their Lordships of the Court of Appeal for instance had this to say:

"Appellant was the only person with the deceased when P.W. 3 went on break. After P.W. 3 returned from break, there was no visitor into the house. Appellant's explanation as to what happened at the period when P.W. 3 was not around was contradictory... The summation and the reasonable inference from the respondent's evidence on the record points to no other person as the one that had the opportunity to kill the deceased and indeed killed the deceased."

The conclusion drawn is apt and very decisive on the point especially when regard is had to the facts surrounding this case. The appellant from all indication was obviously responsible for committing the wicked and inhuman act on the deceased and no other person could have done it. The law is trite that where apparent damning facts are established against the accused and he fails to give any explanation, an inference will be drawn against him as it is done in this case by the trial court. See *Adepetu v. State* (1998) 9 NWLR (Pt. 565) page 185 at 207.

For circumstantial evidence to ground conviction, it must point conclusively and irresistibly to the guilt of the appellant. See *Ade v. State* (2006) Vol. 140 LRCN at 977 reported as *Adekunle v. State* (2006) 14 NWLR (Pt. 1000) 717; See also *Idowu v. State* (1998) 11 NWLR (Pt. 574) Pg. 354, where it was held that circumstantial evidence if cogent, strong, compelling and leading only to one conclusion that the murder was committed by the accused person, a court can convict thereon. See *Gabriel v. State* (1989) 5 NWLR (Pt. 122) Pg. 457; *Ikomi v. State* (1986) 3 NWLR (Pt. 28) p. 340 and *Akpa v. State* (2007) 2 NWLR (Pt. 1019) pg. 500.

The behaviour and circumstances surrounding the entire events of this case have overwhelmingly engulfed the appellant as the one and only person who must have brutally, mercilessly and wickedly

attacked and exterminated the deceased. The concurrent finding by the two lower courts is unassailable. It is only just and fair that the appellant must pay for his brutal deed.

My learned brother, Chukwuma-Eneh, J.S.C. has thoroughly dealt with this appeal. With the few word of mine therefore and more particularly on the fuller reasoning contained in the lead judgment, which I adopt as mine, I also dismiss the appeal as lacking in merit.

The judgment of the lower court which endorsed that of the trial court is also affirmed by me. The appellant is to die by hanging.

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ALAGOA JSC

I read before now in draft judgment delivered by my learned brother, C. M. Chukwuma-Eneh, JSC. I agree with his reasoning and conclusion that the appeal lacks merit and should therefore be dismissed.

I too dismiss the appeal and affirm the judgment of the court below. Appeal dismissed.

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