

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH JULY, 2013. SC. 122/2009  
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI,**  
**N. S. NGWUTA, M. D. MUHAMMAD, S. S. ALAGOA, JJSC**

VIVIAN ODOGWU ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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APPEALS - Issues - Formulation - Principle - Grounds of appeal should not be less than issues - Although court may tolerate equal number of grounds and issues (H1)

EVIDENCE - Witnesses - Tainted witness is one who is an accomplice in crime charged - Or who by evidence he gives - May be regarded as having some purpose of his own to serve (H2)

EVIDENCE - Sources - Can be from direct evidence of fact in issue - Or from witness who claims personal knowledge of facts to which he testified (H3)

EVIDENCE - Hearsay evidence - Definition - By Evidence Act s. 37 - It is oral or written statement made otherwise than by a witness - Which is not admissible - And which is tendered to prove the truth of matter stated in it (H4)

EVIDENCE - Hearsay evidence - Fate - Evidence of PW2 is inadmissible and was wrongly admitted in violation of Evidence Act - Since the witness was repeating what another person told him (H5)

CRIMINAL PROCEDURE - Bad character - Evidence of - Admissibility - Under Evidence Act s. 82 - Evidence of appellant's character is not admissible - As same was not in issue (H6)

MURDER - Evidence - Evaluation - If trial court had properly evaluated oral evidence of prosecution witnesses - The same would have been expunged as inadmissible hearsay - Given by tainted witnesses (H7)

MURDER - Evidence - Missing exhibits - Effect - Doubt created by disappearance of the vital exhibits - And the resultant inability of Supreme Court to evaluate same - Enures to benefit of appellant (H8)

MURDER - Proof - The newspaper wherein cult group - Claimed responsibility for death of deceased is relevant - And ought to have been admitted (H9)

MURDER - Proof - Document - Relevancy - The funeral programme is relevant as it was not meant to contradict PW4 - But to show from its content that deceased could have been killed - By any of those on whose toes he had stepped (H10)

CRIMINAL PROCEDURE - Evidence - Withholding of - As no reason was given for failure to call a relevant witness - It is assumed that the evidence if produced - Would have been unfavourable to prosecution vide s. 149(d) EA (H11)

MURDER - Conviction - Circumstantial evidence - Evidence of circumstances in this case is inadmissible - As same is capable of explanation upon other hypothesis - Than that of appellant's guilt (H12)

### ***FACTS***

Accused/Appellant was charged before the High Court of Rivers State Holden at Port Harcourt with the offence of murder contrary to section 319 of the Criminal Code Laws of Eastern Nigeria (as applicable in Rivers State). Appellant pleaded not guilty to the charge. Appellant and the deceased - Mr. Iyobu Nemieboka were engaged to marry. However, the relationship turned sour and they went their separate ways. The case for prosecution/respondent is that out of frustration at being dumped by the deceased, appellant managed to sneak into deceased's apartment with a spare key on the night of 31/07/2001. Respondent stated further that upon the arrival of the deceased at his home, appellant took him by surprise by attacking and killing him with a stabilizer and two kitchen knives.

Appellant stated contrarily that the deceased had picked her from school on the 30/07/2001 and brought her to his house for

reconciliation. Appellant went on to state that on the following night (31/07/2001) when the deceased was about to drop her at her school, two masked men invaded the premises, attacked and eventually killed the deceased. At the trial, respondent called PW1 – 4 who gave circumstantial evidence in proof of appellant's guilt. Appellant testified in person. At the end, the court convicted appellant and sentenced her to death by hanging. Dissatisfied, appellant appealed to the Court of Appeal Port Harcourt Division. The court dismissed the appeal and held that appellant murdered the deceased with the two masked men. Aggrieved further, appellant lodged appeal in Supreme Court.

### **ISSUES FOR DETERMINATION**

*1. Whether the honourable Court of Appeal was right to hold that PW3 and PW4 were not tainted witnesses?*

*2. Whether the honourable Court of Appeal was right to hold that the testimony/evidence of PW1-PW4 were (sic) not hearsay evidence thereby entitling the trial court to rely on their evidence to convict the appellant?*

*3. Whether the honourable Court of Appeal was right to hold that the trial court sufficiently and properly evaluated the evidence adduced by the prosecution as well as the appellant in proof of the charge against the appellant beyond reasonable doubt?*

*4. Whether the honourable Court of Appeal was right to hold that the learned trial Judge rightly excluded pieces of evidence which were vital to the defence thereby depriving the appellant the benefit of doubt which the evidence could have created in the trial court or in the prosecution's case?*

*5. Whether the honourable Court of Appeal was right to hold that the prosecution has proved the charge against the appellant beyond reasonable doubt, based on the circumstantial evidence before the trial court?"*

**HELD** (Unanimously allowing the appeal per **NGWUTA JSC**)

*APPEALS - Issues - Formulation - Principle*

**1. A principle of formulation of issues in appeal is that the grounds of appeal should in no circumstance be less than the**

**issues for determination. While the court may tolerate equal number of grounds of appeal and issues framed therefrom, as in this case, a situation where there are less grounds of appeal than issues for determination will not be tolerated.**

**By the introduction of the respondent's sole issue for determination, learned counsel has increased the number of issues to six (6), with the result that the issues are in excess of the grounds of appeal. It does not matter whether the issues are framed by the appellant, the respondent or both. They cannot be more than the grounds of appeal from which they are derived.**

**I will discountenance the sole issue formulated by learned counsel for the respondent and consider his response to appellant's five issues. (p. 3796 C)**

*EVIDENCE - Witnesses*

**2. A tainted witness falls into one or both of the two categories hereunder listed:**

**(1) A witness who is an accomplice in the crime charged.**

**(2) A witness who, by the evidence he gives, may and could be regarded as having some purpose of his own to serve. By deliberately bringing in matters that are totally irrelevant to the charge of murder, the PW3 and PW4, in their hearsay evidence, brought themselves within the description of tainted witness. In pursuit of their personal interest, as opposed to the interest of justice, the PW3 and, particularly, PW4 turned the murder trial into a referendum in the appellant's personal ethics. I resolve the issue in favour of the appellant.**

**(pp. 3799 G/3803 B)**

*EVIDENCE - Sources*

**3. Evidence can be direct, that is, evidence of fact in issue.**

**It may be testimonial in the form of evidence given by a witness who claims personal knowledge of the facts to which he testified. (p. 3800 B)**

*EVIDENCE - Hearsay evidence - Definition*

**4. Section 37 of the Evidence Act, 2011 defines hearsay thus:**

***“S.37 Hearsay means a statement -***

***(a) oral or written made otherwise than by a witness in a proceeding; or***

***(b) contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.”***

(p. 3802 F)

*EVIDENCE - Hearsay evidence - Fate*

**5. My Lords, above is in the main, the evidence of the star witness in the case and based on which the appellant was convicted. In my view, this witness, masquerading as Sherlock Holmes is a sorry excuse for a police detective. If the prosecutor willingly or on sheer ignorance of the evidence law, led his witness to give such evidence in a murder trial, the trial court and particularly the defence counsel, failed in their duty to the cause of justice and to the appellant.**

**The pieces of evidence above were given and received in violation of the Evidence Act. PW2 testified from pages 50 to 60 of the record. This witness repeated part of the PW1’s evidence in relation to the relationship between the deceased and the appellant and the reason for the break-up of the relationship; facts that could only have come to his knowledge from another source which he did not disclose.**

**In as much as the PW2 relied on his observation of the appellant, his evidence is inadmissible as he did not qualify himself as an expert on young woman’s moral behaviour. In testifying of the appellant’s travels with other men and her calls to the deceased, the PW2 was repeating what another person told him. At least, there is no evidence that the PW2 received calls to the deceased.**

**In my humble view, the evidence of PW1, PW2, PW3 and PW4 was not mainly inadmissible hearsay but portrayed the witnesses as having as their main purpose interest other than justice. I resolve issue 2 in favour of the appellant.**

(pp. 3804 E/3805 B/3806 B)

*CRIMINAL PROCEDURE - Bad character - Evidence of*

**6. Above all, the evidence tainting the appellant with immorality and showing her generally as bad character was offered and received in violation of section 82 of the Evidence Act. It provides:**

B ***“S. 82(1): Except as provided in this section, evidence of the fact that a defendant is of bad character is inadmissible in Criminal proceedings.”***

C ***The character of the appellant was not in issue. What was in issue was whether or not she killed the deceased. She had not testified at the time the witnesses gave evidence and so she could not have made her character an issue in the trial, nor did she do so in her Statements other than a denial of the charge. See section 82 (2) (a) and (b) of the Evidence Act.***

D ***In my humble view, the evidence of PW1, PW2, PW3 and PW4 was not mainly inadmissible hearsay but portrayed the witnesses as having as their main purpose interest other than justice. I resolve issue 2 in favour of the appellant.***

(p. 3805 G)

E

*Evidence - Evaluation*

F ***7. PW1 swore that the appellant stabbed the deceased all over his body. However, the doctor’s report as reproduced at page 10 of the record did not mention stab wounds all over the body. It showed wounds on the head and face and cut throat as well as defensive wounds (Italics mine). The evidence of the PW1 that the appellant stabbed the deceased all over his body is not borne out by the medical evidence.***

G ***A proper evaluation of evidence would have raised the question of the appellant, a mere girl, not credited with supernatural powers, killing a man in a fight (as evidenced by the defensive wounds on the deceased) without herself sustaining an injury and not having a splutter or stains of blood on her cloths or body after having killed the deceased with a stabilizer and two kitchen knives all stained with blood.***

H

***Also the pair of boots was not given any attention by the trial court even though there was evidence that it did not belong to the deceased or the appellant. Was it left by the kill-***

**ers? That question did not agitate the mind of the trial court or the court below. In my view, the oral evidence, if properly evaluated, would have been expunged as inadmissible hearsay, given by witnesses who, by the evidence itself, had purpose other than justice to serve.**

**It was inadmissible being evidence of bad character in a criminal trial, my conclusion relates exclusively to oral evidence.** (p. 3807 B)

*Evidence - Missing exhibits - Effect*

**8. Above was communicated to the Chief Registrar of the Supreme Court on 6<sup>th</sup> June 2012 and the matter appeared laid to rest. In the circumstances, this court is not in a position to determine whether or not the documentary evidence was properly evaluated. And given the antecedents of the trial court and the court below with respect to the oral evidence in this case, it is dangerous to assume that the documentary evidence was properly evaluated by either court.**

**The seeming flight of the exhibits from the custody of the trial court speaks eloquently to the plan to railroad the appellant to the gallows. In the circumstances, the doubt created by the disappearance of the vital exhibits and the resultant inability of this court to evaluate same enures to the benefit of the appellant. Issue 3 is resolved in favour of the appellant.** (p. 3808 H)

*MURDER - Proof*

**9. The purpose of the trial was to determine who killed the deceased - the appellant or some other person or persons, and here is a Newspaper in which a cult group - the Black Dragons - claimed responsibility for the killing in the following words: "Again do you still remember your friend lyobu Nemieboka... Nemieboka who thought he was Almighty God we brought him down." Nothing can be more relevant or material to the issue before the court than the claim of the Black Dragons.**

**Granted that the cultists may not have "...sliced his manhood; removed his eye, etc..." or "in fact dismembered his**

*body” their claim to have “brought him down” is not diminished by their obvious exaggeration of what they did to the body of the deceased. In my view, the reasons the trial court gave for rejecting the Newspaper is irrelevant and is based on extraneous matter or speculation by the court as to the source of the article.*

*That court go (sic) outside the evidence before it, or even rely on the personal knowledge of the judex to determine an issue before it. The reasons stated by the trial court do not justify a rejection of the Punch Newspaper of Friday, September 28<sup>th</sup>, 2001 particularly page 6 thereof. The Newspaper is relevant and ought to have been admitted. (p. 3810 H)*

*MURDER - Proof - Document - Relevancy*

*10. Next is the funeral programme of the deceased sought to be tendered through PW4. The trial court rejected the document because the PW4 was not the maker; the portion of the document upon which he was to be contradicted was not shown to him; the document is not relevant as it did not show how the deceased was murdered. There is uncontradicted evidence that the document was prepared for the family of the deceased which includes PW4 and that the document was signed by Chief M. D. Nemieboka “for the family”.*

*In the circumstance of this trial and on the authority of Flight Lt. Otu Edet v. Chief of Air Staff & Anor (1994) 2 NWLR (Pt. 324) 41 at p. 65-66 cited by learned counsel for the defence, the document sought to be tendered as the document of each member of the family for which it was prepared was not meant to contradict PW4 but to show from its contents that the deceased could have been killed by any of those on whose toes he had stepped.*

*With profound respect to His Lordship of the trial court, “the fact in issue in this suit” is not how the deceased was murdered. The cause of death is a medical question settled in the autopsy report. There is no doubt that the deceased was murdered by being hit with stabilizer and stabbed with knives. These are established facts. The fact in issue, which the trial court appeared to have missed in its rejection of the document sought*

**to be tendered, is who murdered the deceased?**

**The evidence is entirely circumstantial and the document, if it had been admitted, could have influenced the impact of the evidence one way or the other. It is my view that the document is relevant and was rejected on the wrong premise. I resolve issue 4 against the respondent in favour of the appellant.** (p. 3811 E) B

*Evidence - Withholding of*

**11. Appellant said that one Blessing Chinda knew when the deceased came to pick her. The prosecution contented itself with tendering the statement allegedly made by Blessing Chinda, from which the PW1 quoted profusely. No reason was given why the witness was not called to give evidence proving or disproving the assertion of the appellant. That evidence could be, and is not produced and it is assumed that it would have been unfavourable to the case of the prosecution if it had been produced by the prosecution who withheld it. See Section 149 (d) of the Evidence Act, Cap E14, Laws of the Federation of Nigeria, 2004.** (p. 3813 E) C  
D  
E

*MURDER - Conviction - Circumstantial evidence*

**12. Before a piece of evidence, whether direct or circumstantial, can be considered and probative value ascribed thereto, it must be admissible. No inference of guilt can be drawn from a purported circumstantial evidence which, as in this case, is inadmissible. The evidence in this case, alleged to be circumstantial, cannot be relied on to convict the appellant on the authorities above. Even if the circumstantial evidence in this case is admissible, it is incapable of proving any proposition with the accuracy of mathematics.** F  
G

**It is not cogent, complete or unequivocal. It is not incompatible with the innocence of the appellant and from the unchallenged evidence of the appellant; the evidence is capable of explanation upon other hypothesis than that of the guilt of the appellant as is evident from her testimony in the trial court. In any case, the mere fact that the circumstantial evidence adduced by the prosecution is complete and the chain** H

***of evidence is unbroken” does not lead to the irresistible conclusion that the appellant and no one else committed the murder.***

***That the evidence is complete and the chain of evidence is unbroken do not invest the circumstantial evidence with the cogency required for the court to draw inference of the guilt of the appellant therefrom. Had the trial court considered the conditions that must be present before the inference of guilt of an accused can be drawn from the circumstantial evidence, the appellant would have been acquitted and discharged. Had the Court of Appeal considered the trial court’s reason for reliance in the circumstantial evidence, it would have been clear to it that evidence that is complete and unbroken cannot, by that fact alone, found conviction on a charge of murder.*** (p. 3819 B)

### **REPRESENTATION**

Dr. Onyechi Ikpeazu, SAN with Emeka Etiaba, Esq., Jerry Okpala, Esq. Ike Ogbogu, Esq., Prisca Ozoilesike (Miss) and Ifeyinwa Nwabueze (Miss), for the Appellant  
R. N. Godwin, Director of Public Prosecution, Rivers State with C. U. Eke, Chief State Counsel, Rivers State), for the Respondent

### **CASES REFERRED TO**

- F Oguonzee v. State (1998) 4 SCNJ 255
- Ojo v. Gharoro (2006) FWLR (pt. 320) 3470
- Aje v. State (2006) 2 FWLR (pt. 318) 3421
- Obidike v. State (2001) 17 NWLR (pt. 743) 601
- G State v. Ogbubunjo (2001) FWLR (pt. 37) 1113
- Ahmed v. State (2002) FWLR (pt. 90) 1378
- Archibong v. State (2006) 14 NWLR (pt. 1000) 349
- Adisa v. State (1991) 1 NWLR (pt. 168) 490
- Torti v. Ukpabi (2000) FWLR (pt. 29) 2492
- H Nweke v. State (2001) FWLR (pt. 40) 1613
- Agu v. Ikewibe (1991) 3 NWLR (pt. 180) 385
- Ugo v. Obiekwe (1989) 1 NWLR (pt. 99) 566
- Ochemaje v. State (2008) 15 NWLR (pt. 1109) 57
- Omotola v. State (2009) 2 - 3 SC (pt. 11) 196

Arogundare v. State (2009) 6 NWLR (pt. 1136) 165

**STATUTES REFERRED TO**

Evidence Act LFN 2011, ss. 37 – 39, 82, 227(2)

Evidence Act Cap E14 LFN 2004, s. 77

Criminal Code Laws of Eastern Nigeria, s. 319

B

**BOOK REFERRED TO**

Cross on Evidence 4<sup>th</sup> Edn. p. 387

**LEAD JUDGMENT BY NGWUTA JSC**

C

Appellant was charged before the High Court of Rivers State Holden at Port Harcourt with the offence of murder contrary to Section 319 of the Criminal Code, Laws of Eastern Nigeria as applicable in Rivers State. The particulars of the offence read:

D

*“Vivian Odogwu, and others at large, on the 31<sup>st</sup> day of July, 2001 at No. 49 Woji Road, Rumurolu, Port Harcourt, murdered one Iyobu Nemieboku.”* (See page 2 of the record).

The facts of this case appear like a feature in Nollywood programme. Appellant was at the material time a final year law Student at the University of Science and Technology, Port Harcourt. The deceased was a law lecturer in the institution. In the University environment, the appellant and the deceased became close to each other, fell in love and were engaged to marry. The engagement broke off and the appellant was banned from the premises where the deceased had secured accommodation with her as his wife. They went their separate ways, trading accusation for the break-up in their relationship.

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The prosecution’s theory is that out of frustration at being dumped by the deceased to whom she was engaged, the appellant managed to sneak into the deceased’s apartment with a spare key, waited for the deceased who was at work, took him by surprise when he returned in the night of 31/7/2001, attacked and killed him with a stabilizer and two kitchen knives.

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On the other hand, appellant claimed that the deceased came to her at her institution on 30/7/2001, brought her to his home for reconciliation. Deceased locked her in the house on 31/7/2001 and went to work. Deceased came back by 10 pm and she was angry at

being kept in the house when she had some assignment to do in the school. The deceased apologized, gave her N10,000 for her needs and as the deceased was about driving her back to school, two masked men invaded the house and killed the deceased.

The case against the appellant was exclusively circumstantial.

B The prosecution called four witnesses and tendered exhibits which included 10 (ten) statements made by the appellant and statements made by two people who were not called to testify in the case. The statements were however expunged by the court below. Appellant testified for herself but called no other witness. The trial court convicted the appellant and sentenced her to death by hanging.

Aggrieved by the judgment and sentence of death passed on her, appellant appealed to the court below. The court below dismissed the appeal and affirmed the judgment of the trial court.

D Appellant has appealed to this court on five grounds. Learned counsel for the parties filed and exchanged briefs of argument. In his brief filed on 1/6/2009, learned counsel for the appellant distilled five issues, one from each of the five grounds of appeal. The issues are hereunder reproduced:

E *“Issues for determination”*

1. *Whether the honourable Court of Appeal was right to hold that PW3 and PW4 were not tainted witnesses?*

F 2. *Whether the honourable Court of Appeal was right to hold that the testimony/evidence of PW1-PW4 were (sic) not hearsay evidence thereby entitling the trial court to rely on their evidence to convict the appellant?*

G 3. *Whether the honourable Court of Appeal was right to hold that the trial court sufficiently and properly evaluated the evidence adduced by the prosecution as well as the appellant in proof of the charge against the appellant beyond reasonable doubt?*

H 4. *Whether the honourable Court of Appeal was right to hold that the learned trial Judge rightly excluded pieces of evidence which were vital to the defence thereby depriving the appellant the benefit of doubt which the evidence could have created in the trial court or in the prosecution’s case?*

5. *Whether the honourable Court of Appeal was right to hold that the prosecution has proved the charge against the appellant beyond reasonable doubt, based on the circumstantial evidence before*

*the trial court?”*

In his amended brief of argument, learned counsel for the respondent presented a lone issue for determination. It reads:

*“Whether the court below was right in affirming the judgment of the trial court in its conviction and sentence of the appellant?”*

In his brief of argument, learned counsel for the appellant argued his five issues seriatim. B

Issue one distilled from ground 1 is:

*“Whether the honourable Court of Appeal was right to hold that PW3-PW4 were not tainted witnesses.”* C

In dealing with this issue, learned counsel defined a tainted witness as either an accomplice or a witness who has an interest to defend or purpose to serve in a case in which he is called upon to give evidence as witness. He relied for this definition on the Supreme Court’s decision in *Oguonzee v. The State* (1998) 4 SCNJ at 255, (1998) 5 NWLR (Pt. 551) 521 and also on *Ojo v. Gharoro* (2006) FWLR (Pt. 320) at 3470 B-C, (2006) 10 NWLR (Pt. 987) 173 at 209-210, paras. H-A wherein the Supreme Court held that the word:

*“tainted... in the context of the Nigerian Law of evidence is bereft of its ordinary dictionary daily meaning... it has and carries the element of bias for the particular reason of nearness or closeness in relationship and deliberate and uninstigated slant qua unsolicited and undeserved expression of favour to a particular person.”* E

Learned counsel referred to page 7 lines 17, 19, and 38; page 8 line 33; page 9 lines 3, 36; page 90 lines 13; page 69, lines 6, 8, 19, 22; page 21 line 30 as evidence of bias, and hatred the witnesses harboured against the appellant as well as evidence of lies, speculation and unsubstantiated conclusion of the witnesses. He argued that the evidence of PW3 and PW4 lacked credit and probative value to ground a conviction on a charge of murder. He said that the lower courts acted in error in attaching weight to the evidence of PW3 and PW4 contrary to section 97(1)(7) of the Evidence Act. F

Learned counsel contended that the PW3 and PW4 were tainted witnesses not because of their blood relationship with the deceased but because of their special interest to secure a conviction of the appellant to avenge the death of the deceased. He relied on *Aje v. The State* (2006) 2 FWLR (pt. 318) at 3421 (E-F), (2006) 8 NWLR (pt. 982) 345. He also relied on *Obidike v. State* (2001) 17 G

NWLR (pt. 743) 601.

He described the evidence of PW3 and PW4 as replete with bias, partiality, abuses, sentiments, hatred, speculation, suspicion, hearsay and motivated by spirit of revenge. He impugned the judgment based on such evidence, especially in view of the fact that the PW3 and PW4 were not eye-witnesses to the crime. Learned counsel urged the court to resolve Issue 1 against the respondent and in favour of the appellant.

The complaint in issue 2 is that the evidence of PW1-PW4 upon which the trial court relied on to convict the appellant was hearsay evidence. He said that the court below was in error in holding that the evidence of PW1 - PW4 was not hearsay as they gave account of their respective personal knowledge of what they did, saw and observed and knew concerning the appellant, the deceased and the relationship between them.

He emphasised that the prosecution conceded it relied on circumstantial evidence in an attempt to prove its case. Learned counsel referred to the evidence of PW1 and contended that the witness simply narrated the stories as contained in the statements of PW3, PW4 and exhibits A-A9 and did not give evidence of what he did or saw in the course of the investigation.

He cited diverse paragraphs in the testimony of PW1 to support his contention that the witness merely repeated what he was told and not what he saw in the course of his investigation. Counsel argued that what purports to be direct evidence of PW1 was only his assumption or what he perceived to have happened. He said that the prosecution witnesses did not give evidence of fact but gave vent to their speculations, suspicions and assumptions.

Learned counsel said there was no proper investigation of the case and cited exhibit N - the boot found at the scene - as an example of vital issue that was not investigated. He said that the finding of fact based on statements of witnesses not called to testify was perverse. He relied on Section 77 of the Evidence Act; *State v. Ogbubunjo* (2001) FWLR (Pt. 37) p 1113, (2001) 2 NWLR (Pt. 698) 576; *Ahmed v. State* (2002) FWLR (Pt. 90) 1378, (2001) 18 NWLR (Pt. 746) 622 in his contention that the evidence of PW1-PW4 is not of the quality that can ground a conviction in a charge of murder.

He said that the concurrent decision of the two lower courts

had been shown to be perverse or not based on proper evaluation of evidence. He relied on Archibong v. State (2006) 14 NWLR (pt. 1000) 349. He urged the court to answer issue 2 in the negative.

Issue 3 is:

*“Whether the honourable Court of Appeal was right to hold that the trial court sufficiently and properly evaluated the evidence adduced by the prosecution as well (sic) the appellant in proof of the charge against the appellant beyond reasonable doubt.”*

Learned counsel argued that the trial court summarized the evidence on both sides and submissions of learned counsel for the parties and reached a conclusion without evaluation of the evidence. He referred to exhibits W, X and M which he said were not properly evaluated and impugned as perverse, the finding that appellant killed the deceased with the objects without testing to show the finger prints of the appellant on them.

He referred to the boot found at the scene (exhibit N) which was tendered by the appellant and argued that the prosecution excluded it to avoid inference that other people killed the deceased or to weaken the prosecution’s case against the appellant. He said the reception of statements of Blessing Chinda and Cecilia Genesis as well as the contents of the statements of Chief Mark Nemiebaka and Mrs. Akingboye were all evidence of improper evaluation of evidence. He argued that a proper evaluation of the evidence would have led the court to exclude the statements which were inadmissible hearsay evidence, contrary to Section 77 of the Evidence Act.

He referred to page 7 of the record and contended that if the trial court had carried out a proper evaluation of the evidence the testimony of the PW1 would have been expunged. He referred to the statements of the appellant and argued that a proper evaluation would have shown that the statements exhibits A-A9 did not contain contradictions and that the nine (9) other statements were continuation or additions to the first statement and in response to questions put to the appellant by the police.

He cited Adisa v. The State (1991) 1 NWLR (Pt. 168) 490 in support of his contention that the judgment of the trial court, affirmed by the court below, was based on improper evaluation of evidence and therefore perverse and led to a miscarriage of justice. He urged the court to resolve issue 3 against the respondent. In issue

4, the question raised is:

*“Whether the honourable Court of Appeal was right to hold that the learned trial Judge was right in excluding pieces of evidence which were vital to the defence thereby depriving the appellant the benefit of doubt which the evidence could have created in the trial or*  
 B *in the prosecution’s case?”*

Learned counsel referred to a copy of Punch Newspaper of Friday, 28<sup>th</sup> September, 2001 and a copy of the funeral programme of the deceased, which the appellant tendered but which were re-  
 C jected on the grounds that they were tendered through persons not said to be the makers, under wrong procedure and that they are remote to the facts in issue. He relied on R v. Kilbourne (1973) AC 729 at 759 in his contention that a piece of evidence is relevant if it is logically probative of same matter which requires proof.

D He cited and relied on Torti v. Ukpabi (2000) FWLR (Pt. 29) 2492 paragraph H, (1984) 1 SCNLR 214 at 237, para. A wherein this court held, *inter alia*:

*“Admissibility is based on relevance and not proper custody. Once a matter, be it a document or oral evidence is relevant, it is*  
 E *admissible.”*

He referred to section 6 of the evidence Act in support of his argument that once a piece of evidence is relevant, it is admissible irrespective of how it was obtained and sections 116 and 124 which  
 F he said make Newspapers admissible in evidence. He said that the Punch Newspaper the trial court rejected contained the assertion: *“Law Teacher Resigns over Threat from Cultists”*.

He said the Newspaper contained also a copy of a letter addressed to a Mr. Daniel Nwuche with the warning, *inter alia*, *“again*  
 G *do you still remember your friend, Iyobu Nemieboka, who thought he was Almighty God; we brought him down...”*

He referred to the following assertion in the funeral programme to the effect that the deceased:

*“... stepped on the toes of many people including Ogubolo*  
 H *LGA, Adamac Group of Companies; University of Science and Technology, etc., because of his forthright, bold and firm character”* which he said is a pointer to who killed the deceased.

He said that the documents ought to have been admitted irrespective of any error committed by counsel in tendering same. He

relied on *Obidike v. State* (2001) 17 NWLR (Pt. 743) page 601 at 637 paragraph G wherein it is held that “to avoid injustice, the court will not punish a party for the mistake or inadvertence of his counsel.”

Learned counsel said that a consideration of the boot found at the scene and the Punch Newspaper and the Funeral programme would have created a serious doubt as to who lured the deceased. He urged the court to resolve Issue 4 in favour of the appellant.

Issue 5 is:

*“Whether the honourable Court of Appeal was right to hold that the prosecution has proved the charge against the appellant beyond reasonable doubt based on circumstantial evidence before the trial court?”*

Learned counsel submitted that the circumstantial evidence adduced in the case did not point inconclusively and indisputably to the guilt of the appellant. He argued that the appellant offered reasonable, coherent and unbroken account as to who, how and what caused the death of the deceased.

Learned Counsel referred to the totality of the evidence and contended that there was no certainty as to who killed the deceased. He referred to the evidence of the DW1 that two masked hoodlums killed the deceased, the charge that the appellant and others at large killed the deceased, the evidence that the appellant alone killed the deceased, with which the trial court agreed as well as the judgment of the court below that the appellant colluded with others at large to kill the deceased.

He said that in the above state of affairs, it cannot be said that the circumstantial evidence relied on by the courts below was of the cogency to found a conviction on a charge of murder. He relied on *Nweke v. State* (2001) FWLR (Pt. 40) p.1613, (2001) 4 NWLR (Pt. 704) 588 in his submission that other co-existing circumstances destroyed the inference that the appellant committed the offence.

In summary, he contended that the circumstances did not point positively, cogently, compellingly, unequivocally to the guilt of the appellant. He urged the court to set aside the judgment of the lower court and the judgment of the trial court and to discharge and acquit the appellant of the charge of murder.

At paragraph 4.01 of his brief, learned counsel for the respon-

dent stated:

*“The respondent proposes to respond to the issues formulated by the appellant in the appellant’s brief, and which issues shall be considered seriatim in the order in which the appellant has formulated them. The respondent shall thereafter argue the sole issue raised in the respondent’s brief. These issues are hereby argued as set out below, beginning with a consideration of the appellant’s issue to wit”*

Appellant formulated five issues from five grounds of appeal. By responding to the five issues in the appellant’s brief, learned counsel had, by necessary implication, adopted them. A respondent, without a cross-appeal or respondent’s notice, may adopt the issues formulated by the appellant or formulate his own issues provided the issues so formulated are derivable from the grounds of appeal.

***A principle of formulation of issues in appeal is that the grounds of appeal should in no circumstance be less than the issues for determination. While the court may tolerate equal number of grounds of appeal and issues framed therefrom, as in this case, a situation where there are less grounds of appeal than issues for determination will not be tolerated.*** See Agu v. Ikewibe (1991) 3 NWLR (Pt. 180) 385; A.-G. Bendel State v. Aideyan (1989) 4 NWLR (Pt. 118) 646; Ugo v. Obiekwe & Anor (1989) 1 NWLR (Pt. 99) 566.

***By the introduction of the respondent’s sole issue for determination, learned counsel has increased the number of issues to six (6), with the result that the issues are in excess of the grounds of appeal. It does not matter whether the issues are framed by the appellant, the respondent or both. They cannot be more than the grounds of appeal from which they are derived.***

In Anie & Ors v. Chief Uzorka & Ors (1993) 8 NWLR (Pt. 309) 1 SC, it was held that the now firmly established principle of law is that it is wrong for counsel to formulate issues for determination in excess of the grounds of appeal. See also Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688 at 714. ***I will discountenance the sole issue formulated by learned counsel for the respondent and consider his response to appellant’s five issues.***

In his reply to issue 1, learned counsel for the respondent cited

the case of *Okolo Ochemaje v. The State* (2008) 15 NWLR (Pt. 1109) 57 at 91 to buttress his submission that a tainted witness strictly so-called is a person who is either an accomplice or who by the evidence given may be regarded as having some purpose of his own to serve.

Learned counsel referred to PW3 and PW4, the father and elder brother of the deceased respectively, and contended that the mere fact of their relationship with the deceased is not enough to tag them as tainted witnesses. He relied on *Omotola & 4 Ors v. State* (2009) 2 - 3 SC (Pt. 11) p.196 at 222, (2009) FWLR (Pt. 1139) 148 in his argument that whether a witness is tainted or not must be proved by the evidence the witness gives at the trial. B  
C

He said that the evidence of the PW3 and PW4 was devoid of malice, hatred or interest and that the evidence was corroborated at the trial. He submitted that in view of the evidence they gave at the trial, the PW3 and PW4 are not tainted witnesses. He added that in the unlikely event that the court is persuaded that PW3 and PW4 are tainted witnesses, what is left if their evidence is expunged is enough to support the conviction of the appellant. D

He concluded that the PW3 and PW4 are not tainted witnesses and that notwithstanding their blood relationship with the deceased; their evidence did not occasion a miscarriage of justice. E

In issue 2, learned counsel contended that the lower court was right in holding that the evidence of the prosecution witnesses -PW1-PW4 - was not hearsay as each witness gave account of what he saw, observed and knew concerning the appellant, the deceased and the relationship between the two of them. He conceded that hearsay evidence is generally inadmissible but contended that hearsay evidence is admissible when the purpose is to establish not the truth of what was heard by the witness, but the fact that the statement he said he heard was made. F  
G

He relied on *Arogundare v. State* (2009) 6 NWLR (Pt. 1136) at page 165. He conceded that none of the witnesses was an eye-witness but argued that each of them gave evidence of facts within his personal knowledge. H

In issue 3 on evaluation of evidence, learned counsel submitted that the lower court was right in holding that the trial court sufficiently and properly evaluated the evidence of the defence as well as the prosecution before it convicted the appellant. He said that it is

not the duty of the apex court to interfere with concurrent findings of fact by the two lower courts which was not shown to be perverse.

He cited and relied on *Olufosoye v. Olorunfemi* (1989) 1 NWLR (Pt. 95) 26 at 35; *Bashaya v. State* (1998) 5 NWLR (Pt. 550) 351 at 370; *Gambo Musa v. State* (2009) 6-1 SC 34 at 47, (2009) B 15 NWLR (Pt. 1165) 467 and contended that this court should not interfere with a decision reached on a proper evaluation of evidence led at the trial. He made particular reference, to exhibits K5, K6, K7, Y, 2, AA, W and X and said that the trial court evaluated each exhibit before arriving at its decision to convict the appellant. He urged the court to hold, that the final court properly and adequately evaluated the evidence before it.

In Issue 4 on the exclusion of pieces of evidence offered by the appellant, learned counsel submitted that relevancy is a cardinal rule of admissibility. He relied on *Fawehinmi v. NBA* (No. 2) (1989) 2 NWLR (Pt. 105) 558 at 621-622; *Oyediran v. Alebiasu II* (1992) 6 NWLR (Pt. 244) 550 at 559. He noted the trial court's finding on the funeral programme to the effect, *inter alia*:

“... *It is common knowledge that forthright, honest, bold, outspoken and firm character would usually step on toes...*” and said that the trial court was right to hold that the said words were not made to throw light on how the deceased was murdered, and that the said words are not relevant to the fact in issue in the case.

He said that the court rightly rejected the *Punch Newspaper* on the ground that the author relied on information supplied by people who lacked personal knowledge of the matter in court coupled with the fact that the PW1 (the IPO) was seeing the paper for the first time in court. He said that the lower court agreed with the reason the trial court offered for rejecting the *Newspaper* and in the alternative, held that the *Newspaper* was too remote to be material to the case and excluded it under section 6 (a) of the Evidence Act.

He also relied on the finding of the court below that even if the *Newspaper* was admitted, it would not have made any difference in the decision of the trial court and that section 227(2) of the Evidence Act is applicable to the appeal. He urged the court to hold that the trial court rightly rejected the *Punch Newspaper* of Friday, 28<sup>th</sup> September, 2001 and the burial programme.

In dealing with issue 5 on the appellant's complaint that the

prosecution did not prove its case beyond reasonable doubt based on the circumstantial evidence, learned counsel submitted that the circumstantial evidence upon which the conviction of the appellant was founded points unequivocally, positively, unmistakably and irresistibly to the guilt of the appellant and as such sustains the conviction for murder. He relied on *Yongo v. COP* (1992) 8 NWLR (Pt. 257) 36<sup>B</sup> at 64; *Ebenehi & Anor v. State* (2009) 2-3 SC (Pt. 1) 109 at 117, (2009) 6 NWLR (Pt. 1138) 431.

He said the court below set down the evidence laid against the appellant and that the appellant did not refute the copious evidence against her. He cited *Orogundare v. The State* (supra). He contended that proof beyond reasonable doubt is not proof beyond the shadow of doubt. He urged the court to hold that the prosecution proved its case beyond reasonable doubt, and to dismiss the appeal.<sup>C</sup>

In his reply brief, learned senior counsel for the appellant referred to pages 175 and 318 of the record for the judgments of the court of trial and the Court of Appeal respectively, and refuted the assertion that there was a concurrent finding of facts by the two courts below. He referred to the evidence before the trial courts and the documentary exhibits and contended that the respondent's claim that the appellant did not refute the copious evidence against her is unfounded.<sup>D</sup>

The learned silk urged the court to allow the appeal, set aside the judgments of the two lower courts and discharge and acquit the appellant.<sup>E</sup>

My Lords, I intend to determine this appeal on the five issues raised and argued by the appellant and, by implication, adopted and replied to by the respondent. I will deal with the five issues seriatim.

Issue 1 is:

*"Whether the Court of Appeal was right to hold that PW3 and PW4 were not tainted witnesses"?*<sup>F</sup>

**A tainted witness falls into one or both of the two categories hereunder listed:**

**(1) A witness who is an accomplice in the crime charged.**<sup>H</sup>

**(2) A witness who, by the evidence he gives, may and could be regarded as having some purpose of his own to serve.**

*Rasheed Olaiya v. The State* (2010) Vol. 180 LRCN 1 -197 p. 34, (2010) 3 NWLR (Pt. 1181) 423; *The State v. Dominic Okolo & Ors*

(1974) 2 SC 73 at 82; Ishola v. The State (1978) 9-10 SC 81 at 100. Neither PW3 nor PW4 falls into the first category above, there being no evidence that either of them is an accomplice in the matter in which he gave evidence. That leaves the second category and whether or not they are tainted witness will be determined from the evidence they gave, at the trial of the appellant.

***Evidence can be direct, that is, evidence of fact in issue.***

See Sule Ahmed v. The State (5001) 92 LRCN 3467 at 347, (2001) 18 NWLR (Pt. 746) 622. ***It may be testimonial in the form of evidence given by a witness who claims personal knowledge of the facts to which he testified.*** See Sule Ahmed v. The State (supra).

Now none of the witnesses who testified in the matter, including PW3 and PW4 can claim to give a direct and/or testimonial evidence of the fact of the murder of the deceased. None of them can give direct evidence of the crime because none was an eye-witness to it. It follows that the evidence they can give of the crime with which the appellant was charged tried, convicted and sentenced to death, is purely circumstantial.

Speaking of circumstantial evidence, Lord Heward, CJ, said, inter alia:

*“... but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of providing a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”* See R v. Taylor & Ors (1928) Vol. 21 CAR 20 at 21.

My Lords, on the peculiar facts of this case, in the determination of whether by the evidence the PW3 and PW4 gave; they had some interest to protect or purpose to serve. I will consider their evidence to determine if it relates only to circumstances from which a court can correctly draw an inference to the guilt or innocence of the appellant.

I will start with the evidence of PW3 which runs from pages 62 to 64 of the record. PW3 was the father of the deceased. At page 63 of the record, he said, inter alia:

*“The accused and my son Iyobu did not marry. I know because of the accused attitude that made my son not to marry her. My son told me he would not marry the accused again because of the*

*way accused travels out without telling him. The accused was aware that my son lyobu was not going to marry her again. There was one day that the accused came to my house and wanted to drink bleach. I did not know the accused intention why she wanted to commit suicide by drinking bleach.”*

Above is the main point in the testimony-in-chief of PW3. He was not cross-examined. The deceased and the appellant were to marry. The deceased would not marry the appellant. The appellant was in the habit of traveling out without telling the deceased. The witness did not know why the appellant attempted to commit suicide by drinking bleach. Can a court infer from the above that the appellant killed the deceased?

If she attempted suicide by drinking bleach, can that fact justify the inference that she killed the deceased? I answer the above posers in the negative. PW3 did not give evidence from which it can be inferred that the appellant ever posed a threat to the life of the deceased for dumping her or for any other reason.

PW4's evidence-in-chief and under cross-examination runs from pages 64 to 84 of the record. He is an elder brother of the deceased. At page 65 of the record he made a general comment on the broken relationship between his younger brother, the deceased, and the appellant and the reason for the break-up of the relationship. At page 66 of the record, the witness came down to specifics:

*“He spoke first on the issue of infidelity. He accused her of dealing with four men the same time. Although the deceased did not mention their names, he spoke of a cult student whom the deceased said walked up to him and her in a supermarket and cautioned him to beware of his girlfriend. According to him, my brother the (deceased) turned to look at her for a reaction. She passively requested him to overlook it. My brother the (deceased) spoke of a man in the USA who sends her clothes and other members of her (accused) family. When my brother (deceased) confronted the accused with these facts, she claimed that the man has a relation with another member of her family not herself... My brother (deceased) talked of another man, a company manager whom he described as a married man but was in love with her. According to him, this man was responsible for her (accused) prodigal life style. I mean that the accused (sic) above the life of a student. The 4<sup>th</sup> and last persons (sic) he*

said, was a young law graduate to whose graduation ceremony she surreptitiously attended at Lagos and took a photograph with but she (accused) claimed she was on errand for the mother to register a title deed for her. She denied attending such a programme but unknown to the accused, he (my late brother) stumbled over the photograph...”

In addition to the above, the PW4 narrated what the witness who testified before him (PW2) told him he did or said. See page 69 of the record. The evidence of PW3 and PW4 is largely hearsay evidence. In the leading English authority on hearsay, *Subramanian v. Public Prosecutor* (1956) 1 WLR 956 at 969, it was held that:

*“Evidence of a statement made to a witness by person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to prove the truth of the facts asserted by the statement. It is not hearsay and is admissible when it is proposed to establish by evidence not the truth by the statement but the fact that it was made.”*

The hearsay evidence was given and received not for the purpose of establishing the fact that the statements were made or that the facts were stated. The purpose of the evidence was for the trial court to draw the inference that the appellant killed the deceased and that purpose was achieved. It is no less hearsay because the witness whose statement was given in evidence was later or earlier called as a witness.

**Section 37 of the Evidence Act, 2011 defines hearsay thus:**

***“S.37 Hearsay means a statement -***

***(a) oral or written made otherwise than by a witness in a proceeding; or***

***(b) contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.”***

Also section 38 of the Act states:

*“S.38: Hearsay evidence is not admissible except as provided in this part or by or under any other provision of this or any other Act.”*

The hearsay evidence of the PW3 and PW4 does not fall within

the provision of section 39 of the Evidence Act. The evidence was given as proof of the facts, stated and for the trial court to draw inference of the guilt of the appellant from the said facts. Above all, the said hearsay evidence is bereft of probative value, its main purpose being to portray the appellant as a scarlet woman as if she was charged and tried for an offence of moral depravity. B

***By deliberately bringing in matters that are totally irrelevant to the charge of murder, the PW3 and PW4, in their hearsay evidence, brought themselves within the description of tainted witness. In pursuit of their personal interest, as opposed to the interest of justice, the PW3 and, particularly, PW4 turned the murder trial into a referendum in the appellant's personal ethics. I resolve the issue in favour of the appellant.*** C

Issue 2 is:

*"Whether the honourable Court of Appeal was right to hold D that the testimonies evidence of PW1-PW4 were not hearsay evidence, thereby entitling the trial court to rely on the evidence to convict the appellant."*

This issue should have been argued together with issue 1 which has been dealt with. The two issues are linked together. In resolving issue 2, I will consider the evidence of PW1 and PW2 and adopt my reasoning in respect of the evidence of PW3 and PW4 which I have already determined as inadmissible hearsay in addition to portraying the PW3 and PW4 as tainted witnesses. E

The evidence of PW1 starts at page 18 and ends at page 50 of the record. At page 20 of the record, the witness said, inter alia: F

*"the said Blessing Chinda was contacted in the school, she said she saw the accused that day but accused did not tell her that the deceased had come to pick her."* G

PW1 added to the fatal effect of his inadmissible hearsay, by introducing into evidence the statement he obtained from the witness who was not called to testify. It was admitted and marked exhibit B. At page 21, he confirmed this:

*"The deceased made up his mind not to marry the accused."* H

PW1 said he got a report of the incident on 2/8/2001. He did not visit the scene until 6/8/2001 and he described himself as a detective. The portion of his evidence reproduced below is at best inadmissible hearsay and at worst a figment of the witness fertile imagination.

tion. He said on oath, inter alia:

*"On 31<sup>st</sup> July, 2001 the deceased came back from work, entered into his parlour and locked it, drew the curtains (door) leaving the bunch of keys on the door. Unknown to him that the accused who had his spare keys had gained entrance into his apartment. The accused opened the backyard door through the kitchen where she gained entrance into the parlour. She attacked the deceased by hitting him with stabilizer on his face. The deceased fell in the parlour, she ran to the kitchen and picked some bottles and kitchen knife and stabbed the deceased all over his body that result in his death."*

At page 25, he swore that

*"I last told this court that when the deceased later made up his mind not to marry the accused, the accused became bitter, angry and frustrated and threatened to kill the deceased. At one time the accused threatened to commit suicide by drinking bleach in the deceased home... One day the accused visited the deceased in his home at 49 Woji Road Port Harcourt and met Cecilia Genesis in the deceased house at No. 49, Woji Road. The deceased beat up the said Cecilia Genesis and carried the stabilizer in the deceased home to hit the said Cecilia Genesis but she was prevented by the deceased. It is the same stabilizer tendered as exhibit M yesterday that the accused used..."*

***My Lords, above is in the main, the evidence of the star witness in the case and based on which the appellant was convicted. In my view, this witness, masquerading as Sherlock Holmes is a sorry excuse for a police detective. If the prosecutor willingly or on sheer ignorance of the evidence law, led his witness to give such evidence in a murder trial, the trial court and particularly the defence counsel, failed in their duty to the cause of justice and to the appellant.***

Furthermore, if the learned defence counsel was not fully aware of his duty to protect his client's interest by objecting to inadmissible evidence, the trial court should have made sure that the trial was not marred by reception of admissible hearsay evidence and evidence based on the witness' speculation At page 44, PWI said:

*"The incident was on 31<sup>st</sup> July 2001, night, the accused was arrested at the scene and taken to Mini Okoro Police Station where she was detained until 2<sup>nd</sup> August, 2001.... Mr. Akingboye may not*

*have known that the accused was taken to the hospital.”*

At page 46, PW1 swore that:

*“The accused leaked gas in the deceased kitchen in attempt to destroy the entire evidence as per my investigation. The accused denied this fact in her statement to the police. I got this fact from Mr. Akingboye when I visited the scene.”* B

At page 50, PW1 said:

*“Apart from pirates the accused also was against secret cults.”*

**The pieces of evidence above were given and received in violation of the Evidence Act. PW2 testified from pages 50 to 60 of the record. This witness repeated part of the PW1’s evidence in relation to the relationship between the deceased and the appellant and the reason for the break-up of the relationship; facts that could only have come to his knowledge from another source which he did not disclose.** C D

As if the witness is an expert of moral behaviour and the appellant was on trial for moral delinquency, PW2 swore, inter alia:

*“From my observation of the accused she has a good temperament but she is slippery. The accused does immoral things and immediately you accuse her she will be crying. The accused’s moral life is questionable. On several occasions, the accused traveled outside the state with other men and the accused herself rang the deceased from Lagos and Owerri announcing her whereabouts.”* E

**In as much as the PW2 relied on his observation of the appellant, his evidence is inadmissible as he did not qualify himself as an expert on young woman’s moral behaviour. In testifying of the appellant’s travels with other men and her calls to the deceased, the PW2 was repeating what another person told him. At least, there is no evidence that the PW2 received calls to the deceased.** F G

**Above all, the evidence tainting the appellant with immorality and showing her generally as bad character was offered and received in violation of section 82 of the Evidence Act. It provides:** H

***“S. 82(1): Except as provided in this section, evidence of the fact that a defendant is of bad character is inadmissible in Criminal proceedings.”***

**The character of the appellant was not in issue. What**

**was in issue was whether or not she killed the deceased. She had not testified at the time the witnesses gave evidence and so she could not have made her character an issue in the trial, nor did she do so in her Statements other than a denial of the charge. See section 82 (2) (a) and (b) of the Evidence Act.**

**B In my humble view, the evidence of PW1, PW2, PW3 and PW4 was not mainly inadmissible hearsay but portrayed the witnesses as having as their main purpose interest other than justice. I resolve issue 2 in favour of the appellant.**

**C Issue3 is:**

*“Whether the Honourable Court of Appeal was right to hold that the trial court sufficiently and properly evaluated evidence adduced by the prosecution as well as the appellant in proof of the charge against the appellant beyond reasonable doubt.”*

**D** The phrase “evidence adduced by the prosecution as well as the appellant in proof of the charge...” would give the false impression that the appellant gave evidence of proof of the charge against her. This is not the case. Issue 3 rests on my determination of issue 2 and 3. A proper evaluation of the evidence would have shown that the evidence of PW1-PW4 was received in contravention of section 77 of the Evidence Act, Cap, E14, Laws of the Federation of Nigeria, 2004. The Section (77) provides:

**F** *“S. 77: Oral evidence must, in all cases whatever, be direct, that is:*

*(a) If it refers to a fact which could be seen it must be the evidence of a witness who says he saw that fact;*

*(b) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;*

**G** *(c) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner”* See Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1; Okpara v. FR.N. (1977) 4 SC 53.

**H** Viewed within the context of section 77 of the evidence Act reproduced above, the evidence of the PW1-PW4 is inadmissible hearsay. See Cross on Evidence, 4<sup>th</sup> Edn. P387. Furthermore, the evidence should not have been received as it is not relevant. See Abubakar v. Chuks (2007) 18 NWLR (Pt. 1066) 386 at 402. Also

the bulk of the evidence of PW1-PW4 was devoted to and did, portray the appellant as a call girl. It is evidence of bad character and no reasons were given for its admission. It is inadmissible. See Lawal v. State (1966) 4 NSCC 111 at 116-117 paras. 50-55. The said evidence of bad character of the appellant should have been expunged had the evidence been properly evaluated. See Lawal v. State (1966) 1 All NLR 107, 1 SCNLR 325; Chukwueke v. State (1991) 7 NWLR (Pt. 205) 604. B

***PW1 swore that the appellant stabbed the deceased all over his body. However, the doctor's report as reproduced at page 10 of the record did not mention stab wounds all over the body. It showed wounds on the head and face and cut throat as well as defensive wounds (Italics mine). The evidence of the PW1 that the appellant stabbed the deceased all over his body is not borne out by the medical evidence.*** C D

***A proper evaluation of evidence would have raised the question of the appellant, a mere girl, not credited with supernatural powers, killing a man in a fight (as evidenced by the defensive wounds on the deceased) without herself sustaining an injury and not having a splutter or stains of blood on her cloths or body after having killed the deceased with a stabilizer and two kitchen knives all stained with blood.*** E

***Also the pair of boots was not given any attention by the trial court even though there was evidence that it did not belong to the deceased or the appellant. Was it left by the killers? That question did not agitate the mind of the trial court or the court below. In my view, the oral evidence, if properly evaluated, would have been expunged as inadmissible hearsay, given by witnesses who, by the evidence itself, had purpose other than justice to serve.*** F G

***It was inadmissible being evidence of bad character in a criminal trial, my conclusion relates exclusively to oral evidence.***

Now I will consider the documentary evidence. H

A letter dated 17/5/2012 was addressed by the DCR (Litigation) Supreme Court to the Deputy Chief Registrar, Court of Appeal, Port Harcourt. It was headed: *"Re SC.122/9C/2009 -CA/PH/1345/2005 & PHC/9C/2002: Vivian Odogwu v. The State."*

It reads:

*"The above refers. On Thursday; the 17<sup>th</sup> day of May, 2002 in the course of this Hon. court's proceedings; it was discovered that you did not transmit to this Hon. court the exhibit mentioned in the record of appeal in respect of the above named appeal. Note that this Hon. court has already adjourned the matter to the 7<sup>th</sup> day of June 2012. Note further that this exhibit is very vital to the determination of the appeal, without which same cannot be possible. In view of the foregoing therefore, this Hon. court has ordered that the said exhibit be made available to us before the 7<sup>th</sup> day of June, 2012..."*

In reaction to the letter from the Supreme Court, the Deputy Chief Registrar of the Court of Appeal, Port Harcourt, wrote to the Chief Registrar, High Court, Port Harcourt on 21/5/2012. The letter reads in part:

*"I am directed to demand from this court all the exhibits, materials and documentary tendered in this case during this trial for onward transmission to Supreme Court, this will enable the Justices of that court determine the matter expeditiously. The case being adjourned to 7<sup>th</sup> day of June 2012 as a result of non-availability of these exhibits..."*

*Exhibit:*

*"A-A9" original statement of Blessing Chinda*

*'B' statement of accused person*

*'C' report of pathologist*

*'D' coroner*

*'E' death Report*

*All other exhibits material/documentary that were tendered before the court of 1<sup>st</sup> instance."*

In a letter dated 5/6/2012 addressed to the Deputy Chief Registrar of the Court of Appeal, Port Harcourt, the Chief Registrar of the High Court, Port Harcourt replied thus:

*"Your letter dated 21<sup>st</sup> May 2012 in respect of the above subject refers. We have searched the archives and have not been able to find any of the exhibits mentioned in your said letter."*

**Above was communicated to the Chief Registrar of the Supreme Court on 6<sup>th</sup> June 2012 and the matter appeared laid to rest. In the circumstances, this court is not in a position to determine whether or not the documentary evidence**

**was properly evaluated. And given the antecedents of the trial court and the court below with respect to the oral evidence in this case, it is dangerous to assume that the documentary evidence was properly evaluated by either court.**

**The seeming flight of the exhibits from the custody of the trial court speaks eloquently to the plan to railroad the appellant to the gallows. In the circumstances, the doubt created by the disappearance of the vital exhibits and the resultant inability of this court to evaluate same enures to the benefit of the appellant. Issue 3 is resolved in favour of the appellant.**

Issue 4 is:

*“Whether the honourable Court of Appeal was right to hold that the learned trial Judge rightly excluded pieces of evidence which were vital to the defence thereby depriving the appellant the benefit of doubt which the evidence could have created in the trial or in the prosecution’s case?”*

The pieces of evidence referred to are; (1) a copy of Punch Newspaper of Friday 28<sup>th</sup> September, 2001 and, (b) a copy of the Funeral Program of the deceased. On the Punch Newspaper, the learned trial Judge agreed with learned counsel for the appellant that under section 116 and in view of the case law relied on by learned counsel for the parties, the Newspaper did not have to be produced from proper custody before it can be received in evidence.

The learned trial Judge read the relevant portions of the paper and concluded that *“the article was based on a letter dated 15<sup>th</sup> July 2001 but delivered 21st September”*. From the ruling, part of the Newspaper reads:

*“How are you doing today? Hope you are enjoying your brief stay here on earth. We are called the Black Dragons... Again do you still remember your, friend Iyobu Nemieboka... Nemieboka, who thought he was Almighty God we brought him down...”* See page 42 of the record.

At page 43 of the record, the learned trial Judge held, *inter alia*:

*“Reading the article and its contents this court can reasonably draw the inference that the author recorded information supplied to him by a person or a group of persons that lacked personal knowledge of the matter pending before this court or relevant to the mat-*

ter before this court. Coupled also with the evidence of PW1 that this article was not brought to his attention in the course of investigating and as it appeared he did not see the document save for seeing it in court, the defence has failed to show the relevance of the document and this court does not see and does not consider the said newspaper relevant. I hold that the Punch Newspaper of Friday, September 28 the (sic) article captioned 'Law Teacher Resigns over Death Threat from Cultists' is not relevant to the matter in issue in the criminal trial and thus it is inadmissible in evidence..."

There was no evidence before the trial court that "the article was based on a letter dated 15<sup>th</sup> July, 2001 but delivered on 21 September."

There was no evidence or material from which the trial court could draw "the inference that the author recorded information supplied by a person or a group of persons that lacked personal knowledge of the matter pending before this court or relevant to the matter before this court."

The trial court relied on extraneous matters in rejecting the Newspaper. The fact that the PW1 was seeing it for the first time in court is no reason for rejecting it. The trial court held, in its conclusion that the article captioned "Law Teacher Resigns over Death Threat from Cultists" is not relevant, and so inadmissible.

This cannot be correct in view of the portion of the Newspaper reproduced by the court in its ruling at page 42 of the record. The article named the deceased and who killed him. Speaking of relevant fact, Tobi JSC held that:

"Relevant facts are facts which, though not in issue are so connected with a fact in issue as to form part of the same transaction and facts which are the occasion cause or effect/immediate or otherwise if relevant fact or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity from their occurrence or transaction." See Abubakar v. Chuks (2007) 18 NWLR (Pt. 1066) 386 at 402 paras G-H.

**The purpose of the trial was to determine who killed the deceased - the appellant or some other person or persons, and here is a Newspaper in which a cult group - the Black Dragons - claimed responsibility for the killing in the following words: "Again do you still remember your friend lyobu**

***Nemieboka... Nemieboka who thought he was Almighty God we brought him down.*** "Nothing can be more relevant or material to the issue before the court than the claim of the Black Dragons.

Granted that the cultists may not have "...sliced his man-  
hood; removed his eye, etc..." or "in fact dismembered his  
body" their claim to have "brought him down" is not dimin-  
ished by their obvious exaggeration of what they did to the  
body of the deceased. In my view, the reasons the trial court  
gave for rejecting the Newspaper is irrelevant and is based on  
extraneous matter or speculation by the court as to the source  
of the article.

That court go (sic) outside the evidence before it, or even  
rely on the personal knowledge of the judex to determine an  
issue before it. The reasons stated by the trial court do not  
justify a rejection of the Punch Newspaper of Friday, Septem-  
ber 28<sup>th</sup>, 2001 particularly page 6 thereof. The Newspaper is  
relevant and ought to have been admitted. See *Kuruma v. The*  
*Queen* (1955) AC 197.

Next is the funeral programme of the deceased sought  
to be tendered through PW4. The trial court rejected the docu-  
ment because the PW4 was not the maker; the portion of the  
document upon which he was to be contradicted was not shown  
to him; the document is not relevant as it did not show how  
the deceased was murdered. There is uncontradicted evidence  
that the document was prepared for the family of the deceased  
which includes PW4 and that the document was signed by Chief  
M. D. Nemieboka "for the family".

In the circumstance of this trial and on the authority of  
Flight Lt. Otu Edet v. Chief of Air Staff & Anor (1994) 2 NWLR  
(Pt. 324) 41 at p. 65-66 cited by learned counsel for the de-  
fence, the document sought to be tendered as the document  
of each member of the family for which it was prepared was  
not meant to contradict PW4 but to show from its contents  
that the deceased could have been killed by any of those on  
whose toes he had stepped.

The trial court was in grave error when it held at pages 83-84  
of the record that:

*“...It cannot be said they were made to throw light on how the deceased was murdered and this court will not ascribe any such insinuation and thus the said words are not relevant to the fact in issue in this suit.”*

**With profound respect to His Lordship of the trial court, “the fact in issue in this suit” is not how the deceased was murdered. The cause of death is a medical question settled in the autopsy report. There is no doubt that the deceased was murdered by being hit with stabilizer and stabbed with knives. These are established facts. The fact in issue, which the trial court appeared to have missed in its rejection of the document sought to be tendered, is who murdered the deceased?**

**The evidence is entirely circumstantial and the document, if it had been admitted, could have influenced the impact of the evidence one way or the other. It is my view that the document is relevant and was rejected on the wrong premise. I resolve issue 4 against the respondent in favour of the appellant.**

Issue 5 is:

*“Whether the honourable Court of Appeal was right to hold that the prosecution has proved the charge against the appellant beyond reasonable doubt based on the circumstantial evidence before the trial court.”*

This issue embraces issues 1 to 4. What will be said here below in the resolution of the issue is in addition to what I said in resolving issues 1 to 4.

First: how and when did the appellant get into the deceased’s apartment? Appellant swore that the deceased came to her school on 30<sup>th</sup> July, 2001 and took her to his apartment and that she stayed overnight with the deceased till 31<sup>st</sup> July, 2001. Contrary to the evidence of the appellant, the prosecution’s star witness, PW1, claimed thus:

*“I tried to find out how the accused gained entrance into the deceased apartment. I had to go round the neighbouring compound directly behind the deceased apartment. Some part of the compound is not developed. There were some heaps of moulded blocks put in that compound close to the wall fence demarcating the deceased and his neighbour and I saw that some part of the wall fence were*

*slightly broken. The breaking was very recently judging from the time of the incident. It was this that made me believe that the accused passed through there to murder the deceased.*" (See page 28 of the record).

If there was a break in the fence the witness is not competent to say when the break took place, more so when the incident took place in the rainy season. For the appellant to scale the fence, she would have to get into the deceased's neighbourhood's premises. Who let her in? The PW1 did not say. In any case, the evidence of PW1 reproduced above is in irreconcilable conflict with the evidence of PW2 who said:

*"There is a fence wall demarcating my premises from the premises of my neighbour. There were metallic pins on the fence that no individual can climb through it without sustaining injury."* (See pages 59-60 of the record).

PW1 said: *"The accused had a minor cut on one of her-fingers."* That minor cut on one finger cannot be the result of climbing the wall on which there were metallic pins. In any case, the PW1 disproved his own assertion that the appellant scaled the wall when he said:

*"I carefully examined the injury and saw that it was self-inflicted."* (See page 4 of the record).

***Appellant said that one Blessing Chinda knew when the deceased came to pick her. The prosecution contented itself with tendering the statement allegedly made by Blessing Chinda, from which the PW1 quoted profusely. No reason was given why the witness was not called to give evidence proving or disproving the assertion of the appellant. That evidence could be, and is not produced and it is assumed that it would have been unfavourable to the case of the prosecution if it had been produced by the prosecution who withheld it. See Section 149 (d) of the Evidence Act, Cap E14, Laws of the Federation of Nigeria, 2004.*** See also *Amgbare v. Sylva* (2009) 1 NWLR (Pt. 1121) 1 at 150 paras. D-F 168, paras C-E 176 and paras H-B; *Odili v. State* (1977) 4 SC 1; *Alonge v. IGP* (1959) SCNLR 516.

The PW1 said that *"it is unfounded that on 30<sup>th</sup> July 2001, the accused slept with the deceased."* (See page 47 of the record).

If the appellant's story is false or unfounded, where did she

sleep on 30/7/2001? The PW1 answered the question thus: *"I do not know where the accused slept on 30<sup>th</sup> July, 2001."*

One may ask on what basis the PW1 described the appellant's claim as unfounded? Why did the prosecution not call evidence as to where the appellant slept on 30/7/2001? Again, that evidence was  
B withheld by the prosecution because it would have damaged the case that the appellant stole into the premises and into the apartment of the deceased. (See Section 149 (d) of the Evidence Act).

Appellant said that the deceased gave her the sum of  
C N10,000.00. That sum was found in her bag, exhibit 10. PW1 said: *"Yes, N10,000.00 was found in exhibit 10"*. He added: *"It is not correct that I did not investigate this matter"*. (See page 48 of the record).

If "this matter" included the N10,000.00 appellant said the  
D deceased gave her and the veracity of her claim, the matter was not investigated. An investigation of the matter would have included a finger print test on the money. Apart from speculations, there is no proof that the appellant had a key to the deceased's apartment after the deceased (sic) *"the (deceased) brother of ours words was very*  
E *firm that he had made up his mind to terminate the relationship"*. (See page 68 of the record).

There is evidence that the appellant was banned from the premises. Assuming but not conceding that the appellant had a key to  
F the apartment of the deceased, she could not have used the key unless she got into the premises and no one has said how she got into the premises except the speculation of PW1. In the circumstances, I hold the view that the appellant did not sneak into the premises and into the deceased's apartment. The deceased brought her into the  
G premises and into his apartment on 30/7/2001.

Even in spite of his extreme prejudice against the appellant, the PW1 actually exonerated the appellant from the killing by giving conflicting evidence as to who killed the deceased. At page 77, PW1 said:

H *"From my investigation and findings the accused murdered the deceased."*

In cross-examination, the same witness said:

*"I came by the conclusion that the accused had a self-inflicted injury because of the magnitude of the injury on the deceased. If the*

*accused was present at the time the deceased was injured, she could have had half of the injury the deceased sustained.*" (See page 49 of the record).

If the appellant *"was not present at the time the deceased was injured"*, she could not have killed or injured the deceased. In any case, the court cannot pick and choose between the evidence of PW1 that the appellant killed the deceased and the evidence by the same witness that the appellant could not have been present at the time the deceased was *"injured or killed"* as no explanation was proffered for inconsistency in the evidence of the witness, PW1. (See Onubogu v. State (1974) 9 SC 1, PW 1 was carried away by his imagination -

At page 45 of the record, he said:

*"The accused said, she was going to kill the deceased if he does not marry her. I got this information from the deceased's father Mr. Paul Nemieboka, the deceased's brother Mr. Mark Nemieboka..."*

Not only are the facts stated by the PW1 hearsay, they are false. It is in evidence that the appellant attempted to take her life but there is no evidence that the appellant ever said she would kill the deceased under any circumstance at all. At page 46, the PW1 said:

*"The accused leaked the gas in the deceased kitchen in attempt to destroy the entire evidence per my investigation. The accused denied this fact in her statement to the police. I got this fact from Mr. Akingboye when I visited the scene... In the course of my investigation Mr. Akingboye told me that on the fateful night the accused after she had reported the death of deceased to him and his wife also told him that the scene was burning, he hasten to the deceased's kitchen and put off the fire."*

This is another piece of hearsay evidence. In any case, if the appellant set fire *"to destroy the entire evidence"* she would not have alerted Mr. Akingboye who promptly put out the fire. Had the learned trial Judge properly evaluated the evidence, particularly, the evidence of the PW1, he could not have drawn the inference that the appellant killed the deceased.

On the contrary, His Lordship gave every assertion of the PW1 hearsay and unfounded speculation, the credit properly due to the holy writ. For instance at page 169 of the record, the trial court held as proved:

*"The accused nocturnal appearance on the night of the de-*

*ceased murder after her estrangement by the deceased and without anybody's knowledge including PW2 who had asked her to stop visiting the deceased. The accused lied that Blessing Chinda knew her whereabouts as she mentioned to her that the deceased had come to pick her on the 30<sup>th</sup> July, 2001."*

B The Police investigated this and obtained exhibit 13, statement of Blessing Chinda, wherein Blessing Chinda stated that:

*"...I saw her last on early evening of Tuesday, 31<sup>st</sup> July 2001 it was about 6.30 p.m. I saw her in hostel B2 Staircase and we exchanged pleasantries. Vivian never told me she was going out with her mum"*

The court continued:

*"The prosecution had urged this court to draw the inference that the accused hiding about her movement to and her presence at the residence of the deceased showed she had a criminal motive."*

The trial court did more than the prosecution wanted. The court drew from the above inadmissible hearsay that the appellant stole into the apartment of the deceased and killed him. In my view, the court below was right to have expunged the statement of Blessing Chinda who was not called to testify.

However, the lower court failed to appreciate that the key to the case is how the appellant got into the deceased's apartment if in fact she did and having expunged the evidence relating to what Blessing Chinda said, the court was left with the evidence of the appellant that the deceased brought her into the apartment and this in itself disproves the circumstantial evidence on which the conviction of the appellant was exclusively founded on the potency and character of being *"...the evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics..."* See *R. v. Taylor & Ors* (1928) Vol. 21 CAR 20 at 21 (per Lord Newart, CJ); *Adie v. The State* (1980) 1-2SC 116; *Ukorah v. The State* (1977) 4 SC 167.

The trial court drew heavily from the documentary evidence which were not produced as ordered by this court. The trial court quoted, and relied only on, a part of exhibit K wherein it was stated:

*"...God please forgive me! I always warned him to stay out of trouble instead his threats shut me up."*

But the court left out a portion of the sentence reproduced

above. The appellant supplied the missing portion: *“since I have to go with lyobu...”* That not only completes the paragraph but clearly dispels any intention to kill the deceased. In a portion of exhibit K6 reproduced in the appellant’s reply brief, the appellant stated inter alia:

*“I still write in respect of our discussion last night... Yesterday night you talked for more than 3 hrs... I just wondered what you meant by locking me in here. Abi you don’t know I have lectures? I almost broke this door... Just realized Mrs. Akingboye will see me. What will I explain to do here.”*

Above shows that the appellant and the deceased spent the night previous to the night of the murder together in the deceased’s apartment, and the deceased talked to her, the appellant for 3 hours. It also shows that the deceased locked the appellant, though with her consent, in his apartment and went to work the following morning.

If the appellant stole into the deceased’s apartment unknown to the deceased, the two of them could not have talked for 3 hours nor could the deceased have locked the appellant in his apartment with her consent if she had sneaked in unnoticed. If the appellant had stealthily entered the premises and the appellant had killed the deceased, by the theory of consciousness of guilt, she would have fled the scene to save her life. The same way she went in to kill the deceased, if she had done it, she would have left the scene undetected. There could hardly have been anyone on the street that late in a rainy night.

The appellant gave a graphic account of the incident leading to the murder of the deceased. (See especially pages 92 - 93 of the record). At page 93, the appellant said, inter alia:

*“I also heard one of them say to lyobu (deceased) ‘We will not kill you but we will disfigure you... They also asked for documents which he went into the room with one of them and that particular boy came out with the documents with lyobu deceased... Then I head (sic) lyobu say ‘you, you again, that he wasn’t the one that sacked the boys from the office, it was the boss that said he doesn’t require their services any more. Apparently he had identified the boy holding him down.”*

The police followed the line of least resistance. They did not identify the boys who were sacked or the boss who said he no longer

needed their services. From this uncontradicted account of the incident, the invaders came not to kill the deceased, but to disfigure him. The deceased sealed his fate when he identified one of his attackers. They had to kill him to save themselves from arrest.

B Appellant gave evidence consistent with the ten statements she made at the instance of the police. She explained why she hid the knives. She was afraid the killers would come back and kill her too with the knives. The appellant was raked over the coals in cross-examination but her testimony was not shaken.

C The evidence led by the prosecution witnesses was in conflict with the charge that “Vivian Odogwu *and others at large*” killed the deceased. (Italics mine). The witnesses, particularly, the star ‘witness, PW1, were consistent in their evidence that the appellant, and she alone, killed the deceased. Based on the evidence which is in conflict D with the charge (which was not amended), the trial court found the appellant guilty of murder based on what the court described as “*The circumstantial evidence adduced by the prosecution is complete and the chain of evidence is unbroken.*” (See page 176 of the record).

E I have already demonstrated that the totality of the circumstantial evidence before the trial court is made up of inadmissible hearsay evidence and unfounded speculations and account of witness who came to vent their spleen on the appellant and portray her as a woman of easy virtue. The noble courtroom concept of “the truth and nothing but the truth” was grossly abused by each of the F PW1-PW4.

In Teper v. R (1952) AC 480 at 489, it was held:

G “*Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.*” (Per Lord Normand).

H See also *Pius Nweke v. The State* (2001) 84 LRCN 482 at 506, (2001) 4 NWLR (Pt. 704) 588 at 603, paras. D-E where it was held:

“*To secure a conviction in a criminal trial circumstantial piece or pieces of evidence must be cogent, complete and unequivocal. Such evidence too, must be compelling and must lead to the irresist-*

*ible conclusion that the accused and no one else must have committed the crime. Indeed, the facts must be incompatible with innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of his guilt."*

See the decision of this court in Joseph Lori & Anor v. The State (1980) 8-11 SC 81 at 87. See also Iyaro v. The State (1988) 1 B NWLR (Pt. 69) 256; Mbenu v. The State (1988) 3 NWLR (Pt. 84) 615 at 630; Ukorah v. The State (supra); Adie v. The State (1980) 1-2SC116.

***Before a piece of evidence, whether direct or circumstantial, can be considered and probative value ascribed thereto, it must be admissible. No inference of guilt can be drawn from a purported circumstantial evidence which, as in this case, is inadmissible. The evidence in this case, alleged to be circumstantial, cannot be relied on to convict the appellant on the authorities above. Even if the circumstantial evidence in this case is admissible, it is incapable of proving any proposition with the accuracy of mathematics.*** See R. v. Taylor & Ors (1928) Vol. 21 CAR 20 at 21.

***It is not cogent, complete or unequivocal. It is not incompatible with the innocence of the appellant and from the unchallenged evidence of the appellant; the evidence is capable of explanation upon other hypothesis than that of the guilt of the appellant as is evident from her testimony in the trial court. In any case, the mere fact that the circumstantial evidence adduced by the prosecution is complete and the chain of evidence is unbroken" does not lead to the irresistible conclusion that the appellant and no one else committed the murder.***

***That the evidence is complete and the chain of evidence is unbroken do not invest the circumstantial evidence with the cogency required for the court to draw inference of the guilt of the appellant therefrom. Had the trial court considered the conditions that must be present before the inference of guilt of an accused can be drawn from the circumstantial evidence, the appellant would have been acquitted and discharged. Had the Court of Appeal considered the trial court's reason for reliance in the circumstantial evidence, it would have been***

***clear to it that evidence that is complete and unbroken cannot, by that fact alone, found conviction on a charge of murder.***

Again, had the lower court considered the substance of the evidence of PW1-PW4, it would have been clear to it that the rest of the evidence is as much hearsay as exhibits B and S - the statements of Blessing Chinda and Cecilia Genesis that were expunged. It would have been clear to it that the witnesses testified not to help the trial court to get the truth but to take their pound of flesh on the appellant who they believe killed the deceased even before she was tried.

They, from their evidence, did not seek justice but vengeance and to reinforce their intent, and make the trial court act on same they had to paint the appellant with the tarnished brush of a whore in evidence of bad character that is irrelevant and therefore inadmissible. I resolve issue 5 against the respondent and in favour of the appellant.

All the five issues having been resolved in favour of the appellant and against the respondent, I allow the appeal and set aside the judgment of the court below that the appellant and others at large killed the deceased and the judgment of the trial court that the appellant alone killed the deceased.

Consequently, it is my order that the appellant, Vivian Odogwu, be and is hereby, acquitted and discharged on the charge of murder. Appeal allowed. Appellant acquitted and discharged.

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### ***I. T. MUHAMMAD JSC***

I have had the opportunity of reading in draft, the judgment of my learned brother, Ngwuta, JSC, just delivered. I agree with his reasoning and conclusion which I adopt. I allow the appeal. I quash the conviction and set aside the sentence of death on the appellant. Appellant is hereby discharged and acquitted.

H

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### ***FABIYI JSC***

I have had a preview of the judgment just delivered by my learned brother - Ngwuta, JSC. I agree with the detailed reasons therein advanced to arrive at the conclusion that the appeal is meri-

torious and should be allowed.

I wish to chip in a few words of my own in support. The appellant was charged with the offence of murder contrary to section 319 of the Criminal Code, Laws of Eastern Nigeria as applicable in Rivers State at the High Court of Rivers State Holden at Port Harcourt (the trial court). B

The particulars of the offence read -

*“Vivian Odogwu and others at large, on the 31<sup>st</sup> day of July, 2001 at No. 49 Woji Road, Rumurolu, Port Harcourt, murdered one lyobu Nemieboka.”* C

The case which the prosecution tried to make up is that the appellant, out of frustration at being dumped by the deceased to whom she was engaged, sneaked into the deceased’s house with spare key. On the deceased’s return from work to his flat in the night of 31/7/2001, the appellant took him by surprise to attack and kill him with a stabilizer and two kitchen knives. D

The appellant’s side of the story was that the deceased came to her school on 30/7/2001 and brought her to his home for reconciliation of their hectic and tortuous amorous relationship. The deceased arrived late on 31/7/2001 and as he was about to take the appellant back to school that night, two masked men came in and killed the deceased. She said they screamed and called for help but as it was raining, no one heard them. She reported to the wife of the landlord. E

The trial Judge garnered evidence and applied the law to the best of his ability. He found that the appellant attacked and killed the deceased with two domestic knives and stabilizer which were stained with blood. In short, the trial Judge accepted the prosecution’s theory of the case; as it were. F

On appeal to the Court of Appeal, Port Harcourt Division (the court below) it was found that the appellant committed the offence with others as alleged in the charge. It must be observed that both courts relied essentially on circumstantial evidence in arriving at their respective stand points. G

The appellant has appealed to this court; as expected. The issues for determination, as couched by the appellant, have been set out in the lead judgment. They have been ably considered therein. I only wish to touch briefly on issue 5 which reads as follows:- H

*“5. Whether the honourable Court of Appeal was right to hold that the prosecution has proved the charge against the appellant beyond reasonable doubt, based on the circumstantial evidence before the trial court.”*

Circumstantial evidence has been described as the evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics... See *R. v. Taylor & Ors.* (1928) 21 CAR 20 at 21.

In *Teper v. R* (1952) AC 480 at 489, it was held as follows:

*“Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another -*

*... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”*

It is clear to me that circumstantial evidence must be narrowly examined with utmost care and where need be as in this matter, with the tooth comb. To be sufficient for a conviction, it must point to only one conclusion, namely that the offence has been committed and that it was the accused who had committed it. The evidence must irresistibly and unequivocally lead to the guilt of the appellant. It must be depicted that no other reasonable inference could be drawn from it. There must be no co-existing circumstances which could weaken the inference. See: the case of *Nasiru v. The State* (1999) 1 SC 1, (1999) 2 NWLR (Pt. 589) 87; *B. Idowu v. The State* (1998) 9-10 SC 1; (1998) 11 NWLR (Pt. 574) 354; *Ororosokode v. The Queen* (1960) SCNLR 501 at 504; *The State v. Nafiu Rabi* (1980) 8-11 SC (Reprint) 130; (1980) 1 NCR4 at 50 reported as *Rabi v. State* (1981) 2 NCLR 293.

In employing circumstantial evidence to ground a conviction, the totality of same must be cogent, compelling and unequivocal. It must point only at the direction of the appellant and to no other person. It must lead conclusively and indisputably to his guilt. See *Peba v. The State* (1980) 8-11 SC 76; *Omogodo v. The State* (1981) 5 SC 5. Let me further say it that this in line with the dictate of section 138 (3) of the applicable Evidence Act.

It should be depicted right away that the circumstantial evi-

dence primarily relied upon by the lower courts is the evidence of PW1, the IPO who described himself as a detective. His evidence is no doubt, rooted in crass suspicion, assumption, permutation and speculation which cannot sustain a valid conviction; in the main. On oath, he said, *inter alia*:-

*“On 31<sup>st</sup> July, 2001 the deceased came back from work, entered into his parlour and locked it, drew the curtains (door) leaving the bunch of keys on the door. Unknown to him that the accused who had his spare keys had gained entrance into his apartment. The accused opened the backyard door through the kitchen where she gained entrance into the parlour. She attacked the deceased by hitting him with stabilizer on his face. The deceased fell in the parlour, she ran to the kitchen and picked some bottles and kitchen knife and stabbed the deceased all over his body that result in his death.”*

PW1 was not at the scene of incident in the night of 31/7/2001. He said he got a report of the incident on 2/8/2001 and only visited the scene on 6/8/2001. The evidence above reproduced is not only inadmissible hearsay but also a figment of his own imagination concocted to nail the appellant. One wonders how he could stage manage such a story without feeling some sense of compulsion and guilt since he was not at the scene of the incident at the material time and could not arrogate to himself the power of omni-science. I fail to see why the courts below could agree with this type of witness. It is a pity.

Further, the appellant maintained that two masked men came in and killed the deceased while he was about to take her back to school that night. There is Exhibit N - the boot which was found at the scene. There is evidence by the prosecution that it did not belong to either the deceased or the appellant. The police did not find out how and why it was there at the material time. It could have been left by those two masked men. The doubt continues to linger on.

There is evidence that the deceased did not belong to any cult group. But there is also evidence that he was a member of the Rivers State Task Force Against Cultism. In his position he was vulnerable to attack by cult members. In this respect, the Punch Newspaper of Friday 28<sup>th</sup> September, 2001 wherein the Black Dragons claimed responsibility for killing the deceased in the following words: *‘again do you still remember your friend lyobu Nemieboka... Nemieboka who*

*thought he was Almighty God we brought him down*; was wrongly rejected by the trial court. The claim by the Black Dragons was, no doubt, relevant and material to the issue as to who killed the deceased. Again, the doubt as to who killed the deceased continues to steer everyone in the face.

B The medical doctor who performed the post-mortem examination was not called. His report was admitted and marked exhibit C. Therein, it was said that ‘photograph A shows defensive wounds’. It cannot be presumed that the deceased sustained the wounds while  
C defending himself against attack by the appellant. That would contradict the speculative assertion of PW1 on oath that-

*“She attacked the deceased by hitting him with stabilizer on his face. The deceased fell in the parlor, she ran to the kitchen and picked some bottles and kitchen knife and stabbed the deceased all over his  
D body that resulted in his death.”*

With all the above, it cannot be said that the circumstantial evidence in this case, when narrowly examined with utmost care with the tooth comb, point only at the direction of the appellant. It points at the direction of the two masked men. It points at the direction of  
E the Black Dragons as well. There is little or nothing in the evidence of PW1 who embarked on highly speculative and hearsay evidence that is worthy of credence.

There is no doubt about it that this case is replete with doubts. In all clear conscience, it is not safe to find otherwise. The case was  
F not proved beyond reasonable doubt as evolved by Lord Sankey, L.C. in *Woolmington v. DPP* (1935) AC. 462.

For the above reasons and of course the detailed one adumbrated in the lead judgment, I too feel that the appeal is meritorious  
G and should be allowed. I order accordingly and endorse the consequential order contained in the lead judgment.

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### **M. D. MUHAMMAD JSC**

H I had a preview of the lead judgment of my learned brother Ngwuta, J.S.C., and entirely agree with his reasoning and conclusion that the appeal should succeed.

It is an extant rule of evidence that in criminal matters the prosecution succeeds only when it proves its case beyond reasonable

doubt against the accused. In the case at hand, my learned brother has succinctly demonstrated how impossible it is to exclude the doubt which the law says the courts must exclude before finding the appellant guilty. I adopt the lead judgment as mine in allowing the appeal. I abide by the consequential orders contained in the lead judgment as well. B

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### ALAGOA JSC

I read before now and in draft the lead judgment just delivered by my learned brother Nwali Sylvester Ngwuta, JSC and I wish to chip in this bit of mine by way of contribution. The case for the prosecution was built entirely on circumstantial evidence since there were no eyewitnesses to what was undoubtedly the gruesome murder of the deceased. Of circumstantial evidence this court in *Olusola D v. Adepetu v. The State* (1998) 9 NWLR (Pt. 565) 185 held as follows per Onu JSC, *"A long line of cases beginning with R v. Sati (1938) 4 WACA 10 has laid it down that to support a conviction based on circumstantial evidence it must not only be cogent, complete and unequivocal but compelling and lead to the irresistible conclusion that the, accused and no one else is the murderer; it must leave no ground for reasonable doubt"*. See also this court's decisions on this same subject matter to the same effect in the following cases - *Joseph Lori & Anor v. The State* (1980) 8 - 11 SC 81; *Uwe Esai & Ors. v. The State* (1976) 11 SC 39, *Paul Udedibia & Ors v. The State* (1976) 11 SC 133 at 138 -139; *Philip Omogodo v. The State* (1981) 5 SC 5 at 24 and the most recent decision of this court in SC 369/2011 - *Wasiu Babatunde v. The State* decided on the 21<sup>st</sup> June, 2013. In the Nigerian Criminal jurisprudence as in other common law countries, G there is the aphorism that it is better for ten guilty people to be set free than for one innocent person to be convicted. This is more so in offences of a capital nature where a person pays for his crime with his very life. Consistently the courts have always been advised to exercise extreme caution in such cases. With respect to the mysterious pair of boots found in the deceased's house for example, PW2 Mr. Olu Joseph Akinboye, landlord of the deceased said in evidence in cross examination at page 58 of the records as follows, *"For all the time I lived with the deceased I had never seen him with exhibit N-* H

*the pair of boots*”. The presence of the boots in the deceased house has not been explained by the prosecution. This fact is disturbing. Evidence on record is that the deceased was forthright and blunt which had earned him some enemies who had threatened his life.

Could the boots have been left behind in the deceased’s house by one of such people? We will never know and a doubt is created as to the actual perpetrator of this dastardly act. That the appellant, deceased and PW2 were close is not in doubt. The appellant in fact referred to PW2 as “Daddy”. It was the testimony of PW2 that when the quarrels and fighting between the appellant and deceased became persistent, he (PW2) advised the appellant to stay off the deceased’s house for some time for tempers to cool which advice was heeded to by the appellant. The account of PW2 is that there was intense love between the appellant and the deceased which they lacked the ability to handle. The evidence of the appellant was that the deceased had picked her up from school to his house on 30<sup>th</sup> July, 2001 where she stayed until the night of the 31<sup>st</sup> July, 2001 when he was killed. At page 58 of the records PW2 in evidence said as follows *“I found out where the accused sneaked into the premises. The accused told me that it was agreed between herself and the deceased that her presence should be concealed to us. She claimed she wanted some money from the deceased and that she came on Monday the 30<sup>th</sup> July 2001 that she and the deceased came in together in the night of the 30<sup>th</sup> July 2001 and she the accused stayed behind concealing her presence from our knowledge. I did not ask the accused what time of the night they came in.”*

For two people terribly in love, and not wanting to hurt the feelings of PW2 and his wife who they so much respected, is it not possible that this account could be true and that her (appellant) presence in the deceased’s house on the night of the 30<sup>th</sup> July 2001 could have been with the knowledge and consent of the deceased who, not being able to withstand her long absence had brought her into his house without PW2’s knowledge? Again doubts persist.

Whether evidence is direct or as in this case circumstantial the burden lies on the prosecution to prove its case beyond reasonable doubt. There is a long line of Supreme Court cases on this hallowed principle of law. See generally *Sebastian Yongo & Anor v. C.O.P.* (1992) 4 SCNJ 113, (1992) 8 NWLR (Pt. 257) 36; *Williams v. The*

State (1992) 10 SCNJ 74, (1992) 8 NWLR (Pt. 261) 515; Ogundiyan v. The State (1991) 4 SCNJ 44, (1991) 3 NWLR (Pt. 181) 519; Okputu Obiode & Ors v. The State (1970) All NLR 35 where this court held in very simple language as follows “*The onus is on the prosecution to prove its case beyond any reasonable doubt. If the Judge has any doubt at all, he must give the accused person the benefit of that doubt.*”

It is for these reasons and the fuller reasons contained in the lead Judgment of my learned brother that I too allow the appeal and set aside the judgment of the lower court and the High Court. Appellant is accordingly discharged and acquitted.

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