

**SUPREME COURT OF NIGERIA**  
FRIDAY 9TH MAY, 2014. SC. 105/2011  
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,  
C. B. OGUNBIYI, JJSC**

CHIDOZIE ANEKWE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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JUDICIAL PRECEDENTS - Stare decisis - Departure from - SC previous decision in Nkebisi's case reached on different issues - Cannot be relied on to resolve the single issue in present appeal (H1)

CRIMINAL PROCEDURE - Proof - Burden of - Is on prosecution and the degree of proof is beyond reasonable doubt - Which is not a function of number of witnesses (H2)

APPEALS - Concurrent findings - Interference - Justification for - SC can rightly interfere since the finding based on evidence of PW5 is perverse - And was not based on credible evidence (H3)

CONVICTION - Evidence - Weight of - Although prosecution must not prove its case with mathematical certainty - But evidence to support a conviction must not create room for speculation (H4)

MURDER - Ingredients - Proof - To ground conviction prosecution must prove death of deceased - The act or omission which caused the death - And which was intentional with knowledge that death is probable (H5)

**FACTS**

Accused/appellant and six others were arraigned before the High Court of Anambra State sitting at Otuocha. The arraignment was upon an amended charge of murder contrary to section 274(1) of the Criminal Code Cap 36 Vol. 1 Laws of Anambra State of Nigeria 1986. Appellant and the six others pleaded not guilty to the charge. To prove its case, prosecution/respondent called eleven witnesses,

including PW5 who gave a shaky account of the event of the murder of the deceased. At the close of respondent's case, learned counsel for appellant and the six others made a no-case submission. 7<sup>th</sup> accused raised the plea of alibi in his defence.

Having heard the submissions from both sides, the learned trial Judge Ezeani J. in his judgment, overruled the no-case submission. The court upheld the plea of alibi raised by 7<sup>th</sup> accused. Consequently, 7<sup>th</sup> accused was discharged and acquitted. However, the court relying heavily on the evidence of PW5, found appellant and the remaining five others guilty as charged. They were thus convicted and sentenced to death by hanging. Aggrieved, appellant and the others appealed to the Court of Appeal Enugu Division. Respondent did not appeal against the discharge and acquittal of 7<sup>th</sup> accused. The court dismissed the appeal and affirmed the judgment of the trial court. Aggrieved further, appellant lodged appeal in Supreme Court.

### **ISSUE FOR DETERMINATION**

*"Whether the Lower Court was right in affirming the conviction and sentence of the appellant for murder on the basis of the evidence of PW5."*

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

*JUDICIAL PRECEDENTS - Stare decisis - Departure from*

**1. It follows therefore that the previous decision of this Court in Nkebisi & Anor v. The State (supra) which was reached on issues different from the lone issue in this appeal cannot be relied on to resolve the single issue herein.**

**The earlier appeal in Nkebisi & Anor v. State (2010) 5 NWLR settled the issue of the evidence of a witness who is related to the victim of the crime. The issue in this appeal is whether or not the evidence of PW5 can rightly be relied on to convict the appellant, quite a different issue from a relationship of a witness to the victim. I will therefore resolve the lone issue on the merit.** (pp. 1706 H/ 1707 C)

*CRIMINAL PROCEDURE - Proof - Burden of*

**2. In criminal cases, the burden of proof is on the prosecution and the degree of proof is beyond reasonable doubt. See Section 135 of the Evidence Act 2011. Proof beyond reasonable doubt is not a function of the number of witnesses called by the prosecution.** (p. 1709 F)

*APPEALS - Concurrent findings - Interference - Justification for*

**3. I am not unaware that this appeal is against a concurrent finding of fact of the two Courts below. However, the finding that the story of the PW5 is an eye-witness account of the alleged murder of Maduneke Enweonye or that the story establishes that the appellant murdered the deceased is perverse. The finding is not based on credible evidence. This Court has a right and indeed a duty to interfere.** (p. 1713 H)

*Evidence - Weight of*

**4. While the prosecution who has the burden of proof and the duty to attain a proof beyond reasonable doubt does not have to prove its case to the point of mathematical certainty, the evidence, to support a conviction, must not create room for speculation. The evidence of PW5, very heavily relied on to convict the appellant does not come near proof beyond reasonable doubt that the appellant murdered the deceased. Had the issue been agitated before the lower Court, the appellant would have been acquitted and discharged.**

**Even if it is accepted, on the evidence before the trial Court, that Maduneke Enweonye died, there is no evidence of the specific act or omission which caused his death. Assuming, for the purpose of argument, that there is evidence of such act or omission, it was not proved to be that of the appellant. There is no evidence in the entire trial, with particular reference to the evidence of the so-called eye-witnesses, PW5, that any act or omission of the appellant resulted in the death of the deceased.** (pp. 1714 E/ 1715 C)

*MURDER - Ingredients - Proof*

**5. To ground a conviction for murder, the persecution must**

***prove: (1) the death of the deceased; (2) the act or omission which caused the death, and (3) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.***

***The three conditions must co-exist and where one is absent or tainted with doubt, the case is not proved.*** (p. 1714 G)

## NOTABLE POINT OF INTEREST

### **C NGWUTA JSC**

#### ***1. Stare decisis – Meaning of***

Stare decisis translates to: abide by or adhere to decided cases. It literally means to stand by what has been decided and not to disturb and unsettle things which have been established.

**D** A decided case furnishes a basis for determining later cases involving similar facts or issues. A precedent is an authority only for what it actually decided and not what may remotely follow thencefrom. (p. 1707 A)

### **E REPRESENTATION**

B. C. Igwilo Esq. with Mary-Ann Ekwe and I. C. Chidolue Esq., for the Appellant

D. P. A. Afuba (Hon. A-G Anambra State) with I. C. Adingwu Esq.,

**F** for the Respondent

### **CASES REFERRED TO**

Loyi v. State (1980) 8-11 SC 81

Emeka v. State (2001) FWLR (pt. 66) 682

**G** Nweze v. State (1996) 2 NWLR (pt. 428) 1

Agbi v. Ogbeh (2006) All FWLR (pt. 329) 941

Agbo v. State (2006) 25 NSCQR 137

Ubani v. State (2003) 18 NWLR (pt. 851) 244

Sobakin v. State (1981) 5 SC 75

**H** Alonge v. IGP (1959) SCNLR 516

Onafowokan v. State (1987) 3 NWLR (pt. 61) 538

Okoji v. State (1989) 1 CLRN 29

Omowa v. State 37 NSCQR (pt. 11) 963

Shola v. State (1978) 9-19 SC 81

Ejeka v. State (2003) 23 WRN

Nkebisi v. State (2010) 42 NSCQR (pt. 2) 1173

Adesokan v. Adetunji (1994) 5 NWLR (pt. 346) 540

### **STATUTES REFERRED TO**

Criminal Code Cap 36 Vol. 1 Laws of Anambra State 1986, s. 274(1)

Evidence Act 2011, ss. 77(a)(b)(c), 138(1)

Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 36(5)

### **LEAD JUDGMENT BY NGWUTA JSC**

The original information filed on 28th November, 1994 contained one count charging the appellant and five others with murder contrary to Section 274 (1) of the Criminal Code Cap 36 Vol. 1 Laws of Anambra State of Nigeria, 1986. D

On 6th March, 1995 the learned prosecuting Counsel applied for, and was granted, leave to regularize the amended information filed the same day. The amended information also had one count of murder against the appellant and six others. E

On 13/3/95, the appellant and each of his six co-accused persons pleaded not guilty to the charge.

Trial commenced before Ezeani, J of the High Court of Anambra State, sitting at Otuocho, Anambra State, on 16/3/95. The State called eleven witnesses and rested its case on 29/2/96. Learned Counsel for all the accused persons made a no-case submission on 4th March 1996 which was over-ruled by the learned trial Judge on 18th April, 1996. F

The defence opened its case on 2nd June 1996, called five G witnesses and closed its case on 10th June, 1996. Learned Counsel for the parties addressed the Court from 13th June to 8th July, 1996.

In the judgment delivered on 1st August 1996, the learned trial Judge upheld the plea of alibi raised by the 7th accused and verified by the evidence of DW8. The 7th accused was consequently H acquitted and discharged. His Lordship found each of the 1st to 6th accused persons guilty as charged and convicted and sentenced each of them to death by hanging. The State did not appeal against the acquittal and discharge of the 7th accused person.

The 1st - 6th accused (convicts) were aggrieved and appealed jointly to the Court of Appeal, Enugu Judicial Division. On 18th July 2001, the Court below dismissed the appeal and affirmed the judgment of the trial Court. Against the said judgment of the Court below affirming the judgment of the trial Court, the appellant, Chidozie B Anekwe, appealed to this Court on four grounds.

In the appellant's brief, settled by Eze Uko, Jnr., the single issue formulated for determination reads:

*"Issue for Determination:*

C *Whether the Lower Court was right in affirming the conviction and sentence of the appellant for murder on the basis of the evidence of PW5."*

Learned Counsel for the Respondent, A. O. Okeke, adopted the appellant's issue in his brief.

D In dealing with the lone issue in his brief, learned Counsel for the appellant conceded that the guilt of an accused person can be proved by the confessional statement of the accused or circumstantial evidence or evidence of an eye-witness. He relied on *Loyi v. State* (1980) 8-11 SC 81; *Emeka v. State* (2001) FWLR (Pt. 66) 682, E adding that for circumstantial evidence to support conviction, it must be credible, cogent and lead unequivocally to the guilt of the accused.

F He contended that the circumstantial evidence must be incapable of explanation upon any other reasonable hypothesis than the guilt of the accused. He relied on *Nweze v. State* (1996) 2 NWLR (Pt. 428) 1.

G Learned Counsel referred to page 166 lines 23 to 26 and pages 296 and 300 of the record and impugned the reliance of both Courts below on the evidence of PW5 as an eye-witness account of the incident leading to the charge against the appellant. He contended that it is impossible for the witness, PW5, to hear the shout of the deceased from one and a half (1 1/2 kilometres away from him or to identify the deceased by his voice from that distance. Specifically, he H referred to the evidence of the PW5 to the effect that he, PW5, heard and identified the deceased by his voice from the distance from Otuocho High Court to Aguleri junction, a distance of one and a half kilometers and the evidence that it took him 45 minutes to get to the scene of crime and said that the evidence was incredible and should

not have been relied on by the two Courts below. He relied on Agbi v. Ogbah (2006) All FWLR (Pt. 329) 941.

He referred to the evidence of the PW5 that on approaching the scene of crime he was ordered to stop and that at that point he flashed his torch light and in one moment he saw all the accused persons, including the 7th accused and identified the weapons each accused had on him. He referred also to the evidence of PW5 that he was forced to swear an oath of Iyi Ani not to reveal what he knew of the death of the deceased and argued that the evidence is not only incredible but the PW5 cannot be said to be eye-witness to the death of the deceased.

Learned Counsel stated that none of the witnesses who went on a search for the deceased, or the Police who investigated the case saw the dug out ground where the PW5 claimed the Iyi Ani oath was administered on him, even though Police officers who visited the scene gave evidence of foot prints at the scene. He relied on Abudu v. State (1985) 1 NWLR (Pt. 1) 55 in his contention that the evidence of PW5 was whittled down by a delay of close to three months before disclosing what he saw on the night of the incident, adding that the explanation given by the PW5 for the delay is not satisfactory.

He characterized the evidence of PW5 as fraught with inconsistencies and self-contradiction in that the PW5 who believed in the efficacy of Iyi Ani fell ill and was about to die even though he did not breach the oath. He urged the Court to treat the eye-witness account of the PW5 as unreliable. He relied on Agbo v. State (2006) 25 NSCQR 137 at 162.

Learned Counsel relied on Ubani v. The State (2003) 18 NWLR (Pt. 851) 244 and Sobakin v. The State (1981) 5 SC 75 in his contention that the facts of this case bring it within the exception permitted by law for this Court to interfere with the concurrent findings of facts by the two lower Courts.

In summary, he urged the Court to allow the appeal, and set aside the judgment of the Court below which was based on the incredible evidence of the PW5 relied on by the trial Court.

Arguing the issue in his brief, learned Counsel for the Respondent stressed that the evidence of a single witness, if believed by the Court, can establish a case even of murder. He relied on Sunday Effiong State (sic) (1998) 5 NWLR (Pt. 512) 362 ratio 1; Alonge v.

IGP (1959) SCNLR 516; Onafowokan v. State (1987) 3 NWLR (Pt. 61) 538 at 552.

He contended that the Court of Appeal was right in relying on the evidence of PW5. His words:

B *“It is therefore our submission that the Court of Appeal was perfectly right in relying on the evidence of PW5 Godfery Emengwu to affirm the conviction of the appellant Chidozie Anekwe.”*

C He added that the prosecution established through the evidence of PW5 that the victim died and that the act of the appellant caused the death of the victim as required by law. Learned Counsel referred to Section 77 (a) (b) and (c) of the Evidence Act 2011 relating to what could be seen, what could be heard and what would be passive (sic) (may be he meant what could be perceived) and submitted that the two lower Courts were right in treating the PW5 as an D eye-witness.

He said that the witness, PW5, gave evidence of what he heard and what he saw and that his evidence was not challenged. He argued that one and a half kilometres being an estimate means that the distance from where the PW5 said he heard the shout of, and identified the appellant could be more or less than estimated. E

Learned Counsel argued that the fact that it took about 45 minutes for the PW5 to get to the location where he saw the appellant does not mean that the distance is far, taking into account the circuitous route in the reverine area. F

He relied on Okoji v. State (1989)1 CLRN 29 at 33 ratio 6 in his submission that the only way to attack evidence lawfully admitted at trial is by cross-examination and not by appeal. He relied on Omowa v. The State 37 NSCQR (Pt. 11) 963 at 972 which he carelessly stated G earlier, as *“Omowa the State”* and argued that the fact that PW5 is related by blood to the deceased does not have adverse effect on his evidence. He relied on Ogulana v. The State (1995) 5 NWLR (which he state as *“5 WWLR) (Pt. 395) 266 at 285 para. F-G”*. He urged the Court to hold that the submission of the appellant on this point is of H no moment.

On the PW5's delay in disclosing what he said he heard and saw on the night of the incident or the case of the appellant that there was no Police investigation of the place where the oath was administered on the PW5, I will quote the learned Counsel rather than para-



phrase him. He said:

*"It has been firmly established that mere saline of a witness to report to the Police a person who designs to commit an affiance or when he has seen committing unworthy of credit should he testify on behalf of the prosecution in such trial."*

He relied on *Ogulana v. The State* (supra); *Onyikoro v. R* (1959) B SCNLR 659 and *Shola v. State* (1978) 9-19 SC 81.

He submitted that the failure of the appellant to invite the Court to visit *"the locus in quo where PW5 described how Francis Obidike the 1st accused prepared the ground for Iyi Ani oath taking"* strengthened the fact that the evidence was not disputed by the appellant. In relation to what he described as graphic and vivid description of all accused persons the PW5 saw at the scene of crime, he argued that:

*"On careful analysis of the evidence of 7th and his witness PW8 one can easily say that the Court of first instance erred in law in discharging and acquitting the 7th accused person whose evidence and that of his witness did not dislodge the evidence of PW5 fixing the suspect at the scene of crime. The learned trial Court was sentimental in giving the benefit of doubt to the 7th accused person..."*

Learned Counsel stated that:

*"...it is pertinent to state that it is the law where two or more accused persons are charged with the same offence and the same evidence is rendered in proof of the charge. It does not automatically follow that the acquittal of one of them lead to acquittal of others. If there is error in acquitting one of them the appellate Court is not expected to partake in the error as two wrongs do not make a right. See the cases of Yongo v. COP (1990) 5 NWLR (Pt. 148) 603 at 624. Hence the Court of Appeal is not bound in law to discharge and acquit the appellants acting on erroneously sentiment as did by the Court of first instance to partake in their error."*

He argued, in response to the submission that there were inconsistencies in the evidence of PW5, that the alleged inconsistencies in the evidence of PW5 were not highlighted by the Appellant *"...hence render the ground incompetent."* He said that what the appellant called contradictions and inconsistencies were mere discrepancies which he said are not material. He relied on *Ejeka v. The State* (2003) 23 WRN or (2003) 4 SCNJ 161 at 168.

He urged the Court to hold that the prosecution did not only

prove that the deceased was killed by the acts of the appellant but also that the body was criminally disposed by the appellant to avoid detection. He urged the Court to dismiss the appeal as unmeritorious and *“judgment of the Court of Appeal be further affirmed.”*

My noble Lords, before I resolve the lone issue in this appeal, permit me to comment on the Respondent’s brief. With respect to learned Counsel, who is the Director of Public Prosecutions, Ministry of Justice, Anambra State, the brief appears to me a reflection of a dim bulb in the legal firmament. It speaks negatively of a man in such high office with its attendant responsibilities to the public.

Here are the facts as appeared in the Respondent’s brief. The brief was not paginated by the author. A subsequent attempt to paginate it, perhaps in the Registry of the Court, led to mutilations and absurdity of page 76, followed by 72, 87. The case cited as Sunday Effiong State (1998) WWLR (Pt. 515) 362 ratio 1 does not exist nor does the citation 5 WWLR, etc.

Learned Counsel devoted a paragraph of his brief to reply to an issue not raised in the appellant’s brief. The appellant did not refer to, or make an issue of, any relationship between the deceased and the PW5. The issue was raised and resolved in an earlier appeal. In a paragraph that appears to have been composed when he was in the lowest altitude of mind, learned Counsel stated, *inter alia*:

*“...It has been firmly established that more saline of a witness to report to the Police a person who designs to commit an affiance or when he has seen committing unworthy of credit should he testify on behalf of the prosecution in such trial...”*

Learned Counsel for the Respondent had no business impugning the judgment of the trial Court discharging and acquitting the 7th accused as sentimental when he did not appeal against the said judgment. Learned Counsel continued, *inter alia*:

*“... Hence the Court of Appeal is not bound in law to discharge and acquit the appellants acting on erroneously sentiment as did the Court of first instance to partake in the error.”*

The argument of the alleged failure of the appellant to invite the trial Court to the locus in quo is most misconceived. Appellant does not have to prove his innocence. See Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

It is hard to accept that this brief was written or settled by a

Director of Public Prosecutions. It is harder to accept that no less a person than the Hon. Attorney-General of Anambra State adopted and relied on same at the hearing of the appeal.

Learned Counsel for the appellant deemed it fit to parade his academic profile in his brief: “B.Sc (Acctg), MBA”. In my humble view, if there is need for learned Counsel to state his qualification in his brief it should be those qualifications on the basis of which he prepared the brief and has audience in Court of law in this country. Be that as it may, I will consider relevant arguments in the brief, no matter how poorly presented, in the resolution of the lone issue in the appeal.

We were provided copies of the judgment of this Court in *Nkebisi and Anor v. State* (2010) 5 NWLR page 471. The two appellants were among those who were tried and convicted of murder along with the appellant. Their appeal to the Court of Appeal was dismissed and this Court in the judgment delivered on 5th November, 2010 dismissed their further appeal.

Ordinarily, I should follow the line of least resistance and abide by and adopt the reasoning and conclusion in the earlier appeal. The doctrine of *stare decisis* would apply. However, the main issue canvassed before the Supreme Court in the earlier appeal is different from the lone issue in this appeal. The four issues presented to the Court in the earlier appeal are hereby reproduced as stated in the judgment:

*“(a) Whether the Court of Appeal was right when, relying on the evidence of PW5, Godfrey Emengini, it affirmed the conviction of the appellants for the murder of Maduneke Enweonye. (This issue flows from Grounds 1 and 3 of the notice of appeal).”*

*“(b) Whether the Court of Appeal was right in law to have relied on the evidence of identification of PW5 who allegedly saw all the accused persons at the scene of crime to affirm the conviction of the appellants when the same evidence was relied upon to discharge and acquit the 7th co-accused person on a successful plea of alibi. (This issue is formulated from Ground 2 of the notice of appeal).”*

*“(c) Whether the learned Justices of the Court of Appeal were not in error to have held that failure of the prosecution to call the native doctor who allegedly exorcised the baneful effect of the “Iyi Ani” native oath taken by the PW5 was irrelevant. (This issue is dis-*

tilled from Ground 4 of the notice of appeal).

(d) *Whether the Court of Appeal was right to have affirmed the conviction of the appellant when the prosecution failed to discharge the evidential burden of proof placed on it by law. (This issue is formulated from Ground 5 of the notice of appeal).*”

B The said issues were adopted in the brief filed by the learned Director of Public Prosecutions, Anambra State Ministry of Justice.

Before this Court, the four issues collapsed into two issues only. At page 484 of the report, it was indicated that: “Issue 2 is virtually a repeat of Issue 1.” At page 485 the Court stated that “Issue 4 is essentially the same as Issue 1.” So Issues 1, 2 and 4 were resolved into issue 1 while Issue 3 stood by itself. Now issue 3 on the failure to call the native doctor who administered the oath on PW5 is not part of the Appellant’s case in the present appeal. Issue 1 (comprised of Issues 1, 2 and 4), in the argument proffered, questioned the reliance on the evidence of PW5.

The basis of the complaint is that the PW5 on whose evidence the trial Court convicted and the Court below affirmed the conviction of the appellant was a relative of the deceased, and his evidence should have been scrutinized with caution by both Courts below.

There were collateral issues such as whether the Court could rightly convict on the evidence of one witness, the PW5, and whether the appellants and the 7th accused who was acquitted by the trial Court had a common base for their defence. These subsidiary issues do not arise in the present appeal. The same applies to the complaint that the prosecution failed to call the native doctor who was consulted by the PW5.

At page 485 of the record in the earlier appeal, Tobi, JSC identified the main issues, thus:

*“The main issue in this appeal is whether the evidence of PW5, the blood relative of the deceased was properly accepted in evidence.”*

This was the main issue resolved in the earlier appeal to this Court.

H On the other hand, the sole issue raised and canvassed in the present appeal is the veracity and probative value of the evidence of the PW5 based on which the appellant was convicted and the conviction affirmed by the Court below.

***It follows therefore that the previous decision of this***

**Court in *Nkebisi & Anor v. The State* (supra) which was reached on issues different from the lone issue in this appeal cannot be relied on to resolve the single issue herein.**

Stare decisis translates to: abide by or adhere to decided cases. It literally means to stand by what has been decided and not to disturb and unsettle things which have been established. See *Adesokan v. Adetunji* (1994) 5 NWLR (Pt. 346) 540 at 577-578 SC. B

A decided case furnishes a basis for determining later cases involving similar facts or issues. A precedent is an authority only for what it actually decided and not what may remotely follow thencefrom. See *Goodyear India Ltd v. State of Haryana* (1990) 26 STC 71 SC. **The earlier appeal in *Nkebisi & Anor v. State* (2010) 5 NWLR settled the issue of the evidence of a witness who is related to the victim of the crime. The issue in this appeal is whether or not the evidence of PW5 can rightly be relied on to convict the appellant, quite a different issue from a relationship of a witness to the victim. I will therefore resolve the lone issue on the merit.** C  
D

The evidence-in-chief and in cross-examination of the PW5 run from page 93 to page 101 of the record. I will reproduce as much of it as I consider relevant to the determination of the lone issue in this appeal. PW5 stated inter alia: E

*“When I reached at Iyinsuwa, which is at Ikpi fishing pond, as I was fishing I heard a loud noise saying ‘Anaku doo, Isiokwe doo’. I listened carefully and the noise was coming from Ikpi. I stopped fishing and listened attentively. It was the voice of Muneke Enweonye. I decided to go to Ikpi to find out the reason for the shout. As I was going the ground was muddy and difficult to walk upon. The loud noise was lessening. As I was approaching the Ikpi I heard some murmuring. I listened attentively and it was the voice of our Anuku people. When I got near I flashed my torch light and see Francis Obidike..., Chidozie Aneka.... When I flashed the torch light I saw Francis Obidike holding a single barreled gun, Jideofor Anyagbo was holding a machete, Onwughalu Ikenwa was holding a single barreled gun, Obiora Chukwuemeka was holding a rod. Others were holding some heavy sticks. When I flashed the torch light Oguejiofor Ilodigwe asked who was flashing the torch light. I did not reply at first and he asked again, then I replied that I was the one Godfrey Emengini. He* F  
G  
H

asked me what I came here to do. I told him I came to know why Muneke Enweonye was shouting. Oguejiofor Ilodigwe asked Jideofor Anyagbo and Chidozie Anekwe and Ezekonam Ntebisi to catch me and kill me. I ask them why they want to kill me. They told me that I heard the voice of Muneke and that if they leave me to go home I will tell our people what happened. Francis Obidike told them not to kill me. He called me and asked me to swear “Iyi Ani” for them promising that I should not tell our people what happened otherwise they will kill me. As I was afraid that they will kill me I agreed to swear the Iyi Ani. Francis Obidike then got a machete and made a mark on the ground in form of a coffin. He put a machete at the head and at the front of the coffin. He dug out the ground in the shape of the coffin. He filled the dug up ground with water. He got some leaves and then put the tied leaves in the dug up ground. That is what he call Iyi Ani... He said that if I tell anybody that they killed Muneke the ground will kill me if I did not tell anyone I shall live... I did the swearing as he prescribed. I then asked Francis Obidike where is Muneke whose voice I heard before coming. He told me to look at Muneke. I flashed the torch light and saw Muneke lying on his back facing upwards with his hands spread out. Muneke’s mouth was open. Blood was gushing out from Muneke’s mouth, his nose and ears meaning that he had died... When I fell sick, very sick I nearly died. I went to a native doctor to find out why I was sick. I now say it was Onyejelu Uyaonwu who I asked to call the native doctor for me. The name of the native doctor is Okoko Uyaonwu... The native doctor told me that the cause of my sickness was that I failed to reveal the names of people who killed someone. He said that unless I reveal them I would die... I did as the directed by the native doctor. As I was getting better I went and told my brother Ajana Ofodile what I knew of the death of Muneke. He then reported to our kindred and then reported to the Police at Awka. When he came back from Oka he told me that the police invited me to come to Awka and make a statement...”

Cross-examined by learned Counsel for the accused persons,  
H PW5 answered, inter alia:

That what he described took place on 8/6/94 by 9 pm, that the distance from where he was fishing to where he found the accused persons is “like from this Court to Aguleri junction” which according to the Court, “is about 1 1/2 kilometres at the most. It took

you 45 minutes to get there”, to which he replied “Yes, the place is muddy and swampy”. He answered that when he was ordered to stop he did so, he did not go to them but they came to him. He did not know that the accused persons were charged to Court on 9/8/94 but he knew he made his statement to the Police on 30/8/94 for the event of 8/6/94. His statement to the Police was offered and received in evidence and marked Exh. E. In the said statement he said, with reference to the oath he said he took: “After this I was allowed to be there while they continued with what they were doing. I asked them who was raising the alarm, they told me it was Muneke Enweonye who was being stubborn with them... I was shown where he was lying down there on the ground.”

The trial Court relied “very heavily” on the testimony of PW5 reproduced above, and the lower Court endorsed such reliance, to hold that the prosecution proved its case against the appellant beyond reasonable doubt.

It should be noted that the deceased is variously referred to as Muneke Enweonye, Muneke Enwoye and Maduneke Enweonye.

The sworn testimony of the PW5 tallied, substantially, with his written statement as contained in Exhibit E. The trial Court had accepted and treated the testimony of PW5 as an eye-witness account of the incident giving rise to this case. In its judgment, the Court below found that:

*“The learned trial Judge believed and accepted the evidence of PW5 and relied very heavily on it in coming to his decision.”*

***In criminal cases, the burden of proof is on the prosecution and the degree of proof is beyond reasonable doubt. See Section 135 of the Evidence Act 2011.*** State v. Okechukwu (1994) 9 NWLR (Pt. 368) 273. ***Proof beyond reasonable doubt is not a function of the number of witnesses called by the prosecution.*** See Nkebisi v. State (2010) 42 NSCQR (Pt. 2) 1173 at 1196; Adelumola v. The State (1988) 3 SCNJ (Pt. 1) 68; Akalezi v. The State (1993) 2 NWLR (Pt. 273) 1 at 13.

What then is the meaning or import of proof beyond reasonable doubt? To answer the poser I will seek guidance in the dictum of Lord Denning in the English case of Miller v. Minister of pensions (1947) 2 All ER p.372 cited with approval in Nkebisi v. State (2010) 5 NWLR 421.

The Law Lord said of proof beyond reasonable doubt:

*“Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, but nothing short of that will suffice.”*

Speaking on the same subject, Lord Cowper said:

*“The wisdom and goodness of our law appear in nothing more remarkable than in the perspicuity, certainty and clearness of the evidence it requires to fix a crime upon any man whereby his life, his liberty or his property may be concerned: herein we glory and pride ourselves and are justly the envy of all our neighbour nations. Our law, in such cases, requires evidence so dear and convincing that every bystander the instant he hears it must be fully satisfied of the truth of it; it admits of no surmises, innuendos, forced consequences or harsh construction, nor anything else to be offered in evidence but what is real and substantial according to the rules of natural justice and equity.”* See 8 New Parl. Hist. 338; Proceedings against Bishop Attenbury (1723).

Does the appellant’s issue on the evidence of PW5 fall within Lord Denning *“fanciful possibilities to deflect the course of justice”*? Is the evidence of PW5 up to what the law requires, in the words of Lord Cowper *“to fix a crime upon any man whereby his life, his liberty or his property may be concerned”*?

To answer the questions above, I will start with the assumption of the trial Court, in the judgment affirmed by the Court below, that the PW5 is an eye-witness to the murder with which the appellant was charged. The trial Court said:

*“In Court PW5 testified that he was an eye-witness of the crime and described how he heard the shouting of the victim, Madueke Enweonye, and took same 45 minutes (his estimation) to get to the scene at night, a distance of about one and half kilometres (his estimation).”*

With due respect, this is a flawed interpretation of the testimony of PW5 and the Court below erred in affirming the judgment of the trial Court in this respect. PW5 said he was ordered to stop and



he did stop when he was approaching the people he identified as the accused persons before the trial Court.

In cross-examination, he was asked:

*“Q: You told the Police that you swore for the accused persons to keep everything secret before they took you to see Madueke?”*

*A: Yes I swore before they showed me where Madueke was.”* B

And according to the witnesses, Madueke was already dead at the time and place he saw his body. He is certainly not an eye-witness to the murder of the deceased. If he was an eye-witness to the murder he would have been able to say who, among those on trial, did what to the deceased in the process of the commission of the crime. There was no count of or conviction for conspiracy and so what one of the co-accused persons did or said, if any, cannot be given in evidence against the appellant. See *The State v. Aworgu & Ors* 4 ECSLR 246 at 247, 250. C

In his evidence in Court which came much later than the statement he made some three months after the incident, PW5 claimed that he recognized the voice of the deceased. In his statement, Exhibit E, he stated, inter alia: *“After listening for some time I recognize the voice as that of Muneke Enweonye.”* In the same statement he claimed: *“I asked them who was raising the alarm...”* D

He would not have asked that question if he had recognized the voice as that of the deceased. In any case, the distance from where he was fishing when he heard the voiced to the spot where he said he was stopped by the appellant and others is the same distance from the High Court premises, Otuocha to Aguleri junction, a distance estimated at 11/2 kilometres. E

Even if it is possible for someone at Otuocha High Court to hear the shout of someone at Aguleri junction, it is certainly not probable for him to identify the person whose shout he heard, given the fact, as is evident from the testimony of the PW5, that it is an anguished cry of one on the throes of imminent death. There was no evidence that PW5 had knowledge of voice identification or voice print. He did not even translate the words “doo doo” which he claimed to have heard. F

PW5 knew at all material times that what he claimed he saw was a heinous crime of murder. If the oath of secrecy he claimed was administered on him accounted for not reporting to the police, when G

H

he was released from the effect of the oath he would have gone to the Police with his story. When he recovered from his illness, he did not go to the Police but disclosed what he said he knew to a relative who reported to the Police. PW5 went to the police only when he was invited.

B In my view, this story appears more or less contrived to bolster the prosecution's case. Its veracity and credibility raise serious doubt which should have been resolved in favour of the appellant.

C In relation to the blood stain and foot-prints at the scene of the crime, a pit dug out of the earth in the form of a coffin is a permanent feature. If the pit was filled up after the admission of the oath (and there is no evidence to that effect), it would still have been discovered by the search party or the Police.

In his testimony, the PW8, ASP Paul Ebodile, swore that:

D *"I also saw foot-print which was peculiar. We wanted to lift the foot-print so as to compare it with those of the accused, but the nature of the soil could not allow that to be done."*

E The foot print, if lifted, could have settled the question of whether or not the appellant was at the scene. Even in the mind of the Police the doubt was not cleared since the print could not be lifted.

F The nature of the soil notwithstanding, the foot-print was distinct enough for the witness to classify it as peculiar. A pit dug out in the form of a coffin would have advertised its presence a distance from its location. If the pit was there it would have been seen by the Police even months after it was dug. If there was no pit, then there was no oath taking and the statement made by the PW5 at the invitation of the Police some three months after the incident described G therein is a script prepared for the PW5 or by him, as an afterthought.

PW5's testimony in Court and his statement, Exhibit E, lack the probative value assigned to them by the trial Court in the judgment affirmed by the Court below.

H If the appellant and his co-accused persons killed the deceased as claimed by the PW5 and believed by the trial Court in its judgment which was affirmed by the Court below, they would have disposed of the body before the PW5 came to the scene 45 minutes later, realizing that having killed fellow human being their lives were at stake. Instinct of self-preservation would have prompted them to flee the

scene of crime.

From the evidence which the trial Court accepted, the PW5 flashed his light when he approached, and was stopped by the accused persons. How then did he travel 11/2 kilometres in a treacherous terrain without light at 9 pm? It cannot be assumed that he used his light prior to the time and place he was stopped by the accused persons. B

The story told by the PW5 is far below the status of eye-witness account to which the two Courts below elevated it. It is an affront to intelligence, reason and logic. He claimed he flashed his torch light on approaching the accused persons and in that moment he not only saw the seven accused persons but also identified each by name and the weapon he wielded at that time. C

Were the seven men together on one spot with their weapons displayed for easy identification? For how long did he keep his light on at them? Did he flash the light in other directions? Answers to these questions are relevant to the determination of the veracity vel non of the PW5's evidence, but they were not provided by the prosecution who has the onus of proof reasonable doubt. D

Among the seven accused persons the PW5 swore that he saw and identified by name and their weapon was the 7th accused person whose plea of alibi was verified by PW7 and accepted by the trial Court. E

The prosecution did not appeal the order of discharge and acquittal of the 7th accused. The finding of fact made by the trial Court that the 7th accused person could not have been at the scene of crime at the material time is deemed to settle the issue as between the parties herein. See *Zaccheus Abiodun Koya v. UBA Ltd* (1997) 1 NWLR (Pt. 481) 251 ratio 2. F

The 7th accused person was not at the scene as claimed by the PW5. He was somewhere else. Either the 7th accused appeared to the PW5 as a ghost or, more likely, the PW5 was seeing double. May he see who he wanted to see. G

The story told by the PW5 as far as it related to the appellant is a product of a fertile imagination of one who reads murder fictions of the likes of Agatha Christie. It lacks the persuasive authority to determine the guilt of the appellant. H

***I am not unaware that this appeal is against a concur-***

**rent finding of fact of the two Courts below. However, the finding that the story of the PW5 is an eye-witness account of the alleged murder of Maduneke Enweonye or that the story establishes that the appellant murdered the deceased is perverse.**

**The finding is not based on credible evidence. This Court has a right and indeed a duty to interfere.** See *Ibodo v. Enarofia* (1990) 5-7 SC 42; *Chikwendu v. Mbamali* (1980) 3-4 SC 31; *Okafor v. Idigo* (1984) SCNLR 481.

Anyone of the issues herein discussed is sufficient to create serious doubt, as distinct from shadow of doubt in the evidence of PW5 on which the Court relied very heavily to convict the appellant. Their cumulative effect drags the entirety of the evidence of PW5 far below *"the perspicuity, certainty and clearness to fix a crime upon any man where his life, his liberty or his property may be concerned..."* Evidence is the medium of proof and proof is the effect of evidence. I am not unmindful of the principle that:

*"...proof does not mean proof to rigid mathematical demonstration because that is impossible that it must mean such evidence as will induce a reasonable man to come to a particular conclusion."* Per Fletcher Moutton, L.J. in *Hawkins v. Powells Tillery Sloam Council Co. Ltd* (1911) 1 KB 988.

**While the prosecution who has the burden of proof and the duty to attain a proof beyond reasonable doubt does not have to prove its case to the point of mathematical certainty, the evidence, to support a conviction, must not create room for speculation. The evidence of PW5, very heavily relied on to convict the appellant does not come near proof beyond reasonable doubt that the appellant murdered the deceased. Had the issue been agitated before the lower Court, the appellant would have been acquitted and discharged.**

**To ground a conviction for murder, the persecution must prove: (1) the death of the deceased; (2) the act or omission which caused the death, and (3) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.** See *Ogba v. State* (1992) 2 NWLR (Pt. 222) 164; *Nweze v. State* (1996) 2 NWLR (Pt. 428) 1; *Fred Dupere Gira v. State* (1996) 4 NWLR (Pt. 443) 375 at 382.

***The three conditions must co-exist and where one is absent or tainted with doubt, the case is not proved.*** See Edwin Ogba v. State (1992) 2 NWLR (Pt. 222) 164 at 168, C-D; Obudo v. State (1991) 6 NWLR (Pt. 198) 435 at 456. See also Felix Nwosu v. State (1986) 4 NWLR (Pt. 348) 359 where it was held that:

*“A judgment sending a man to the gallows must be seen to be the product of logical thinking based upon admissible evidence which the facts lead to conviction as clearly found and the legal deduction thereupon carefully made. It must not be allowed to stand if it is founded upon scraggy reasoning or perfunctory... It is so in all cases and more so in capital offences.”* Per Eso, JSC.

***Even if it is accepted, on the evidence before the trial Court, that Madunke Enweonye died, there is no evidence of the specific act or omission which caused his death. Assuming, for the purpose of argument, that there is evidence of such act or omission, it was not proved to be that of the appellant. There is no evidence in the entire trial, with particular reference to the evidence of the so-called eye-witnesses, PW5, that any act or omission of the appellant resulted in the death of the deceased.***

In conclusion, I find merit in the appeal which is hereby allowed. I hereby set aside the judgment of the Court below affirming the judgment of the trial Court and in its place I enter a verdict of not guilty. I acquit and discharge the appellant. Appeal allowed. Appellant acquitted and discharged.

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### **MUHAMMAD JSC**

I read the judgment of my learned brother, Ngwuta, JSC. I am in agreement with him that the appeal has merit and it should be allowed. I allow the appeal and abide by all consequential orders made in the leading judgment.

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### **MUNTAKA-COOMASSIE JSC**

The Appellant and six others were arraigned on one count charge of murder contrary to section 274 (1) of the criminal code cap 36. vol. 1 Laws of Anambra State of Nigeria, 1986. All the ac-

cused persons pleaded not guilty to the amended one count charge including the Appellant herein.

The prosecutor called eleven (11) witnesses. Defence filed a no-case submission which was overruled by the learned trial Judge.

B The trial court upheld the plea of alibi raised by the 7th accused which was verified by the evidence of DW8. He was ultimately discharged and acquitted. The rest six (7) accused persons were each convicted and sentenced to death. These accused persons including the present appellant unsuccessfully appealed to the Court of Appeal, Enugu Division which court affirmed the judgment of the trial court. The Appellant alone appealed to the Supreme Court on a notice of appeal containing four (4) grounds of appeal. I reproduce the grounds of appeal without their respective particulars, thus:-

D 1. The learned Justices of the Court of Appeal erred in law when they affirmed the conviction of the appellant for the murder of Maduneke Enweonye, when the prosecution did not prove the case beyond reasonable doubt as required by Section 138 (1) of the Evidence Act.

E 2. The learned Justices of the Court of Appeal misdirected themselves in law when they overwhelmingly relied on the testimony of PW5, Godfrey Emengini, to confirm the conviction of the appellant.

F 3. The court of Appeal erred in law when it relied on the evidence of PW5, which evidence was negated and discredited by the successful plea of alibi by the 7th accused to affirm the conviction of the appellant.

G 4. The learned Justices of the Court of Appeal at page 15 of their judgment misdirected themselves in law when they held thus:-  
“that leads me to the conclusion that the delay by the PW5 to make a statement to the police after the commission of the crime was duly explained and the excuse being on health ground which the defence did not contradict it is justifiable and neutralizes the imputation of fabrication of evidence by the defence”.

H The Appellant formulated one single issue for the determination of this appeal before us. It is hereby stated:-

“Whether the lower court was right in affirming the conviction and sentence of the Appellant for murder on the basis of the evidence of PW5”.

The respondent declined to specifically formulate any issue or issues of its own but rather adopts the issue raised by the Appellant as its own issue.

I am privileged to have read before now the judgment rendered by my learned brother Ngwuta, JSC. I entirely agree and adopt the clear reasons and conclusions reached by his lordship. The appeal is clearly pregnant with a lot of merit. I too allow the appeal. I abide by the consequential orders made by his lordship, Ngwuta, JSC. The judgment of the court below is set aside. The judgment of the trial court was sound and it is hereby affirmed. The appellant herein is discharged and acquitted forthwith.

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**ARIWOOLA JSC**

My learned brother, Ngwuta, JSC obliged me with a draft of the judgment just delivered. I agree entirely with the reasoning therein and the conclusion arrived thereat.

However, I shall chip in a few words in support of the lead judgment which beautifully dealt with the sole issue raised in the instant appeal to clearly distinguish it from the sister appeal of other co-convicts already decided by this court - See *Nkebisi & Anor v. The State* (2010) 3 SCM 170 where the appeal was dismissed. The issues that were raised and considered by this court in the other appeal are clearly different from the sole issue in the instant appeal.

I am not in the slightest doubt that the trial court wrongly relied on the unreliable testimony of PW5 who claimed to be an eye-witness to the commission of the crime alleged against the appellant and others. The court below ought to have allowed the appeal by holding that the case was not proved beyond reasonable doubt against the appellant hence the verdict of the trial court ought to have been not guilty and be discharged and acquitted.

Generally and there is no doubt that it is not the function of an appellate court to disturb the findings of fact of the trial court, the exception being when such findings are shown to be unreasonable or perverse and not a result of a proper exercise of judicial discretion. *Ntiaro v. Akpan* 3 NLR 9 at 10. Where the appellate court is in doubt as to whether the trial court was right or wrong, it is bound to resolve such doubt in favour of the trial court. It should be noted that, the

onus is on the appellant to satisfy the appellate court that the decision appealed against was wrongly decided. Where doubt exists, then the onus has not been discharged. See; *Macaulay v. Tukur* 1 NLR 36. *Akinloye & Anor v. Eyiola & Ors.* (1968) NMLR 92 at 98. *Obisanya v. Nwoke* (1974) 6 SC 69 at 80. *Obodo & Anor v. Ogba & Ors.* B (1987) 2 NWLR (Pt. 54) 1, (1987) 3 SC 459. *Jimoh Michael v. The State* (2008) 13 NWLR (Pt. 1104) 361; (2008) 34 NSCQR (Pt. 11) 700.

Therefore, where it is shown by the appellant to the satisfaction of the appellate court that the decision appealed is obviously C perverse or that there is miscarriage of justice or violation of some principles of law or procedure by the courts, this court will surely interfere with the concurring findings of facts of the courts. This instant is an example of a case where this court ought to and should D interfere in the findings of facts by the two courts below. The testimony of PW5 which was relied on to convict the appellant leaves much to be desired. For instance, the witness claimed and was treated, erroneously, as an eye witness to the alleged murder. Yet he stated that from a distance of one and a half (11/2) kilometres away where E he was fishing to the place where the alleged murder took place, he heard the shout of the deceased. The time was 9 p.m. and it took him up to 45 minutes after he heard the shout to get to the scene. On arrival at close by; he was stopped after he pointed his torch light F at the appellant and others. He also claimed to have seen what weapon each of the accused persons was holding. From his testimony, the act of murder had been carried out before he got to the scene and he did not see the deceased until he was shown already dead. The testimony of PW5 appears so incredible and impossible to G believe hence the trial court ought to have held that the prosecution failed to prove the case beyond reasonable doubt. In other words, the court below ought not to have affirmed the decision of the trial court against the appellant.

From the above and the fuller reasoning of my learned brother H in the leading judgment, I hold that this appeal is meritorious and should be allowed. I also allow the appeal. The court below erroneously affirmed the decision of the trial court.  
I abide by the consequential orders in the lead judgment.



**OGUNBIYI JSC**

I had the privilege of reading in draft the judgment of my learned brother Ngwuta, JSC. I agree with same that the appeal has merit and should be allowed.

Briefly, the appellant and 6 (six) others were charged with murder and convicted by the trial High Court. The Court of Appeal also affirmed the conviction and sentence.

At the trial court, several witnesses, including 'PW1' the deceased's elder brother were called. The evidence of 'PW5' who was also a relation was the only eye witness to the incident. It was the testimony of 'PW5' that he heard the deceased shouted one and half kilometers away from the scene of crime and that he did identify the shout coming from the deceased. It also took the witness 'PW5' a span of 45 minutes to arrive at the scene. The event also occurred at 9.00 p.m.

The trial High Court convicted and sentenced the appellant and others on the foregoing evidence of 'PW5' and same was affirmed by the Court of Appeal, hence the appeal before us.

The only issue raised before this court is whether the lower court was right in affirming the conviction and sentence of the appellant for murder on the basis of the evidence of 'PW5'.

On the totality of the evidence by 'PW5', it was expected of the trial judge to have exercised great caution before relying thereon as the only reason for the conviction of the accused. This is especially where the scene of crime was a distance of at least 45 minutes walk from where the witness heard the deceased. The fact that the incident happened in the night was also relevant for purpose of clear identity. Furthermore, it is shown on record that the evidence by the witness was delayed for a period of almost three months, the attempted explanation for the delay notwithstanding. The cumulative effect of the foregoing in my view ought to have sounded a warning that a conviction of the appellant was not very safe in the circumstance.

I seek to add further that the inability of the defence in adducing evidence to contradict that of the prosecution did not in law exonerate the prosecution from the onus placed on it to prove the accused guilty beyond reasonable doubt. The law under our Constitution presumes the accused innocent until he is proved guilty.

I am also mindful of the fact that the appeal before us is against concurrent findings of the two lower courts. The case at hand I hold falls within the exception permitted by law that this court can interfere with the decisions of the two lower courts. See the case of Onyejekwe v. The State (1992) 3 NWLR (Pt. 230) 444, also the case of Posu v. The State (2011) All FWLR (Pt. 565) 234. However, the interference herein is, notwithstanding the earlier decision of this court in the case of Nkebisi and Anor v. State (referred to in the lead judgment) wherein the issues canvassed in that case are different from the one in the case at hand. Those issues are not placed before us. The only issue now in question relates to the credibility of the evidence of ‘PW5’, as the sole witness upon which the appellant was convicted. The consideration of ‘PW5’ as a witness was not a matter in the earlier appeal under reference. My learned brother had adequately distinguished the two cases in his lead judgment and I do not want to over flog the horse.

On the totality of this appeal, I also subscribe to the judgment of my learned brother Ngwuta, JSC that it is meritorious and is hereby allowed in the same terms of the orders made therein.

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