

SUPREME COURT OF NIGERIA
FRIDAY 13TH JUNE, 2014. SC. SC.199/2011
CORAM:- M. MOHAMMED, J. A. FABIYI,
M. U. PETER-ODILI, M. D. MUHAMMAD,
K. M. O. KEKERE-EKUN, JJSC

OLUSOLA ADEYEMI APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Issues - Proliferation of - Effect - Issues so formulated come to naught - Since in determination of appeal - Arguments are based on issues - And not on grounds (H1)

APPEALS - Respondent's briefs - Failure to file - Does not tantamount to automatic allowing of appeal - Especially where the mistake of counsel is glaringly evident (H2)

CRIMINAL PROCEDURE - Guilty plea - Finding - Court makes finding of guilty for accused - Who has pleaded guilty in which no evidence is led - And in which there is no address by counsel (H3)

JUDGMENTS - Error in - Effect - It is not every mistake that results in appeal being allowed - As the slip must be substantial and occasion miscarriage of justice (H4)

WORDS & PHRASES - Miscarriage of justice - Meaning of - It is a departure from the rules - Which permeate all the judicial procedure - As to make it not a judicial procedure at all (H5)

APPEALS - Evidence - Wrongful admission - Judgment would not be reversed - On account of trial court accepting inadmissible evidence - When that evidence did not occasion miscarriage of justice (H6)

EVIDENCE - Testimony of a minor - Accused having been properly identified - Issue of admission of statement of the minor - Did not lead to miscarriage of justice (H7)

CRIMINAL PROCEDURE - Conviction - Confession - A positive voluntary and unequivocal statement - Is an admission of guilt - And can solely sustain a finding of guilt - Without corroboration (H8)

CRIMINAL PROCEDURE - Appeals - Concurrent findings - That appellant's statement was voluntarily made - Cannot be disturbed in spite of his allegation of denial of fair hearing - Which has been demolished (H9)

FACTS

Before the High Court of Kogi State, accused/appellant was arraigned on a two count charge of conspiracy and armed robbery punishable under sections 97(1) and 298(c) of the Penal Code. Appellant pleaded not guilty to the charges. The case against appellant is that he and others (at large) while armed with guns, stormed the house of PW1 in Lokoja on an armed robbery mission. They held PW1 and family hostage for a long time during which the sum of N5,000.00, PW2's jewelries and other valuable items were stolen from PW1's house. The thieves equally made away with PW1's Honda Car that was parked in the compound at the material time. The robbery incident was thereafter initially reported to the 'A' Division Police Station and subsequently to the State Police Headquarters. Two months later, PW1 was informed by the Criminal Investigation Department of the Police that some thieves had been caught in Abuja and brought to Lokoja upon which PW1 and PW2 were asked to come and identify them. Appellant was identified as one of the armed robbers.

In his confessional statement to the Police, appellant admitted being among the armed robbers that attacked the house of PWs 1 and 2. With the aid of appellant's confession, the Honda car was later recovered. Appellant was therefore charged before the court. Appellant objected to the admissibility of his confessional statement on the ground that the same was not voluntarily made. After a trial within trial, the confession was admitted in evidence as exhibit P2. At the trial proper, prosecution/respondent called four witnesses and tendered exhibits in support. Appellant testified in his defence and called no witness. He denied committing the crime and ever coming

to Lokoja on the fateful day. In its judgment, the court found appellant guilty as charged. He was convicted for conspiracy and armed robbery and sentenced to three years imprisonment on the first count and five years imprisonment on the second count with the sentences to run concurrently. Appellant was dissatisfied. His appeal to the Court of Appeal Abuja Division was dismissed and the High Court's judgment affirmed. Appellant subsequently has appealed to Supreme Court.

ISSUES FOR DETERMINATION

(1) Whether the learned Justices of the Court of Appeal did not err in law when they dismissed the Appellant's appeal, held that the reliance and utilization by the learned trial Court of the evidence of the Prosecution's first and second witnesses (PW1 and PW2 daughter, an individual being a person) who did not give evidence in the matter at all to convict the Appellant and sentence him to three and five years prison terms is one that bothers on typographical error, or mere observation or at most amount to a wrongful admission of evidence by the trial Court under Section 227 of the Evidence Act that did not influence the decision of the trial Court.

(2) Whether the learned Justices of the Court of Appeal did not err when rather than address properly and fully the breach of the Appellant's fundamental right to fair hearing and consequences of the breach being a relevant issue for determination consigned the relevant issue to one of shadow and held that the Appellant's case is a bad one that cannot be saved even where there is breach of the principle of fair hearing?

(4) Whether the learned Justices of the Court of Appeal did not err and occasioned a miscarriage of justice when in spite of the facts and circumstances surrounding the trial Court's foreclosure that an identification parade was not necessary considering that the Appellant was not arrested at the scene of the crime relied on the confessional statement as sufficient to make an identification parade not necessary?

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

APPEALS - Issues - Proliferation of

1. The judicial authorities of this Court on the matter of proliferation of issues have pointed to the fact that when such an occurrence presents it produces no room for maneuver as the issues so formulated come to naught. The damning situation is anchored on the fact that in the determination of an appeal, the arguments are based on issues and not on the grounds of appeal. Fortunately in this instance as I said earlier, the other issues 1, 2, and 3 are valid leaving only issue 4 dead and unusable as the abnormality is incurable. (p. 2286 C)

APPEALS - Respondent's briefs - Failure to file

2. The learned counsel for the Appellant canvassed that this Court accept that the issues and arguments of the Respondent having failed to survive, the Respondent not having a Brief should be taken to have accepted the arguments and position of the appellant. He had urged the application of *Nwankwo v. Yar'Adua* (2010) 12 NWLR (Pt. 1209) 543

My reaction to what the Appellant posits is to say, not so fast. It cannot be what *Nwankwo v. Yar'Adua* (supra) authorizes nor can the dictum above quoted be so interpreted as accepting the view put forward by the appellant as it would be taking technicality way too far and outside the policy stance of the Courts effectively stamped by the Supreme Court.

What I see as recourse in a scenario presented where a Respondent's Brief has failed is the Court utilizing the arguments of the appellant and stepping in a path finding manner as to whether the accused/appellant can get off from what is on record and if taking what the two Courts below have done, the appeal should be allowed or dismissed. What I am labouring to put across is that, it is not tantamount to the automatic allowing of the appeal once the issues and arguments of the Respondent failed in compliance with the Rules especially where the mistake of counsel is glaringly evident. Just as an individual should not suffer for mistake or inadvertence of counsel, the state as in the case in hand should not have its criminal administration easily scuttled due to the obvious lack of drafting expertise of counsel. Therefore, the issues and argu-

ments of the Respondent being alive and well in spite of Issue 4 and arguments of Issues 1, 2, and 3 would be considered alongside those of the Appellant. (pp. 2286 F/ 2287 C)

CRIMINAL PROCEDURE - Guilty plea - Finding

3. There cannot be memory loss by the Court in that in our criminal justice administration, the court still makes a finding of guilty for an accused person who has pleaded guilty in which no evidence is led and in which there is no address by a legal practitioner. (p. 2287 A)

JUDGMENTS - Error in - Effect

4. The law has been over-flogged that it is not every mistake, slip or error in a judgment that will result in an appeal being allowed since it is only where the error is substantial that it can be seen that it has occasioned a miscarriage of justice which makes it mandatory for the Appellate Court to interfere and have the judgment upset.

The views expressed by the Court of Appeal have settled any nagging questions that may be hanging out and I see no reason to interfere with such a sound reasoning. This is so because a mere irregularity which is really what that slip by the trial judge was when he referred to what the daughter had said when there was nothing on which such a statement can be said to exist, then it falls into a minor human slip or error which would not vitiate the proceedings but rather an error that the Court of Appeal could and did in this case correct. (pp. 2290 A/2292 D)

WORDS & PHRASES - Miscarriage of justice - Meaning of

5. Black's Law Dictionary 8 edition at page 1019 defines miscarriage of justice thus:-

"A grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of crime."

This Court has described what amounts to a miscarriage of justice to be:

"A departure from the rules which permeate all judicial

procedure as to make that which happened not in the proper sense of the word judicial procedure at all.” (p. 2290 C)

Evidence - Wrongful admission

6. Other judicial authorities had towed the same line that wrongful admission of evidence or wrongful exclusion will not result in the reversal of a decision if it did not affect the decision of the trial Court such that it would have been different if the error had not been committed. Also a decision of a Lower Court would not be reversed on account of a trial court accepting inadmissible evidence when that evidence did not occasion any miscarriage of justice or affect the decision of the court in any way. (p. 2290 E)

EVIDENCE - Testimony of a minor

7. All that was not disputed is that those present in the house at the time of incident apart from the robbers were PW1, PW2 and their daughter. The trial Court satisfied there was nothing doubtful of the identity of the perpetrators of the crime held thus:-

“Having regard to the totality of the evidence adduced in respect of the identification of the accused, I hold that the accused was properly identified. The encounter of PW1 and PW2 with the accused provided an opportunity for the observation of the features of the accused, including the face which PW2 said she ‘looked at very well’, such that he could easily be identified two months after the incident.”

In the light of the circumstances evaluated by the trial Court, it can be seen that even if the daughter aforesaid had made a statement before the trial court and failed to testify and be cross-examined in court and what she said previously admitted by the court albeit erroneously, with the two testimonies of PW1 and PW2 firmly established, then that erroneous admission of the daughter’s statement would have no adverse effect on the consideration of the case flowing into the conviction and sentence as no miscarriage of justice was occasioned. The Court of Appeal was therefore right when it held as follows:-

“In this appeal under consideration, it has not been shown that if the evidence of the First and Second Prosecution witnesses’ daughter was not admitted that the decision of the learned trial judge would have been otherwise i.e. he would not have been convicted. Apart from that, there was a confessional statement made by the Appellant.” (p. 2291 D) B

Conviction - Confession

8. It is to be reiterated that a confessional statement is really the best evidence or the strongest against an accused in the determination of his guilt. Therefore, when such a statement has been proved to have been made voluntarily and it is direct, positive and unequivocal, then it is an admission of guilt and can even stand alone to sustain a finding of guilt that is without corroboration. (p. 2293 A) C
D

Appeals - Concurrent findings

9. In the light of the finding of the learned trial judge and upheld by the Court of Appeal that the confessional statement was made voluntarily and in the consideration of the contents thereof, taking them as positive and unequivocal and the recovery of the stolen vehicle belonging to PW1 and PW2 which even offers corroboration apart from the evidence of the prosecution witnesses, then I see no room from which these concurrent findings of the two Courts below can be disturbed in spite of the invitation by the Appellant for this Court to interfere based on his allusion of the denial of fair hearing which has been effectively demolished. E
F

From the foregoing, I have no difficulty in concluding that this appeal lacks merit and is liable to be dismissed and I hereby dismiss the appeal. (p. 2293 E) G

NOTABLE POINTS OF INTEREST

FABIYI JSC

1. Identification parade – Meaning of

The appellant complained that an identification parade was not carried out. Identification evidence is that tending to show that the per-

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son charged with an offence is the same person who committed the alleged offence. (p. 2296 A)

2. Identification parade – When not necessary

B It is basic that an identification parade is not necessary where the victim of the crime or a witness promptly and positively identifies the criminal, as herein, where PW1 and PW2 clearly identified the appellant. (p. 2296 C)

C REPRESENTATION

A.R. Fatunde for the Appellant and with C.A. Makpu, A.U. Umoso, for the Appellant
Kemi Balogun with A.A. Abdulhameed, for the Respondent

D CASES REFERRED TO

Uzoho v. NCP (2007) 10 NWLR (pt. 1042) 327
Ika Local Government Area v. Mba (2007) 12 NWLR (pt. 1049) 782
State v. Ozuzu (2009) 3 NWLR (pt. 1128) 253
Alamieyesigha v. FRN (2006) NWLR (pt. 1004) 1
E Chief of Air Staff v. Iyen (2005) 6 NWLR (pt. 922) 496
Ojo v. Anibire (2004) 10 NWLR (pt. 882) 571
Aigbobali v. Aifuwa (2006) 21 WRN 1
Alli v. Alesinloye (2002) 6 NWLR (pt. 660) 177
Ezeoke v. Nwagbo (1988) 1 NWLR (pt. 72) 616
F Onajobi v. Olanipekun (1985) 4 SC (pt. 2) 612
Nnajofofor v. Ukonu (1986) 4 NWLR (pt. 36) 505
Omuju v. FRN (2008) 7 NWLR (pt. 1085) 30
Anyanwu v. Mbara (1992) 5 NWLR (pt. 242) 386
G Nwaeze v. State (1996) 2 NWLR (pt. 428) 1
Gira v. State (1996) 4 NWLR (pt. 443) 375

STATUTES REFERRED TO

Penal Code, ss. 97(1), 298(c)
H Evidence Act, ss. 138, 227
Constitution of the Federal Republic of Nigeria 1999, s. 36(1)

BOOK REFERRED TO

Blacks' Law Dictionary 8th Edn. p. 1019

LEAD JUDGMENT BY PETER-ODILI JSC

This is an appeal from the Judgment of the Court of Appeal, Abuja Division delivered on the 24th day of November, 2010 dismissing the appellant's appeal and upholding the sentence and conviction of the trial Court. The appellant had been tried and convicted on a two count charge of conspiracy and armed robbery and sentenced to three and five years imprisonment respectively with the sentences to run concurrently. B

The Appellant dissatisfied with the judgment of the trial court appealed to the Court of Appeal or Court below for short, which in turn dismissed the appeal and affirmed the conviction and sentence of the Court of trial. Further dissatisfied the Appellant appealed to the Supreme Court on four grounds of appeal. C

BACKGROUND FACTS:

The Appellant was arraigned and tried before Justice Alaba Omolaye-Ajileye of Kogi State High Court on a two count charge of Conspiracy and Armed Robbery punishable under Sections 97(1) and 298(c) of the Penal Code. D

The position of things put forward by the prosecution is that on or about the 16th day of June, 2007 at about 7.15 pm in the evening, the Appellant in conjunction with others at large went to Phase 1 of Lokogoma Extension, Lokoja and stormed the sitting room of one Raphael Olajide Sabo who later testified as PW1 and who at the time was eating with his wife, PW2 and their daughter in the sitting room. E F

The Appellant and the others who were armed with guns, on entering PW1's sitting room introduced themselves as assassins on a mission to kill PW1. They demanded for money and when PW1 told them he had five thousand naira (N5,000.00) in his car parked outside, they collected the car key from him and went to the car and collected the money. G

The Appellant and the others at large held PW1 and PW1's family hostage for a long time while they ransacked the whole house searching for money. Appellant took PW2 to her room, demanded for and took her jewelries, handsets and money. Also the appellant and his colleagues made away with the Honda car along with five thousand naira in the car, First Bank Current and Savings Account H

Passbook, a pair of glasses, jewelries, handsets, some cassettes, personal and National Identity Cards belonging to PW1 and PW2.

After the robbery operation, PW1 and PW2 went to 'A' Division Police Station to report the incident and they were referred to the Police Headquarters where they made a report. Two months later, B PW1 was informed by the Criminal Investigation Department (C.I.D) that some thieves had been caught in Abuja and brought to Lokoja upon which PW1 and PW2 were asked to come and identify them.

The Honda Halla Car was later recovered at Suleja by the C Police with the aid of a confessional statement furnished by the Appellant. The car was released to the PW1 who entered into a bond to produce the vehicle whenever required which bond was tendered and admitted as Exhibit P1. ASP Obochi Christopher gave evidence as PW3 and he had led a team of detectives upon information that D some suspects were arrested in Abuja and after investigation, two suspects including the Appellant who were found to be connected with the robbery incident in Lokoja were released to PW3 and his team for further investigations. Appellant confessed that he was one of those who came to the house of PW1 and PW2 to rob them. E When the confessional statement was sought to be tendered by the prosecution at the trial, the defence raised an objection as to its admissibility on the ground that it was not voluntary and after trial-within-trial, it was admitted as Exhibit P2.

F At the trial, the Appellant pleaded not guilty to the charge and the prosecution called four witnesses, PW1, PW2, PW3 and PW4 and tendered two exhibits, Exhibits P1, the bond entered into by PW1 to produce the Honda Halla and Exhibit P2 - the Confessional Statement of the Appellant.

G The Appellant gave evidence in his defence and called no witnesses. He denied committing the offence and ever coming to Lokoja on the 16th of June, 2007. That he was residing in Abuja as an automobile mechanic at the time of the crime and was in his house at No.35, Road 35 opposite Federal Government, Gwarinpa Estate, H Abuja on the 16th of June, 2007. The counsel on either side addressed the court at the close of evidence at the end of which the Court of trial convicted the Appellant for the offences of Conspiracy and Armed Robbery under Sections 97(1) and 298(e) of the Penal Code and the subsequent appeal to the Court below and now at this

Court.

On the 20th day of March, 2014 date of hearing, learned counsel for the Appellant, Mr. Adewunmi R. Fatunde adopted the Brief of the Appellant which he settled and filed on the 26/6/11. He equally adopted the Reply Brief filed on 10/3/14. Learned counsel for the appellant identified three issues for determination as follows:-

(1) Whether the learned Justices of the Court of Appeal did not err in law when they dismissed the Appellant's appeal, held that the reliance and utilization by the learned trial Court of the evidence of the Prosecution's first and second witnesses (PW1 and PW2 daughter, an individual being a person) who did not give evidence in the matter at all to convict the Appellant and sentence him to three and five years prison terms is one that bothers on typographical error, or mere observation or at most amount to a wrongful admission of evidence by the trial Court under Section 227 of the Evidence Act that did not influence the decision of the trial Court.

(2) Whether the learned Justices of the Court of Appeal did not err when rather than address properly and fully the breach of the Appellant's fundamental right to fair hearing and consequences of the breach being a relevant issue for determination consigned the relevant issue to one of shadow and held that the Appellant's case is a bad one that cannot be saved even where there is breach of the principle of fair hearing?

(3) And/or whether a party's constitutional right to fair hearing can be sacrificed on the altar of a Court's impression that in spite of a typographical error at the instance of a Court against the interests of a party, *"where a case is bad, it is bad, there is nothing that can change it, not even resorting to breach of fair hearing can resolve it."*

(4) Whether the learned Justices of the Court of Appeal did not err and occasioned a miscarriage of justice when in spite of the facts and circumstances surrounding the trial Court's foreclosure that an identification parade was not necessary considering that the Appellant was not arrested at the scene of the crime relied on the confessional statement as sufficient to make an identification parade not necessary?

The Brief of the Respondent which was settled by Oluwakemi Balogun was filed on 19/9/11 and deemed filed on 20/6/12. Learned counsel distilled four issues for determination which are, viz-

1. Whether the Appellate Court was right in holding that the wrongful admission of evidence tendered by the Prosecution witness' daughter who was not called as a witness, was not a sufficient reason for setting aside the decision of the trial Court, as it did not occasion a miscarriage of justice. (This issue is distilled from Ground B One of the Appellant's Notice of Appeal).

2. Whether the Appellate Court was right in holding that the Appellant's right to fair hearing was not violated, but rather that the wrongful admission of the evidence of PW1 and PW2's daughter was merely a typographical error or, at most, wrongful admission of evidence which did not affect the decision of the trial Court, as the Appellant's conviction could have been sustained on other facts and evidence before the trial Court. (This issue is distilled from Grounds C Two, Three and Four of the Appellant's Notice of appeal).

3. Whether the Appellate Court was right in holding that an identification parade was not necessary in view of the facts, testimonies and the Appellant's confessional statement before the learned trial Judge identifying the Appellant as one of the culprits to the crime. (This issue is distilled from Ground Five of the Appellant's Notice of D E Appeal).

4. Whether in the circumstances of the case, it can be said that a miscarriage of justice was occasioned as to warrant the judgment of the Lower Court being set aside. (This issue is distilled from Grounds F one, two, three, four and five of the Appellant's Notice of Appeal).

The issues as crafted by the Appellant seem straight forward and simple and I shall utilize them in the determination of this appeal.

ISSUES 1, 2 & 3:

These issues in the main question the rightness of the Court of G Appeal in agreeing with the trial Court's using the evidence emanating from the daughter of PW1 and PW2 when she did not testify in court and thereby an infringement of Section 227 of the Evidence Act was made. Also, if the Appellant's constitutional right to fair hearing was not infringed when that evidence of the daughter of the complainants was utilized on the basis that, what the record showed in H that regard was a mere typographical error.

Learned counsel for the Appellant submitted that in criminal jurisprudence the law is trite that the prosecution has a duty, a burden to prove the case against an accused or defendant beyond rea-

sonable doubt. That in so doing the accused person's right to fair hearing and fair trial being one of substance and constitutional too is not compromised or waved aside because the right is guaranteed and protected by the Constitution and the law on the point. He cited Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria and Section 138 of the Evidence Act; *Umaru v State* (2008) B 42 WRN 65 at 74 - 75 (CA).

That going by the meaning and connotation of the principles of right to fair hearing, there is a constitutional duty placed on the court to ensure that parties are given equal opportunities to present their respective cases including the right to cross-examine the witness of the adversary which must be heard before the court arrives at a decision as an impartial observer/bystander in the court room watching the proceeding would conclude that the court proceeding was balanced and fair to both parties. He referred to many cases including *Uzoho v NCP* (2007) 10 NWLR (Pt.1042) 327 at 346; *Ika Local Government Area v Mba* (2007) 12 NWLR (Pt.1049) 782 at 704; *State v Ozuzu* (2009) 3 NWLR (pt. 1128) 253 at 267. C D

That the Appellant having been denied the opportunity of cross-examining the daughter of the complainants, whose statement was used by the court in reaching the adverse decision against the appellant took away the Appellant's right to fair hearing and the failure of the Court of trial to apply the principle of *audi alteram partem*, hear the other side. Learned counsel said this infraction was fatal to the entire proceedings for which the appeal should be allowed and the conviction and sentence set aside as there was a miscarriage of justice. He cited *Alamieyesigha v FRN* (2006) NWLR (Pt.1004) 1 at 126; *Chief of Air Staff v Iyen* (2005) 6 NWLR (Pt. 922) 496 at 559; *Ojo v Anibire* (2004) 10 NWLR (Pt. 882) 571 at 583; *Aigbobali v G Aifuwa* (2006) 21 WRN 1 at 29 - 30. E F

The Appellant further contended that there was a miscarriage of justice when the Court below failed to consider and make a decision on the appellant's issue 1 in the Court of Appeal. That the issue had to do with the use of the evidence of the daughter of the PW1 and PW2 when she was not brought to court to testify on oath and be cross-examined and so that infraction on the Appellant's right of fair hearing was not considered because if it was otherwise, the Court below would have come to a different conclusion. H

Learned counsel for the Respondent submitted that the trial Court in its decision had incorrectly and inadvertently referred to evidence adduced by the daughter of the prosecution witnesses, PW1 and PW2 which fact of error was pointed out by the Court of Appeal. That it is not every mistake or error in a judgment that will result in an
 B appeal being allowed. He cited *Alli v Alesinloye* (2002) 6 NWLR (Pt. 660) 177 at 213; *Ezeoke v Nwagbo* (1988) 1 NWLR (Pt.72) 616; *Onajobi & Anor v Olanipekun* (1985) 4 SC (Pt. 2) 612 at 613; *Nnajofofor v Ukonu* (1986) 4 NWLR (Pt.36) 505; *Blacks' Law Dictionary*, 8th Edition, page 1019 on the definition of - miscarriage of
 C justice.

For the Respondent, was contended that the wrongful admission of evidence purportedly given by PW1 and PW2's daughter was a mere irregularity which would not vitiate the substance of the judg-
 D ment of the trial Court. He cited *Omuju v FRN* (2008) 7 NWLR (Pt.1085) 30 at 63; *Anyanwu v Mbara* (1992) 5 NWLR (Pt.242) 386 at 400.

He stated on that there is a plethora of cases emphasizing the fact that an accused can be convicted of any offence on the evidence
 E of a single witness. He cited *Nwaeze v State* (1996) 2 NWLR (Pt.428) 1 at 11.

Learned counsel for the Respondent stated that the trial Court properly evaluated the evidence as was that Court's function and in that regard ascribed the probative value to the direct identification of
 F the Appellant by PW1 and PW2 which the Court below could not interfere with and this Court should follow. He cited *Ebba v Ogodo* (1984) 1 SCNLR 372.

He further submitted for the respondent that the confessional
 G statement of the Appellant was enough on its own alone for the conviction of the appellant and required no corroboration. He cited *Gira v State* (1996) 4 NWLR (P. 443) 375 at 388; *R v. Obiasa* (1962) SCNLR 102; *Patrick Njovens & Ors v State* (1973) NSCC 257 at 275.

H Learned counsel stated that it is widely accepted that the principle of fair hearing proceeds from the basis that no man should be condemned unheard or without opportunity to be heard and so for the principle to be useful to the Appellant, he must show how the wrongful admission of the evidence of the daughter of the complain-

ants amounted to a miscarriage of justice. He relied on *Otapo v Sumonu* (1987) 2 NWLR (Pt. 58) 587 at 605; *Pam v Mohammed* (2008) 16 NWLR (Pt. 1120) 1 at 49; *Ekiyor v. Bomir* (1997) 9 NWLR (Pt. 519) 1 at 14; & *Adebayo v. A.G. Ogun State* (2008) 7 NWLR (Pt.1085) 201 at 214 etc.

Going on further, learned counsel for the respondent contended that the conviction of the Appellant by the trial Court was in no way affected or materially influenced by the purported evidence of the daughter of PW1 and PW2. This, because there were other pieces of evidence before the Court for it to arrive at the same decision and so the appellant's right to fair hearing cannot be said to have been violated. He cited Section 227 of the Evidence Act: *Elebanjo v Dawodu* (2006) 15 NWLR (Pt.1001) 76 at 138; *Abubakar v. Chuks* (2007) 18 NWLR (Pt.1066) 186 at 416. B
C

For the Respondent was submitted that the Appellant was well identified by PW1 and PW2, thereby making unnecessary, an identification parade. Also an identification parade was not needed since the Appellant from his confessional statement identified himself. He cited *Ikemson v State* (1989) 3 NWLR (Pt.110) 455 at 478; *Otti v. State* (1993) 4 NWLR (Pt. 290) 675 at 681; *Ukpabi v State* (2004) 11 NWLR (Pt.884) 439 at 442. D
E

In reply on points of law, learned counsel for the Appellant contended that Respondent's issue number one should be struck out on the ground of proliferation of issues as it stemmed from ground one of the notices of appeal and issue 4 of the Respondent also arose from the same Ground one and other grounds. He cited *Yusuf v Akindipe* (2000) 8 NWLR (Pt.669) 376 at 384. F

Also, that issues number three and four of the respondent came from ground 5 of the Grounds of Appeal, which ground does not exist. That there is no competent issue of the respondent and therefore the only issue available are those of the Appellant who should be given the advantage of being favoured in the absence of a challenge. He referred to *Nwaigwe v Okere* (2008) 13 NWLR (Pt.1105) 445 at 478 - 479; *The Military Administrator of Benue State v. Ulegede* (2001) 51 WRN 1 at 26 - 27; *UAC Limited v Macfoy* (1962) A.C 152; *Nwankwo v Yar'Adua* (2010) 12 NWLR (Pt.1209) 543 at 556. G
H

I must state that the third issue of the Appellant questioning whether the lack of an identification parade was not fatal to the case

of the prosecution was not argued by them, since Appellant had that issue withdrawn in his brief, it is hereby struck out.

The Appellant's main plank of attack in his Reply Brief is based on the proliferation of issues from same ground or grounds by the Respondent. Indeed, the respondent distilled issue No.1 from Ground one of the Appellant's Notice of Appeal. Issue No.2, Respondent crafted from Grounds Two, Third and Four of the said Notice of appeal. Issue three from Ground five of the same Notice of Appeal and Issue Four from Grounds One, Two, Three, Four and Five thereof. In the circumstance, only Issue 4 would suffer the consequence of proliferation and so is hereby struck out. The other issues 1, 2, and 3 surviving, the arguments of the Respondent in respect thereto would equally survive.

The judicial authorities of this Court on the matter of proliferation of issues have pointed to the fact that when such an occurrence presents it produces no room for maneuver as the issues so formulated come to naught. The damning situation is anchored on the fact that in the determination of an appeal, the arguments are based on issues and not on the grounds of appeal. Fortunately in this instance as I said earlier, the other issues 1, 2, and 3 are valid leaving only issue 4 dead and unusable as the abnormality is incurable. See Ikweki v Ebele (2005) 11 NWLR (Pt.936) 397 at 245; Ogbe v Asade (2009) 18 NWLR (Pt. 1172) 106 at 137; Yusuf v Akindipe (2000) 8 NWLR (Pt. 669) 376 at 384; Nwaigwe v. Okere (2008) 13 NWLR (Pt.1105) 445 at 478 - 479.

The learned counsel for the Appellant canvassed that this Court accept that the issues and arguments of the Respondent having failed to survive, the Respondent not having a Brief should be taken to have accepted the arguments and position of the appellant. He had urged the application of Nwankwo v. Yar'Adua (2010) 12 NWLR (Pt. 1209) 543 at 556 per Onnoghen JSC when he said and I quote -

"Where an opponent fails or neglects to counter any argument, or issue validly raised in the brief of argument or during oral presentation of the issue not so contested is deemed conceded by the defaulting opponent."

My reaction to what the Appellant posits is to say, not

so fast. It cannot be what Nwankwo v. Yar'Adua (supra) authorizes nor can the dictum above quoted be so interpreted as accepting the view put forward by the appellant as it would be taking technicality way too far and outside the policy stance of the Courts effectively stamped by the Supreme Court. There cannot be memory loss by the Court in that in our criminal justice administration, the court still makes a finding of guilty for an accused person who has pleaded guilty in which no evidence is led and in which there is no address by a legal practitioner. What I see as recourse in a scenario presented where a Respondent's Brief has failed is the Court utilizing the arguments of the appellant and stepping in a path finding manner as to whether the accused/appellant can get off from what is on record and if taking what the two Courts below have done, the appeal should be allowed or dismissed. What I am labouring to put across is that, it is not tantamount to the automatic allowing of the appeal once the issues and arguments of the Respondent failed in compliance with the Rules especially where the mistake of counsel is glaringly evident. Just as an individual should not suffer for mistake or inadvertence of counsel, the state as in the case in hand should not have its criminal administration easily scuttled due to the obvious lack of drafting expertise of counsel. Therefore, the issues and arguments of the Respondent being alive and well in spite of Issue 4 and arguments of Issues 1, 2, and 3 would be considered alongside those of the Appellant.

In this regard, my learned brother, Ngwuta JCA (as he then was) has captured the scene before us aptly and I adopt his dictum completely for our purpose here. He said in *Warri v Etsanomi* (2005) 15 WRN 150 at 172 thus:

"Let no man walk out of our Courts disappointed in the administration of Justice. He will prefer to lose the case on its merits than to allow an opponent win by default. There is no provision for a walkover in our adversary system. It is not a game of football or tennis competition. It must be shown and seen that any party has a fair trial. See Allen v Sin Alfred Meaphina and Sons Ltd (1968) 2 QBD 229/2453B; Usikaro v Itshekisi Land Trustees (1991) 2 NWLR (Pt.172) 156 at 172-173."

On the matter of the use of technicality as an advantage for a party as against another, Olatawura JSC in *NIPOL Ltd v Bioku Invest & Pro. Co. Ltd.* (1992) 3 NWLR (Pt.232) 727 at 753 posited as follows:

B *“The reluctance to consider an alternative course which ap-
pears none cumbersome gives the impression albeit untrue, that out-
come of such a decision is based on technicality. Technicality in the
administration of justice shuts out justice. A man denied justice on
any ground much less a technical ground grudges the administration
C of justice. It is therefore better to have a case heard and determined
on merits than to leave the Court with a shield of “victory” obtained
on mere technicalities.”*

I am at one with the admonitions above stated even though in the case in hand all is not lost with the survival of the issues save issue
D 4 and so I will see if the submissions of the appellant are supported by what the two courts below did in the light of the evidence before the trial Court and the evaluation thereof. Of note is that the two Courts below made concurrent findings and conclusion of the guilt of the Appellant. As an aside I would say, assuming there were no
E Respondent’s arguments, the process of consideration of what is then before Court could be tedious in the absence of the Respondent’s Brief of Argument and submissions but the court cannot abdicate its appellate responsibility in the review of what the two Courts below did to see if they met the required standards laid down by law.
F

The thrust of the argument of the learned counsel for the Appellant along the line of his Brief of argument is that the principle of fair hearing in regard to the Appellant was compromised when the trial Court and affirmed by the Court below utilized the extra judicial
G statement of the daughter of the complainants, PW1 and PW2 without the Appellant being availed of the testimony of that daughter in Court and the cross-examination that the Appellant would have subjected her testimony to. That the situation throws up the application under Section 36 of the Constitution of the Federal Republic of Nigeria 1999. In this wise, I shall cite the case of *Alabi v Lawal* (2004) 2
H NWLR (Pt.852) 134 at 147 - 148 wherein the Court of Appeal held thus:-

“The attributes of fair hearing presupposes that the Court or tribunal shall hear both sides not only in the case but also in all the

material issues before reaching decision in the case which may be prejudicial to any party in the case. The court shall give equal treatment, opportunity and consideration to all concerned. Accordingly, natural justice demands that a party must be heard before the case against him is determined.”

The Appellant is insisting that the use of the extra judicial statement of the daughter of the PW1 and PW2 without her coming to testify on oath and be cross-examined by him or counsel on his behalf denied him the right of fair hearing which renders the entire proceedings including the decision, conviction and sentence a nullity and the Appellant entitled to have the proceedings set aside in the interest of justice. To consider the submission of the Appellant on this lack of fair hearing is to go back to the Record to see if indeed his right was denied him by a person whose evidence was crucial to settle a critical point in examination in Chief and cross-examination was not produced, while the trial court went ahead to consider the extra judicial statement of such a person and utilizing it came to a decision adverse to the Appellant.

For the Respondent was submitted that the statement made by the learned trial judge in his judgment which forms the basis of the Appellant's ground of appeal is either a typographical error or at most a wrongful admission of evidence either of which would not affect the substance of the decision of that Court of trial. This is so, learned counsel contends is because it is not every error or mistake in a judgment that will result in a conviction being upturned. He cited many judicial authorities, a few of which are as follows:- *Alli v. Alesinloye* (2002) 6 NWLR (Pt.660) 177 at 213; *Ezeoke v. Nwagbo* (1988) 1 NWLR (Pt. 72) 616; *Onajobi & Anor v Olanipekun & Ors* (1985) 4 SC (Pt.2) 612 at 613.

On the Point, the Court below stated:-

“The learned counsel for the Respondent submitted that the statement made by the learned Trial Judge which formed the basis of the Appellant's allegation must be a typographical error or at most amount to a wrongful admission of evidence. I agree with the submission of the learned counsel for the Respondent.”

The trial court in its summation and decision had referred to the evidence proffered by PW1, PW2 and their daughter when the daughter did not testify.

The law has been over-flogged that it is not every mistake, slip or error in a judgment that will result in an appeal being allowed since it is only where the error is substantial that it can be seen that it has occasioned a miscarriage of justice which makes it mandatory for the Appellate Court to interfere and have the judgment upset. See *Alli v. Alesinloye* (2002) 6 NWLR (Pt.660) 177 at 213; *Ezeoke v. Nwagbo* (1988) 1 NWLR (Pt.72) 616.

To maintain the link in the discourse is to define what miscarriage of justice is which would render a Court of Appeal without option than to intervene and set aside what the Lower court had done. ***Black's Law Dictionary 8 edition at page 1019 defines miscarriage of justice thus:-***

"A grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of crime."

This Court has described what amounts to a miscarriage of justice to be:

"A departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all." See *Nnaji for v Ukonu* (1986) 4 NWLR.

Other judicial authorities had towed the same line that wrongful admission of evidence or wrongful exclusion will not result in the reversal of a decision if it did not affect the decision of the trial Court such that it would have been different if the error had not been committed. Also a decision of a Lower Court would not be reversed on account of a trial court accepting inadmissible evidence when that evidence did not occasion any miscarriage of justice or affect the decision of the court in any way. See *Omomeji v Kolawole* (2008) 2 NWLR (Pt.1106) 180 at 202; *Ogunsina v Matanmi* (2001) 9 NWLR (Pt.718) 286.

Having stated the practice in our Courts on evidence admissible or not, it is to be considered the scenario in this instance where what is being made a fuss of is the identification by the complainants, PW1 and PW2 with their daughter who witnessed the incident and seeing the appellant and his colleagues at the time of the incident.

The PW1 had no difficulty identifying the appellant as one of those who came to their house. PW2 said she was able to identify the appellant because she looked at his face very well. Appellant's discomfiture is that their daughter who was present was not called to testify, rather the trial court combined what she said on the identification before the police to convict him. The words of the trial judge I would restate here and they are: -

"The factual setting in this case as demonstrated by the evidence of PW1 and PW2 and their daughter is that they were having their dinner in the sitting room when three persons entered..."

A few features emerged from what transpired at the court of trial, one of which is that one of the witnesses said the daughter mentioned was a baby in which case she would not be in a position to either make an extra-judicial statement or testify in court. Also nowhere in the record is to be found a statement made by the daughter of PW1 and PW2 nor any police witness allude to such. **All that was not disputed is that those present in the house at the time of incident apart from the robbers were PW1, PW2 and their daughter. The trial Court satisfied there was nothing doubtful of the identity of the perpetrators of the crime held thus:-**

"Having regard to the totality of the evidence adduced in respect of the identification of the accused, I hold that the accused was properly identified. The encounter of PW1 and PW2 with the accused provided an opportunity for the observation of the features of the accused, including the face which PW2 said she 'looked at very well', such that he could easily be identified two months after the incident."

In the light of the circumstances evaluated by the trial Court, it can be seen that even if the daughter aforesaid had made a statement before the trial court and failed to testify and be cross-examined in court and what she said previously admitted by the court albeit erroneously, with the two testimonies of PW1 and PW2 firmly established, then that erroneous admission of the daughter's statement would have no adverse effect on the consideration of the case flowing into the conviction and sentence as no miscarriage of justice was occasioned. The Court of Appeal was therefore right when it held as follows:-

“In this appeal under consideration, it has not been shown that if the evidence of the First and Second Prosecution witnesses’ daughter was not admitted that the decision of the learned trial judge would have been otherwise i.e. he would not have been convicted. Apart from that, there was a confessional statement made by the Appellant.”

The Court of Appeal had stated further in explanation thus:-

The utilization by the learned trial Court of the evidence of the Prosecution’s first and second witnesses (PW1 and PW2) daughter, (an individual being a Person) who did not give evidence in the matter at all to convict the Appellant and sentence him to three and five years prison term as one that bothers on typographical error, or mere observation or at most amount to a wrongful admission of evidence that did not influence the decision of the trial court, that when a case is bad, it is bad, there is nothing that can change it, not even resorting to breach of fair hearing can resolve it.”

The views expressed by the Court of Appeal have settled any nagging questions that may be hanging out and I see no reason to interfere with such a sound reasoning. This is so because a mere irregularity which is really what that slip by the trial judge was when he referred to what the daughter had said when there was nothing on which such a statement can be said to exist, then it falls into a minor human slip or error which would not vitiate the proceedings but rather an error that the Court of Appeal could and did in this case correct.

The cases of Omoju v FRN (2008) 7 NWLR (Pt.1085) 30; Anyanwu v Mbara (1992) 5 NWLR (Pt.242) 386 at 400; Nwaeze v State (1996) 2 NWLR (Pt.428) 1 at 11; Ebba v. Ogodo (1984) 1 SCNLR 372.

On the confessional statement which the Appellant had contested on the basis that it was involuntarily made as he had been tortured and even had a gun shot at his leg. The stand of the Respondent is that the trial court could have convicted the Appellant based on its finding on the testimonies of PW1 and PW2 but could also have solely on the confessional statement equally conveniently convicted the appellant as the confessional statement required no corroboration. He cited Gira v State (1996) 4 NWLR (Pt.443) 375 at 388; R v Obiasa (1962) SCNLR 102. A trial within trial had been conducted by the trial Court in keeping with the law guiding Courts

of trial when the voluntariness of a confessional is disputed. ***It is to be reiterated that a confessional statement is really the best evidence or the strongest against an accused in the determination of his guilt. Therefore, when such a statement has been proved to have been made voluntarily and it is direct, positive and unequivocal, then it is an admission of guilt and can even stand alone to sustain a finding of guilt that is without corroboration.*** I rely on *Gira v. State* (1996) 4 NWLR (Pt. 443) 375 at 388; *R. v Obiasa* (1962) SCNLR 102; *Patrick Njovens & Ors v. State* (1973) NSCC 257 at 275.

In the course of the trial within trial, the Appellant said he made the statement under duress as the police shot him on the leg. He however admitted not going to hospital to have the gunshot wound treated rather that he took ampiclox capsules. The trial court setting his version on a balance with what the police men who obtained the statement proffered held that the contents of the statement had details concerning the accused/appellant that could not have come to light without his volunteering the details which could not tally with a scenario of force or duress. Also that the alleged gunshot to the leg was a fluke in that Appellant could not substantiate either a wound in that regard, what happened to the bullet that may or may not have been lodged in the leg. Under cross-examination, Appellant admitted not been treated in a hospital and said he took ampiclox capsules to treat the gunshot wound. ***In the light of the finding of the learned trial judge and upheld by the Court of Appeal that the confessional statement was made voluntarily and in the consideration of the contents thereof, taking them as positive and unequivocal and the recovery of the stolen vehicle belonging to PW1 and PW2 which even offers corroboration apart from the evidence of the prosecution witnesses, then I see no room from which these concurrent findings of the two Courts below can be disturbed in spite of the invitation by the Appellant for this Court to interfere based on his allusion of the denial of fair hearing which has been effectively demolished.*** The cases of *Ogolo v Fubara* (2006) 13 WRN 102 at 140 - 141; *Adegbite v C.O.P.* (2006) NWLR (Pt. 997) 251 at 271 are not of any assistance to the Appellant as they do not apply in the circumstances prevailing here.

From the foregoing, I have no difficulty in concluding that this appeal lacks merit and is liable to be dismissed and I hereby dismiss the appeal. I uphold the judgment of the Court below which affirmed the judgment, conviction and terms of imprisonment imposed on the Appellant.

B

MOHAMMED JSC

The appeal is against the judgment of the Court of Appeal Abuja delivered on 24th November, 2010 dismissing the Appellant's appeal against his conviction and sentences for the offences of conspiracy and Armed Robbery under Sections 97(1) and 298(C) of the Penal Code of the laws of Kogi State by the trial High Court of Justice of Kogi State sitting at Koton Karfe. The Appellant who is on a further appeal to this Court had framed three issues for the determination of the appeal. The three issues as contained in the Appellant's brief of argument have been carefully considered and appropriately resolved in the lead judgment of my learned brother Peter-Odili, JSC which I have had the opportunity of reading before today and with which I entirely agree that the appeal lacks merit and ought to be dismissed.

The evidence on record against the Appellant is overwhelming. Apart from the evidence of the victims of the armed robbery PW1 and PW2, who clearly identified the Appellant as one of the members of the robbery gang that invaded their residence and robbed them of money and their car which was later recovered as a result of the information given by the Appellant in his confessional statement which was positive and direct in support of the conviction of the Appellant, this appeal must be dismissed. Accordingly, I also dismiss the appeal and further affirm the conviction and sentences imposed on the Appellant by the trial Court and affirmed by the Court of Appeal.

H

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Peter Odili, JSC. I agree with the reasons therein adumbrated to arrive at the conclusion that the appeal lacks merit and should be dismissed.

The appellant herein was charged at the trial court for the offences of conspiracy to commit armed robbery and armed robbery contrary to sections 97(1) and 298(c) of the Penal Code, respectively. He was found guilty and thereafter convicted and sentenced. PW1 and PW2, husband and wife adduced evidence and identified the appellant after he invaded their abode along with others. The appellant made a confessional statement - Exhibit P2 which led to the recovery of the PW1's car that was stolen during the operation. B

The trial court which found the appellant guilty, convicted and sentenced him accordingly. He appealed to the Court of Appeal. Thereat, he raised dust with respect to so-called evidence of the couple's daughter who did not testify but was inadvertently referred to by the trial court. The Court of Appeal felt that such a ploy was not a big deal as the evidence of PW1 and PW2 was enough to nail the appellant. It found that there was no miscarriage of justice and dismissed the appellant's appeal. The appellant has decided to further appeal to this court. C
D

The issues distilled by both sides of the divide have been depicted in the lead judgment. I rely on same for my observations.

The appellant attempted to make a mountain out of an ant hill with respect to the surmised evidence of PW1 and PW2's daughter. The Court of Appeal found that same was to no avail. It found that the pieces of evidence adduced by PW1 and PW2 supported by appellant's confession in Exhibit P2 were enough to nail him. Where there is inadmissible evidence, the appellate court has power to discountenance same as done by the court below. See: *Abubakar v. Joseph* (2008) 13 NWLR (Pt.1104) 302 at 354. The appellant failed to depict how the surmised wrongful admission of the evidence of the couple's daughter led to miscarriage of justice to warrant reversal of the judgment of the Court of Appeal. E
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The appellant tried to cling tenaciously to the principle of right to fair hearing. The appellant had the duty to show that the conduct of the trial complained about, led to a failure of justice. The appellate court must be satisfied that the facts alleged, leading to the failure or miscarriage are substantial and not one of mere technicality which caused prejudice to the appellant. With the evidence of PW1 and PW2 and the confessions made by the appellant in Exhibit P2, it appears the appellant cried wolf when he touted the often mooted H

principle of lack of fair hearing to no avail. This court has cautioned that accused persons with bad cases should leave fair hearing principle to where it rightly belongs. See: Adebayo v. Attorney-General Ogun State (2008) 7 NWLR (Pt.1085) 201 at 214.

B The appellant complained that an identification parade was not carried out. Identification evidence is that tending to show that the person charged with an offence is the same person who committed the alleged offence. See Ikemson v. The State (1989) 3 NWLR (Pt.110) 455 at 478.

C It is basic that an identification parade is not necessary where the victim of the crime or a witness promptly and positively identifies the criminal, as herein, where PW1 and PW2 clearly identified the appellant. See: Madagawa v. The State (1988) 5 NWLR (Pt.92) 61. Further and more importantly, where an accused person, as herein, D in Exhibit P2 - his confessional statement identifies himself, no identification parade is required. See: Ikemson v. The State (supra) at page 479; Ukpabi v. The State (2004) 11 NWLR (Pt.884) 439 at 442.

E In Exhibit P2, the appellant confessed that he committed the offences charged. There is no evidence that is stronger than a person's own admission or confession. After all, no rational being will say any thing negative to his own interest, all things being equal. See: Dibia v. The State (2007) 9 NWLR (Pt.1038) 30 at 51.

F For the above reasons and the fuller ones carefully set out in the lead judgment, I too feel that the appeal lacks merit and should be dismissed. I order accordingly. The appeal is hereby dismissed as the judgment of the court below is affirmed by me without any form of hesitation.

G _____

MUHAMMAD JSC

I had the opportunity of reading before now the lead judgment of my learned brother Ukaego Peter-Odili, JSC, just delivered. H My lord's thorough treatment of the issues raised by the appeal suffices. I adopt the reasoning as well as the conclusion in the judgment that the appeal lacks merit. I for the same reasons hereby dismiss the appeal and abide by the consequential orders made in the lead judgment.

KEKERE-EKUN JSC

I have had the privilege of reading in draft the lead judgment of my learned brother, PETER-ODILI, JSC just delivered. I agree with the reasoning and conclusion that this appeal lacks merit and should be dismissed. I have a few comments in support of the lead judgment. B

The appellant formulated three issues for the determination of this appeal but at page 11 paragraph 4.04 of his brief he abandoned issue 3. The two remaining issues are issues 1 and 2, which have C been reproduced in the lead judgment. The issues as couched are verbose, unnecessarily prolix and argumentative. The essence of the complaints therein may be summarized thus:

1. Whether the utilization by the trial court of the evidence of the daughter of PW1 and PW2 who did not testify, in convicting the D appellant was a mere typographical error or mere observation, or amounted to a wrongful admission of evidence under S.227 of the Evidence Act.

2. Whether the Court of Appeal erred in not giving proper E consideration to the allegation that the appellant's fundamental rights were breached by the utilization of the evidence of the daughter of PW1 and PW2 who did not testify.

Clearly both issues centre around the same fact: the alleged use by the High Court of Kogi State sitting at Kotonkarfe (the trial F court) of the evidence of the daughter of PW1 and PW2 (the complainants) who did not testify in convicting the appellant and the affirmation of the conviction by the Court of Appeal Abuja (the lower court). The main plank upon which this issue rests is that in summing up the evidence, the trial court stated at page 45 of the record: G

"The factual setting in this case as demonstrated by the evidence of PW1 and PW2 and their daughter is that they were having dinner in their sitting room when three persons entered and introduced themselves as assassins, who came to kill PW1".

H It is the appellant's contention that since the daughter of PW1 and PW2 did not testify, the reference by the court to 'the evidence of PW1 and PW2 and their daughter' constitutes a breach of his fundamental rights in the sense that the court used evidence that he did not have the opportunity to challenge in reaching its decision to

convict him. He contends further that the lower court did not properly address this weighty issue before affirming the decision of the trial court. In light of this allegation I deem it appropriate to reproduce the portion of the judgment of the lower court dealing with this issue in some detail. The relevant portion is at pages 173 - 174 and
 B 176 - 177 of the record where the court held:

*“The learned counsel for the respondent submitted that the statement made by the learned trial Judge which formed the basis of the appellant’s allegation must be a typographical error or at most
 C amounts to a wrongful admission of evidence.*

*I agree with the submissions of the learned counsel for the respondent because the first and second prosecution witnesses’ daughter did not testify during trial, neither did she make any statement to the police after the robbery and there was no other place in the
 D judgment where the prosecution’s first and second witnesses daughter was mentioned in that respect.”*

A careful reading of the entire judgment of the lower court would show that the mention of the first and second prosecution witnesses’ daughter by the learned trial judge was made to point to
 E the fact that PW1, PW2 and their daughter had the opportunity of observing the features of the robbers who came to their house on the day of the incident.

This allegation of the appellant could also be viewed from the
 F angle that the trial judge wrongfully admitted the evidence in question.

Section 227 of the Evidence Act Cap E14, Laws of the Federation of Nigeria 2004 provides thus:

The wrongful admission of evidence shall not itself be a ground
 G for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been same if such evidence had not been admitted.

It is trite that where there is sufficient evidence to link an appel-
 H lant to the offence charged without the wrongfully admitted evidence, the appellate court will not overturn the decision of the trial court.

In a similar situation the Supreme Court per Niki Tobi, JSC had this to say in *Adebayo Vs Attorney General of Ogun State* (2008) 7 NWLR (Pt.1085) 201 @ 205 as follows:

“Learned counsel for the appellant roped in the fair hearing principle. I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the court, with a view to moving the court away from the live issues in litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened. They do not stop there, they rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the Constitution is the machinery or locomotive of justice, not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental provision available to a party who is really denied fair hearing because he was not heard or that he was not properly heard in the case. Let litigants who have nothing useful to advocate in favour of their cases leave the fair hearing constitutional provision alone because it is not available to them just for the asking.”

In the circumstances, it is my view that the statement made by the trial Judge relied upon by the Appellant in making his allegation of breach of fair hearing was a mere observation or at most wrongful admission of evidence which did not influence the decision of the trial Court because there are other materials before the trial Court for it to arrive at the same decision if the alleged evidence of the 1st and 2nd prosecution witnesses’ daughter is removed. Therefore Appellant’s right to fair hearing could not be said to have been breached.

From the excerpt reproduced above it is evident that the lower court accorded the appellant’s complaint more than just a wave of the hand. It was fully considered and resolved.

A careful examination of the entire record of proceedings reveals that the so-called evidence of the daughter of PW1 and PW2 is a phantom! It never existed. There is no portion of the judgment of the trial court where the learned trial Judge referred to any specific evidence given by the said daughter. At page 23 of the record, PW1 testified that at the time of the incident he was eating with his wife and daughter. At page 25, PW2 stated that she was eating with her husband and little baby. All that this evidence shows is that at the

time of the incident PW1 and PW2 had their daughter with them, who, from the evidence of PW2, was a baby. In my view, the statement of the learned trial Judge at page 45 of the record (reproduced earlier) was either a typographical error, as held by the Court of Appeal, or a slip. It is not every slip of a Judge in his judgment that would result in the judgment being set aside. The mistake must be substantial and must lead to a miscarriage of justice. See: *Alli vs Alesinloye* (2002) 6 NWLR (Pt.660) 177 @ 213 per Iguh, JSC; *Nzeoke Vs Nwagbo* (1988) 1 NWLR (Pt.72) 616; *Orajobi & Anor. Vs Olanipekun & Ors.* (1985) 4 SC (Pt.II) 612 @ 613 per Obaseki, JSC.

After the portion of the judgment complained of, the learned trial Judge proceeded to consider in detail the evidence of PW1 and PW2 as to how they identified the appellant and placed him at the scene of the crime. He went on to consider the confessional statement, Exhibit P2, which was admitted in evidence after the conduct of a trial within trial to test its voluntariness, and found the charge of conspiracy proved against him. Thereafter he considered the evidence of PW1 and PW2 in respect of the charge of armed robbery in conjunction with the confession in Exhibit P2 along with evidence outside Exhibit P2 that made it probable. His Lordship also considered and dismissed the defence of alibi.

The law is that where a confessional statement has been proved to have been made voluntarily and it is positive, unequivocal and amounts to an admission of guilt, as in the instant case, it is sufficient to sustain a conviction, regardless of whether the accused person resiles from it or not, See: *Gira Vs The State* (1996) 4 NWLR (Pt.443) 375; *Egboghonome Vs The State* (1993) 7 NWLR (Pt.306) 383; *Kanu Vs The State* (1952) 14 WACA 30; *Ekpenyong Vs State* (1991) 6 NWLR (200) 683. It is also considered to be the best evidence of the commission of a crime, since it is the account by the accused person himself of the role he played. Notwithstanding the existence of a voluntary confessional statement, it is the practice of the courts, in order to safeguard the right of the accused person to fair hearing, to consider other evidence outside the statement, no matter how slight, which makes the confession probable. See: *R Vs. Sykes* (1913) 18 Cr. App. Rep. 233; *Dawa Vs State* (1980) 8 - 11 SC 236; *Kanu Vs The State* (supra).

In the instant case, the learned trial Judge, who had the singular opportunity of seeing and hearing the witnesses testify, considered the evidence adduced by the prosecution in its entirety and concluded, rightly in my view, that the prosecution had established both counts of the charge against the appellant beyond reasonable doubt. The contention that the court relied on evidence not given by a witness who never testified is to my mind the act of a drowning man clutching at straws. There is no substance whatsoever to the submission. The lower court fully considered the issues raised by the appellant and rightly resolved them against him. The slip by the learned trial Judge has not occasioned a miscarriage of justice. No cogent reason has been shown to warrant interference with the decision by this court. I therefore resolve both issues against the appellant.

For these and the more detailed reasons comprehensively advanced in the lead judgment, I also dismiss the appeal as lacking in merit and affirm the judgment of the court below which upheld the conviction and sentence imposed by the trial court.

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