

SUPREME COURT OF NIGERIA
FRIDAY 6TH JUNE, 2014. SC. 222/2011
CORAM:- W. S. N. ONNOGHEN, S. GALADIMA,
B. RHODES-VIVOUR, K. B. AKA'AH,
J. I. OKORO, JJSC

ADAMU SHEIDU APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Grounds - Objection - It is not enough for respondent to state - That the grounds are on questions of facts and mixed law and facts - It must go further to show which of them is of facts - Or mixed law and facts (H1)

APPEALS - Issues - Argument on - Where appellant proffers argument on issue properly distilled - Whether or not the argument is correct - Is left for court to determine (H2)

APPEALS - Grounds - Validity - Objection on ground one is untenable - As the ground encapsulates CA's reasons for decision - And it is not an obiter but a decision which is appealable (H3)

CRIMINAL PROCEDURE - Provocation & self defence - Where provocation is set up in extra judicial statement - Subsequent raising of self defence - After prosecution has closed its case - Appears to be an afterthought (H4)

MURDER - Self defence - Weight - Where the defence succeeds - Accused must be discharged and acquitted - Because he was at the time of killing - In reasonable apprehension of death (H5)

CRIMINAL PROCEDURE - Self defence - Proof - Apart from accused leading evidence - To show he is entitled to the defence - Prosecution has onus to establish that the defence is not available (H6)

MURDER - Provocation - Weight - A plea of provocation if successful - Reduces the offence of murder to manslaughter (H7)

CRIMINAL PROCEDURE - Provocation - Ingredients - Accused must show that there was sudden act of provocation by deceased - And that he lost self control as a result of the provocation (H8)

MURDER - Self defence - Ingredients - Accused must prove that his life was threatened by acts of deceased - That he used force on deceased as the only option to save his own life (H9)

CRIMINAL PROCEDURE - Provocation - Defence of - It was rightly held that it is only provocation that availed appellant - As no evidence was led to show that he was actually endangered - By the acts of deceased (H10)

MURDER - Ingredients - Proof - To secure conviction - Prosecution must prove death of deceased - Caused by act of accused - With intention of causing death - And that accused knew that death was probable (H11)

MURDER - Proof - Evidence - Having regard to evidence before trial court - There is no doubt that from the force used and position of the body stabbed - Appellant intended to kill deceased (H12)

FACTS

Accused/appellant was arraigned before the High Court of Kogi State on one count charge of culpable homicide punishable with death under section 221 of the Penal Code. The facts as presented from the evidence adduced in the matter is that there was a lingering land boundary dispute between appellant's mother and mother of the deceased. In order to resolve the matter, appellant's mother invited the village head to demarcate the boundary between the contending parties. It was in the process of the demarcation, that a fight broke out between the parties, which resulted in appellant stabbing the deceased on the chest. The deceased died on the spot. Appellant was arrested for the murder and was charged before the court. Appellant made confessional statements in exhibits 2 and 3 stating that he was provoked to commit the crime.

At the trial, prosecution/respondent called four witnesses and

tendered some exhibits in support of its case. Appellant testified for himself and called two other witnesses in defence. Apart from raising the defence of provocation in Exhibits 2 and 3, appellant attempted to also raise self defence in his testimony in court. At the end of trial, the court considered the defence of provocation and found same proved. Appellant's self defence was in the circumstance not considered. The court proceeded to reduce the punishment to culpable homicide not punishable with death under section 224 of the Penal Code. Appellant was thus sentenced to ten year imprisonment. Not satisfied with the sentence on him, appellant moved to the Court of Appeal on appeal. The court dismissed the appeal and affirmed the judgment of the trial court. Again dissatisfied, appellant appealed to the 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 on the ground that the plea of the defence of self-defence was first raised and introduced by the appellant during his oral testimony at trial which thus was clearly insipid, impotent, wobbly, hypothetical, after-thought not available to the appellant as the prosecution who has proved the case beyond reasonable doubt cannot controvert the plea of the defence of self-defence at that stage?"

2. Whether the learned Justices of the Court of Appeal did not err in law when they held that the prosecution has proved beyond reasonable doubt all the ingredients of the offence with which the appellant was charged in spite of the failure and refusal to consider the plea of the defence of self-defence properly and/or at all, thus Appellant was not heard at all and/or properly on his plea of self-defence.

3. Whether the entire decision of the Justices of the Court of Appeal is not unreasonable, unwarranted and cannot be supported having regard to the evidence before the panel of the honourable learned justices?"

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

APPEALS - Grounds - Objection

1. I shall take the grounds seriatim. I must say that the respondent, apart from stating that the five grounds are on questions of facts and mixed law and facts, he did not go further to show which of the grounds is of facts or mixed law and facts.

B The law is quite clear on this. It is trite that he who alleges must prove.

What the learned counsel for the respondent herein has done is just to state that the five grounds are of questions of facts and mixed law and facts and as such leave of court was required. Nothing more was said or done to demonstrate which of them is of facts alone or of mixed law and facts. This ground of objection, to say the least, has no merit at all and ought to be overruled. (p. 2418 H)

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APPEALS - Issues - Argument on

2. The second ground of objection is that “ground five of the notice of appeal, having not been argued (or properly argued), is deemed abandoned and ought to be struck out.” Let me state right away that in appeals before this court, parties do not argue “grounds of appeal” but issues properly distilled from a ground or a combination of grounds of appeal. Even at that, the respondent did not specifically state what he wanted. Is it that the “ground” was not argued or that it was not properly argued? This is speculative and this court has no room for speculative arguments.

And, in any case, where an appellant proffers argument on an issue properly distilled, whether the argument is correct, persuasive or not it is for the court to determine same. It cannot be the basis for a preliminary objection. So, on this ground, the preliminary objection has failed to ignite. (p. 2419 E)

H *APPEALS - Grounds - Validity*

3. In the instant case, I think that ground one of the notice of appeal and the particulars therein which encapsulate the lower court’s reasons on why the defence of self-defence was not available to the appellant having raised it for the first time

when the appellant opened his defence after the prosecution had closed its case, is not an obiter but a decision of the court which is appealable.

There is therefore, nothing wrong with ground one of the grounds of appeal. The objection on this ground is therefore untenable. B

Having held that ground one is competent, the last ground of objection suffers a still birth. Since ground one is competent issue one was properly formulated from a combination of grounds of appeal, including ground one. C

On the whole, the preliminary objection is too heavy to fly. It lacks merit and is accordingly overruled. (p. 2420 C)

CRIMINAL PROCEDURE - Provocation & self defence

4. From the whole gamut of the record, it is clear that both the learned trial judge and the lower court considered the defence of self defence and concluded that it was not available to the appellant based on the evidence before the court. The lower court did not say that an accused person cannot raise his defence while testifying in court. The court said that the appellant, having earlier in his statements to the police raised a defence of provocation, the new defence of self defence was an afterthought. For me, all the arguments and pontifications by the learned counsel for the appellant that the trial court believed and convicted the appellant before hearing his own side of the story go to no issue. D E F

It follows that where an accused person sets up a defence of provocation in his extra-judicial statement and the prosecution is only aware of that, the subsequent raising of a defence of self defence after the prosecution had closed its case appears to be an afterthought. This was the view of the court below in the instant case which I agree. (pp. 2424 C/2425 D) G

MURDER - Self defence - Weight H

5. In view of the seriousness of the issue at hand, I wish to give some more thought to it in this judgment. The provision of sections 33(2) (a) of the 1999 Constitution of the Federal Republic of Nigeria, and Sections 65 and 66 of the penal code

declare that where a person is killed as a result of the use of reasonably necessary force to such extent and in such circumstances as is permitted by law in one's personal defence from unlawful violence or for the defence of property, the death is justifiable and does not violate the right to life. Such a defence, where it avails an accused person, justifies or excuses by law the act or omission of the accused thereby rendering him not liable for the offence charged. It is usually a complete defence to the charge where it is upheld. The sum total of this is that, where the defence of self-defence succeeds, the accused person must be discharged and acquitted because he was at the time of killing in reasonable apprehension of death or grievous bodily harm, and felt that it was necessary at the time to use the force which resulted in the death of the deceased in order to preserve himself from danger. (p. 2424 F)

CRIMINAL PROCEDURE - Self defence - Proof

6. Whenever a defence of self-defence is raised by an accused person, apart from the accused leading evidence to show that he is entitled to the defence, the onus is still on the prosecution to establish that the defence in the circumstance is not available to the accused. (p. 2425 B)

MURDER - Provocation - Weight

7. The appellant raised a defence of provocation in his statement to the police but while testifying in court he tilted his evidence to appear as if he acted in self defence. Of course, while a plea of self-defence, if successfully raised, completely absolves the offender from criminal responsibility, a plea of provocation, if successful, reduces the offence of murder to manslaughter. As the consequences are different, the requirements are also different. (p. 2425 E)

CRIMINAL PROCEDURE - Provocation - Ingredients

8. In the defence of provocation, an accused person must show that:

1. There was sudden act of provocation by or from the deceased.

2. That he lost self control as a result of the provocation.

3. That he reacted in the feat of passion and before there was time for his passion to cool, and

4. That the acts were proportional to the provocation.

(p. 2425 G)

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MURDER - Self defence - Ingredients

9. On the other hand, for a successful plea of the defence of self defence by an accused person charged with the offence of culpable homicide punishable with death under the penal code, the following must be established by credible evidence:

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1. That his life was actually threatened or endangered by the acts of the deceased;

2. That the only option that was opened to him to save his own life was to use force which was necessary on the deceased at the material time;

3. That amount of force used on the deceased was proportionate to the threat or danger posed by the acts of the deceased;

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4. That he did not take an undue advantage of the deceased in the process of saving his own life from the danger or threat posed by the deceased;

5. Show that he did not want to fight and that he was at the material time prepared to withdraw from the danger posed to his life by the deceased. (p. 2426 B)

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CRIMINAL PROCEDURE - Provocation - Defence of

10. The two courts below held that there was no personal threat to the appellant from the deceased. In other words, he was not in danger at all. The only evidence which appealed to the learned trial judge and which was confirmed by the Court of Appeal was that the appellant was provoked to hit the deceased when the said deceased slapped his (appellant's) sister. From the ingredients of the defence of provocation and that of self defence, I think the two courts below were right to hold that only the defence of provocation availed the appellant in view of the evidence available at the trial. The appellant

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did not lead evidence to show that his life was actually threatened or endangered by the acts of the deceased or that the only option for him was to kill the deceased to preserve his life. This first issue, for me, does not assist the appellant at all. (p. 2426 G)

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MURDER - Ingredients - Proof

11. Under Section 221 (b) of the penal code, the prosecution has to prove the following ingredients in order to secure a conviction for the offence of culpable homicide punishable with death. That is to say:

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- 1. That the death of a human being actually occurred.**
- 2. That it was caused by the act or acts of the accused.**
- 3. That the act/acts were done with the intent of causing**

D death or.

- 4. That accused knew that death was the probable consequence of his acts.** (p. 2427 H)

MURDER - Proof - Evidence

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12. The facts of the case have already been stated in this judgment. There is no doubt that the deceased had died. There is no dispute that the deceased died from the act of the appellant. The evidence from the facts adduced before the trial court particularly that of PW1, the appellant's oral testimony and

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Exhibits P2 and P3, it shows that the appellant was at the time of the incident a 20 year old healthy young man and that he stabbed the deceased with either knife or cutlass on the chest and that the deceased died instantly, immediately or very

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soon after he was stabbed by the appellant from the force used and the position of the body stabbed. It is my view that the appellant intended to kill the deceased or that death was the probable consequence of his act. There is no contrary evidence to this. The decision of the trial court and the confirmation

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of same by the Court of Appeal, were in my opinion reasonable, having regard to the quantum of evidence adduced before the trial court. I resolve issue three against the appellant. (p. 2428 B)

NOTABLE POINTS OF INTEREST

OKORO JSC

1. Grounds of appeal – Meaning of

It must be noted that a ground of appeal is the criticism of unfavourable decision or judgment made against a party being the appellant. It is the totality of the reason why the decision complained of is considered wrong in law or fact or a mixture of both law and fact by a party appealing. (p. 2420 A) B

ONNOGHEN JSC

2. Conflicting defence – Court to adopt established defence

While it is the law that in a criminal trial the trial court should consider all defences available to an accused person irrespective of its merit or stupidity, I hold the view that that principle does not mean that the court can uphold conflicting defences. Where the defences raised by an accused person conflicts with one another, the trial court, in my view, though obliged to consider all the conflicting defences must decide on the defence applicable to the case having regard to the evidence on record. Where the facts disclosed in evidence support one as against the other as in this case, the court will adopt the established defence. (p. 2429 B) C
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RHODES-VIVOUR JSC

3. Provocation – Meaning of

Any acts or words may be provocation. Provocation is an act or series of acts done by the deceased (when alive) to the accused person which would cause a reasonable person, a sudden and temporary loss of self control rendering the accused person so subject to passion as to make him for the moment not master of his mind. (p. 2434 H) F
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REPRESENTATION

A. R. Fatunde, Esq., with C. A. Akpu, Esq., and U. Umoso, Esq., for the Appellant

Adewale Adesokan, Esq., for the Respondent H

CASES REFERRED TO

Ehinlanwo v. Oke (2008) 16 NWLR (pt. 1113) 357

- Abraham v. State (1994) 7 NWLR (pt. 359) 635
 Akpan v. Bob (2010) 17 NWLR (pt. 1223) 421
 Ugboaja v. Sowemimo (2008) 16 WLR (pt. 1113) 278
 Oladele v. State (1991) 1 NWLR (pt. 170) 708
 Ndukwe v. State (2009) 7 NWLR (pt. 1139) 54
 B Ikemson v. State (1989) 3 NWLR (pt. 110) 459
 Musa v. State (2009) 15 NWLR (pt. 1165) 473
 Apugo v. State (2006) 16 NWLR (pt. 1002) 227
 Nwozoke v. State (1988) 1 NWLR (pt. 72) 529
 C Baridam v. State (1994) 1 NWLR (pt. 320) 250
 Baruwa v. State (1992) 1 NWLR (pt. 219) 511
 Ukwunnenyi v. State (1989) 4 NWLR (pt. 114) 131
 Edoho v. State (2010) 14 NWLR (pt. 1214) 651
 Obaji v. State (1965) 1 All NLR 269

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STATUTES REFERRED TO

Penal Code, ss. 65, 66, 221, 224

Constitution of the Federal Republic of Nigeria 1999, s. 33(2)(a)

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LEAD JUDGMENT BY OKORO JSC

This is an appeal against the judgment of the Court of Appeal Abuja Division, delivered on 20th, October, 2010, which dismissed the appellant's appeal against his conviction by the Abejukolo High Court of Kogi State wherein he was found guilty of culpable homicide not punishable with death under Section 224 of the Penal Code and sentenced to ten years imprisonment. A synopsis of the facts giving birth to this appeal will suffice.

As can be gleaned from the record of appeal, particularly the evidence of the witnesses who testified at the trial, on Sunday the 15th day of July, 2007, a lingering land boundary dispute between the mother of the appellant and mother of the deceased re-occurred. The village/ward head of the area called the "Gago" was invited by the appellant's mother to come and once more demarcate the correct boundary between the two family/neighbours. In the process of the demarcation, altercations erupted between members of the two disputing parties present at the time which resulted into a fight in the course of which the appellant stabbed the deceased on the chest. He died at the scene, apparently from the injury.

The appellant was later arrested by the police and after investigation, he was arraigned before the High Court on the following one count charge:

“That you, Adamu Sheidu on or about the 15th day of August, 2007 at Abejukolo in Omala Local Government Area of Kogi State within the Kogi Judicial Division did commit culpable homicide punishable with death in that you caused the death of Abdul Angulu by doing an act of stabbing him with a knife in the chest with the knowledge that his death would be the probable consequence of your act thereby committed an offence punishable under Section 221 of the Penal Code.”

The learned trial judge who heard evidence, considered it and came to the conclusion that the defence of provocation availed the appellant. He then reduced the offence from culpable homicide punishable with death under Section 221, of the penal code to that not punishable with death under Section 224 of the same code. He then proceeded and sentenced the appellant to ten (10) years imprisonment.

Dissatisfied with the stance of the learned trial judge, the appellant appealed to the Court of Appeal. The lower court meticulously considered the issues submitted before it and at the end, found no merit in the appeal and consequently dismissed it.

Again, the appellant is not satisfied with the decision of the Court of Appeal and has further appealed to this court. On 24th November, 2010, the appellant filed notice of appeal containing five grounds of appeal. From the said five grounds the appellant has formulated three issues for the determination of this appeal. The three issues are as follows:-

“1. Whether the learned justices of the Court of Appeal did not err in law when they dismissed the appellant’s appeal on the ground that the plea of the defence of self-defence was first raised and introduced by the appellant during his oral testimony at trial which thus was clearly insipid, impotent, wobbly, hypothetical, after-thought not available to the appellant as the prosecution who has proved the case beyond reasonable doubt cannot controvert the plea of the defence of self-defence at that stage?”

2. Whether the learned Justices of the Court of Appeal did not err in law when they held that the prosecution has proved beyond

reasonable doubt all the ingredients of the offence with which the appellant was charged in spite of the failure and refusal to consider the plea of the defence of self-defence properly and/or at all, thus Appellant was not heard at all and/or properly on his plea of self-defence.

B *3. Whether the entire decision of the Justices of the Court of Appeal is not unreasonable, unwarranted and cannot be supported having regard to the evidence before the panel of the honourable learned justices?"*

C The learned counsel for the respondent is of the opinion that two issues can effectively determine this appeal. He has thus distilled two issues as follows:-

D *"1. Whether the Court of Appeal was wrong in agreeing with the trial court that the defence of self-defence did not avail the appellant.*

2. Whether the decision of the Court of Appeal can be supported having regard to the evidence before the court."

E Before I take a further step in this appeal, let me pause to consider the preliminary objection to the hearing of this appeal which the attention of this court was drawn to at the hearing of this appeal on 27th March, 2014. On page 3, paragraph 3.00 of the respondent's brief, the learned counsel for the respondent, Adewale Adesokan, Esq., gave notice of preliminary objection to the hearing of this appeal. It states:

F *"The prosecution shall at the hearing of this appeal, raise the following preliminary objections, namely:-*

G *i. The appeal is incompetent in that the leave of court was not obtained before the same was brought.*

H *ii. Ground five of the notice of appeal, having not been argued (or properly argued), is deemed abandoned and ought to be struck out.*

iii. Ground one of the notice of appeal relate to obiter dictum of the Court of Appeal, which is not appealable and therefore ought to be struck out.

iv. Issue one of the appellant's brief having been contaminated by the argument of competent and incompetent grounds together is liable to being struck out."

I shall take the grounds seriatim. I must say that the re-

spondent, apart from stating that the five grounds are on questions of facts and mixed law and facts, he did not go further to show which of the grounds is of facts or mixed law and facts. The law is quite clear on this. It is trite that he who alleges must prove. In *EHINLANWO V. OKE* (2008) 16 NWLR (pt. 1113) 357 at 395, this court, per Onnoghen, JSC, held that: B

“It is the duty of counsel who objects to competence of ground of appeal to establish the complaint, since he who alleges must prove. In the instant case, apart from the respondent stating that the grounds of appeal were either of fact or of mixed law and facts and thereby requiring the leave of court, they did not go further to demonstrate to the court how the grounds were of facts or of mixed law and facts. C

The examination of the grounds was left for the court to do so as to arrive at a decision.”

What the learned counsel for the respondent herein has done is just to state that the five grounds are of questions of facts and mixed law and facts and as such leave of court was required. Nothing more was said or done to demonstrate which of them is of facts alone or of mixed law and facts. This ground of objection, to say the least, has no merit at all and ought to be overruled. D

The second ground of objection is that “ground five of the notice of appeal, having not been argued (or properly argued), is deemed abandoned and ought to be struck out.” Let me state right away that in appeals before this court, parties do not argue “grounds of appeal” but issues properly distilled from a ground or a combination of grounds of appeal. Even at that, the respondent did not specifically state what he wanted. Is it that the “ground” was not argued or that it was not properly argued? This is speculative and this court has no room for speculative arguments. See *GRACE ABRAHAM V. THE STATE* (1994) 7 NWLR (pt. 359) 635. F

And, in any case, where an appellant proffers argument on an issue properly distilled, whether the argument is correct, persuasive or not it is for the court to determine same. It cannot be the basis for a preliminary objection. So, on this ground, the preliminary objection has failed to ignite. H

The respondent has also picked holes on the first ground of

appeal arguing that it relates to an obiter dictum of the Court of Appeal, which, according to him, is not appealable and ought to be struck out.

It must be noted that a ground of appeal is the criticism of unfavourable decision or judgment made against a party being the appellant. It is the totality of the reason why the decision complained of is considered wrong in law or fact or a mixture of both law and fact by a party appealing. See AKPAN V. BOB (2010) 17 NWLR (pt. 1223) 421, UGBOAJA V. AKINTOYE-SOWEMIMO (2008) 16 WLR (pt 1113) 278, OLADELE V. STATE (1991) 1 NWLR (pt.170) 708.

In the instant case, I think that ground one of the notice of appeal and the particulars therein which encapsulate the lower court's reasons on why the defence of self-defence was not available to the appellant having raised it for the first time when the appellant opened his defence after the prosecution had closed its case, is not an obiter but a decision of the court which is appealable.

There is therefore, nothing wrong with ground one of the grounds of appeal. The objection on this ground is therefore untenable.

Having held that ground one is competent, the last ground of objection suffers a still birth. Since ground one is competent issue one was properly formulated from a combination of grounds of appeal, including ground one.

On the whole, the preliminary objection is too heavy to fly. It lacks merit and is accordingly overruled.

Having scaled the hurdle placed by the preliminary objection, the coast is now clear for the determination of this appeal on its merit. The three issues distilled by the appellant are inter woven. So also the two issues by the respondent. I intend therefore to resolve the issues together.

The grouse of the appellant on issue one is that the lower court erred and delivered judgment that is perverse when, whilst considering the appellant's case being a criminal matter, held that once the prosecution has proved the ingredients of an offence, it has made a case beyond reasonable doubt against the accused, thus, by implication the accused stands convicted and condemned even when he was yet to enter his defence. Learned counsel submitted that the

finding and decision by the lower court in this regard is against the run of play in criminal jurisprudence which tends to make a defence put forward by an accused completely irrelevant and unnecessary.

According to him, at the stage when the prosecution closes its case and it is assumed that it has made out a *prima facie* case, the accused, as of right is entitled to be heard in his defence. Furthermore, that the procedure adopted by the trial court which was endorsed by the lower court forms a major flaw and fundamental error in the judgment of the lower court. He opines that in criminal jurisprudence, it is trite that no matter how weak, stupid, funny, insipid, fanciful, doubtful and inconsequential the defence put forward by the accused, the court has a duty to consider the defence and make a finding, relying on the case of *NDUKWE V. STATE* (2009) 7 NWLR (pt. 1139) 54 at 96 para C. Learned counsel then concluded that the failure to consider the defence of self defence put up by the appellant occasioned miscarriage of justice. He urged the court to resolve this issue in favour of the appellant.

On the second issue, the learned counsel submitted that the essential ingredients of the offence of murder was not proved against the appellant particularly, the knife allegedly used in stabbing the deceased. He submitted that a knife is not the same as a cutlass which was tendered and that this created a material contradiction in the case of the prosecution vis-à-vis the charge against the appellant. According to him, this has created a huge doubt in the case put forward by the prosecution that should be resolved in favour of the appellant, again relying on the case of *NDUKWE V. STATE* (supra) at 72 - 73 paras G - A, *IKEMSON V. STATE* (1989) 3 NWLR (pt. 110) 459, *MUSA v. STATE* (2009) 15 NWLR (pt 1165) 473.

Learned counsel urged this court to resolve issue two in favour of the appellant as the prosecution did not explain the disparity between a knife and cutlass.

On issue three, the learned counsel for the appellant submitted that whenever the appellate court is faced with a ground of appeal and the corresponding issue arising therefrom that the decision is against the weight of evidence, being the omnibus ground of appeal the appellate court will amongst other things seek to know the evidence before the lower court, whether the lower court accepted or rejected any evidence upon correct perception, whether it cor-

rectly approached the assessment of the value on it whether it used the imaginary scale of justice to weigh the evidence on either side, referring to the cases of *ARO V. LILGC* (2001) 32 W.R.N. 72 at 96 and *IDI V. YAU* (2001) 10 NWLR (pt. 722) 640 at 653. Learned counsel then adopted his argument in issue one to support this issue.

B He then urged the court to resolve this issue in favour of the appellant.

In response on the first issue, the learned counsel for the respondent noted that the appellant did not himself raise the issue of self-defence specifically at the trial court. That even in the submissions of the learned counsel for the appellant at the trial court, only the defence of provocation was raised. According to him, it was the trial court, after considering and sustaining the defence of provocation for the appellant, that it decided to also consider the defence of self-defence, referring to pages 115 of the record of appeal. He also referred to the reaction of the Court of Appeal on the issue on page 187 of the record. It is his view that there are concurrent findings of the two lower courts on the issue after assessment and evaluation of evidence adduced at the trial court. He urged this court not to disturb the concurrent findings of these two lower courts. Learned counsel submitted that appellant failed to prove the requirements to sustain the defence of self-defence. He also noted that the appellant did not appeal against the admission of his two confessional statements (exhibits P2 and P3) which are both consistent with the fact that the appellant stabbed the deceased in the chest and that the deceased died soon after and that was consistent with the evidence of PW1 and PW2. He then urged this court to resolve this issue against the appellant.

G On the second issue, learned counsel submitted that the decision of the trial court which was confirmed by the Court of Appeal was fully supported by the evidence which the two lower courts concurrently reviewed and affirmed. After a review of the evidence led at the trial court and the fact that the appellant did not attack the voluntariness of his two confessional statements, learned counsel submitted that there was nothing to suggest that the defence of self-defence availed the appellant. He then urged this court to resolve this issue in favour of the respondent.

I now proceed to resolve these issues. On page 186 of the

record of appeal, the Court of Appeal held as follows:

“The threat or danger to be shown by credible evidence for the defence of self defence is not an imagined or speculative one, but real and factual danger to be borne out by the facts and circumstance of the case. The evidence of the appellant on self defence is clearly insipid, impotent, weak and only a belated attempt by the appellant to beguile the lower court and impose on it the duty to consider a rather wobbly hypothesis of an imagined defence of self defence. How would the prosecution be expected to controvert the supposed self defence raised by the appellant after it had closed its case?”

The above quotation from the judgment of the court below forms the basis of the first issue in this appeal. Before the above conclusion, the lower court had considered the defence of self defence raised by the appellant at the trial court and even reproduced the said evidence which states:

“My younger sister, Omoji Ademu, began to wail and shouting that Abdul Haruna and his brothers had hit our mother with sticks. The deceased Abdul Haruna then hit her with a stick and she too fainted. As I ran to where my sister was, Abdul Haruna advances (sic) towards me and so I hit him with stick I had with me”

On the above piece of evidence, the Court of Appeal said -

“It may be recalled that in his statements in Exhibits 2 and 3 when the facts of the incidents were very fresh to his mind, the appellant had positively stated that he hit or stabbed the deceased because he could not bear the attack or beating of his mother and sister which resulted in their fainting or losing consciousness. This was the piece of evidence the lower court used to find that the appellant was in law provoked into doing what he did to the deceased and therefore convicted him of the offence of culpable homicide not punishable with death.”

The learned counsel for the appellant had wished that the same piece of evidence used by the learned trial judge to avail the appellant the defence of provocation should have been used to also avail the appellant the defence of self defence. The court below held that the evidence of the stick given by the appellant was an afterthought in view of his statements in Exhibits 1, 2 and 3 and the evidence of PW1 which are all consistent with the account of what actually hap-

pened on the date of the incident. The court below further said as follows:-

“But even if the “stick” story was to be given to the appellant, it is far from establishing that the deceased had posed any real danger or threat to his life and that his only option of preserving his life was do what he did.”

It was after reviewing the evidence at the trial court and the judgment thereof and also taking time to examine the law on provocation and the defence of self-defence that the Court of Appeal held that *“the evidence of the appellant on self defence is clearly insipid, impotent, weak and only a belated attempt by the appellant to beguile the lower court and impose on it the duty to consider a rather wobbly hypothesis of an imagined defence of self defence.”*

From the whole gamut of the record, it is clear that both the learned trial judge and the lower court considered the defence of self defence and concluded that it was not available to the appellant based on the evidence before the court. The lower court did not say that an accused person cannot raise his defence while testifying in court. The court said that the appellant, having earlier in his statements to the police raised a defence of provocation, the new defence of self defence was an afterthought. For me, all the arguments and pontifications by the learned counsel for the appellant that the trial court believed and convicted the appellant before hearing his own side of the story go to no issue.

In view of the seriousness of the issue at hand, I wish to give some more thought to it in this judgment. The provision of sections 33(2) (a) of the 1999 Constitution of the Federal Republic of Nigeria, and Sections 65 and 66 of the penal code declare that where a person is killed as a result of the use of reasonably necessary force to such extent and in such circumstances as is permitted by law in one’s personal defence from unlawful violence or for the defence of property, the death is justifiable and does not violate the right to life. Such a defence, where it avails an accused person, justifies or excuses by law the act or omission of the accused thereby rendering him not liable for the offence charged. It is usually a complete defence to the charge where it is upheld. The sum total of this

is that, where the defence of self-defence succeeds, the accused person must be discharged and acquitted because he was at the time of killing in reasonable apprehension of death or grievous bodily harm, and felt that it was necessary at the time to use the force which resulted in the death of the deceased in order to preserve himself from danger. See APUGO V. STATE (2006) 16 NWLR (PT. 1002) 227, NWOZOKE V. STATE (1988) 1 NWLR (PT. 72) 529, BARIDAM V. STATE (1994) 1 NWLR (pt. 320) 250. B

Whenever a defence of self-defence is raised by an accused person, apart from the accused leading evidence to show that he is entitled to the defence, the onus is still on the prosecution to establish that the defence in the circumstance is not available to the accused. See R. V. ONYEAMAIZU (1958) NRNL 93, R. V. OSHUNBIYI (1961) ALL NLR (pt. 4) 453 and APUGO v. STATE (supra). C

It follows that where an accused person sets up a defence of provocation in his extra-judicial statement and the prosecution is only aware of that, the subsequent raising of a defence of self defence after the prosecution had closed its case appears to be an afterthought. This was the view of the court below in the instant case which I agree. The appellant raised a defence of provocation in his statement to the police but while testifying in court he tilted his evidence to appear as if he acted in self defence. Of course, while a plea of self-defence, if successfully raised, completely absolves the offender from criminal responsibility, a plea of provocation, if successful, reduces the offence of murder to manslaughter. As the consequences are different, the requirements are also different. E

In the defence of provocation, an accused person must show that:

1. There was sudden act of provocation by or from the deceased. F

2. That he lost self control as a result of the provocation. G

3. That he reacted in the feat of passion and before there was time for his passion to cool, and

4. That the acts were proportional to the provocation.

See BARUWA V. STATE (1992) 1 NWLR (pt. 219) 511, (1992) 1 SCNJ 121, UKWUNNENYI V. THE STATE (1989) 4 NWLR (pt.114) 131, EDOHO V. STATE (2010) 14 NWLR (pt.1214) 651, OBAJI V. STATE (1965) 1 ALL NLR 269, OLADIRAN V. STATE (1985) 1 B NWLR (pt. 14) 75, URAKU V. STATE (1976) 6 SC. 128.

On the other hand, for a successful plea of the defence of self defence by an accused person charged with the offence of culpable homicide punishable with death under the penal code, the following must be established by credible evidence:

1. That his life was actually threatened or endangered by the acts of the deceased;

2. That the only option that was opened to him to save his own life was to use force which was necessary on the deceased at the material time;

3. That amount of force used on the deceased was proportionate to the threat or danger posed by the acts of the deceased;

4. That he did not take an undue advantage of the deceased in the process of saving his own life from the danger or threat posed by the deceased;

5. Show that he did not want to fight and that he was at the material time prepared to withdraw from the danger posed to his life by the deceased. See NWUZOKE V. THE STATE (1988) F NWLR (pt.72) 529, THE STATE V. FATAI BAIYEWUNMI (1980) 1 N.C.R. 183, MGBOKO V. THE STATE (1972) SC (Reprint) 113, STEPHEN V. STATE (1986) 5 NWLR (pt. 46) 979; OKONJI V. STATE (1987) 3 SC 175, OBAJI V. THE STATE (1965) NMLR 417.

The two courts below held that there was no personal threat to the appellant from the deceased. In other words, he was not in danger at all. The only evidence which appealed to the learned trial judge and which was confirmed by the Court of Appeal was that the appellant was provoked to hit the deceased when the said deceased slapped his (appellant's) sister. From the ingredients of the defence of provocation and that of self defence, I think the two courts below were right to hold that only the defence of provocation availed the appellant in view of the evidence available at the trial. The appellant

did not lead evidence to show that his life was actually threatened or endangered by the acts of the deceased or that the only option for him was to kill the deceased to preserve his life. This first issue, for me, does not assist the appellant at all.

The second issue also has to do with the defence of self defence. However, during argument the learned counsel for the appellant submitted that failure to tender the knife used to stab the deceased was fatal to the prosecution's case. I do not intend to waste time here because failure to tender the knife was never made an issue before this court. Be that as it may I wish to agree with the decision of the court below on the issue of the instrument used to kill the deceased. It states on page 178 of the record thus:

"Similarly, the evidence of the prosecution witnesses and Exhibits 2 and 3 which were statements of the appellant at Abejukolo police station and the State C.I.D. Lokoja respectively on what happened on the date of the incident, leaves no room for any reasonable doubt that it was the act or acts of the appellant to wit: hitting, sticking or stabbing the deceased with either a knife, cutlass or stick that caused the injury on the chest which eventually resulted in the death of the deceased."

The appellant accepts that it was the wound he gave the deceased on his chest that killed him. So whether he used a knife (or cutlass) which was tendered or a stick which he (the appellant) formulated in court, the truth remains that it was that fatal strike on the chest of the deceased by the appellant that killed him. He knows or ought to have known that the chest region is where the issues of life relate. Any strike on the chest usually and in most cases result in death. I need not say more on this.

The last issue is that the judgment of the Court of Appeal is unreasonable, unwarranted and cannot be supported having regard to the evidence before the panel of justices. All I have been doing since I started writing this judgment has been to review the evidence used to arrive at the conviction of the appellant. That notwithstanding I shall do more.

Under Section 221 (b) of the penal code, the prosecution has to prove the following ingredients in order to secure a conviction for the offence of culpable homicide punishable with death. That is to say:

1. That the death of a human being actually occurred.
2. That it was caused by the act or acts of the accused.
3. That the act/acts were done with the intent of causing death or.

4. That accused knew that death was the probable consequence of his acts. See OMINI V. THE STATE (1999) 12 NWLR (pt 630) 168, IGAGO V. THE STATE (1999) 14 NWLR (pt. 637) I, (1999) 10 - 12 S.C. 84, EDOHO V. THE STATE (2010) 14 NWLR (pt.1214) 651, AUDU V. STATE (2003) 7 NWLR (pt. 810) 516.

The facts of the case have already been stated in this judgment. There is no doubt that the deceased had died. There is no dispute that the deceased died from the act of the appellant. The evidence from the facts adduced before the trial court particularly that of PW1, the appellant's oral testimony and Exhibits P2 and P3, it shows that the appellant was at the time of the incident a 20 year old healthy young man and that he stabbed the deceased with either knife or cutlass on the chest and that the deceased died instantly, immediately or very soon after he was stabbed by the appellant from the force used and the position of the body stabbed. It is my view that the appellant intended to kill the deceased or that death was the probable consequence of his act. There is no contrary evidence to this. The decision of the trial court and the confirmation of same by the Court of Appeal, were in my opinion reasonable, having regard to the quantum of evidence adduced before the trial court. I resolve issue three against the appellant.

Having resolved the three issues against the appellant, it only remains for me to state that there is no scintilla of merit in this appeal. It is accordingly dismissed by me. Appeal dismissed.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead Judgment of my learned brother, Okoro, JSC just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed. It is on record that appellant raised the defence of provocation at the trial which defence was considered

by the learned trial Judge and held applicable to the facts of the case thereby resulting in the court finding appellant not guilty of the offence of culpable homicide punishable with death but guilty of culpable homicide not punishable with death under Section 224 of the Penal Code, and sentenced him accordingly.

However, it is the contention of learned counsel for appellant that the lower courts ought to have considered the defence of self defence alongside that of provocation in determining the case of appellant.

While it is the law that in a criminal trial the trial court should consider all defences available to an accused person irrespective of its merit or stupidity, I hold the view that that principle does not mean that the court can uphold conflicting defences. Where the defences raised by an accused person conflicts with one another, the trial court, in my view, though obliged to consider all the conflicting defences must decide on the defence applicable to the case having regard to the evidence on record. Where the facts disclosed in evidence support one as against the other as in this case, the court will adopt the established defence. In the instant case, learned counsel for appellant contends that the defence of self defence availed the appellant despite the finding of fact that it is rather the defence of provocation that applies.

By the provisions of section 222(1) of the Penal Code, an accused person is entitled to the defence of provocation if it is proved that at the time of committing the crime/offence he was:

- (a) deprived of the power of self control and
- (b) the provocation was grave and sudden, and,
- (c) the act of retaliation is proportionate to the provocation-
- (d) was there time for the passion of the accused to cool.

It is settled law that a successful defence of provocation reduces an offence of murder/culpable homicide punishable with death to that of manslaughter or culpable homicide not punishable with death.

On the other hand, a defence of self-defence, when successfully raised by an accused, entitles him to a complete requital. In this case, the defence of self-defence is provided for under Sections 65 and 222(2L) of the Penal Code.

Though the trial court considered the defence of self-defence

in the Judgment, it came to the conclusion that there was no acceptable evidence to ground the defence and that from the evidence on record only the defence of provocation was available to him. The finding/holding was affirmed by the lower court.

I hold the view that an accused person cannot legally be entitled to the defence of provocation and that of self defence at the same time and in relation to the same offence. In the case of LAOYE V. STATE (1985) 2 NWLR (Pt. 10) 8d32, this Court, while dealing with the defence of self-defence held as follows:-

“The law would excuse a killing if the killer had reasonable grounds for believing that his own life was in danger and that he had to kill in order to deserve it. The belief of the accused in such a case would be tested on objective grounds and several factors would necessarily arise in determining the objective belief, for example the quality of force used on the deceased must be the same as that with which the accused defends himself” See also the case of Odu V.State (2001) 10 NWLR (Pt. 722) 668.

Now the facts on which the trial court found the defence of provocation as having been established and which was affirmed by the lower court includes the appellant’s statements in Exhibits 2 and 3 in which appellant stated positively that he hit or stabled the deceased because he could not bear the attack or beatings of his mother and sister by the deceased which resulted in their fainting or loss of consciousness it was on that basis that the trial Judge held that the defence of provocation had been made out.

On the other hand for a defence of self defence to avail an accused person he has to establish the following:-

- a. That there was a real and actual threat or danger to the life of the accused person.
- b. the act of the accused person must be the only option he had to save or preserve his own life etc, etc.

It is clear from the above that the defence of self defence does not extend to the defence of a mother, sister or wife or child or relation, etc of the accused but is limited to the defence of the life of the accused person whereas in the case of the defence of provocation it can avail an accused person who is provoked by the beating he sees inflicted on his parents etc, as disclosed in this case.

It is for the above reasons and the more detailed reasons given

in the lead Judgment of my learned brother that I too find no merit in the appeal and consequently dismiss same. Appeal dismissed.

GALADIMA JSC

From the Record of Appeal and the evidence of witnesses of who testified at the trial High Court of Kogi State, Abejukolo the following facts were exposed:

There has been a lingering land boundary dispute between the mother of the appellant and that of the deceased. The village head had to invite the parties for settlement of the boundary dispute. In the process of the demarcation serious altercations between the dispute parties erupted resulting into a fracas as a result of which the appellant stabbed the deceased on the chest and he died at the scene.

The appellant was arraigned on a one count charge of Culpable Homicide punishable with death under S.221 of the Penal Code.

The learned trial Judge who took and heard the evidence, in his considered judgment, concluded that the appellant had put up a good defence of provocation and thereby convicted and sentenced him to 10 years imprisonment under Section 224 of the Penal Code.

Dissatisfied with his sentence and conviction by the trial court appellant appealed to the Court of Appeal, Abuja Division. The lower court having meticulously considered the issues and argument canvassed before, by the parties, came to the conclusion that the appeal lacked merit and it was accordingly dismissed on 20/10/2010.

Appellant has further appealed to this court. He filed his Notice of Appeal on 24/11/2010, containing FIVE GROUND of appeal and distilled THREE ISSUES there from as follows:

"1. Whether the learned Justice of the Court of Appeal did not err in law when they dismissed the Appellant's Appeal on the ground that the plea of the defence of self-defence was first raised and introduced by the Appellant during his oral testimony at trial which thus was clearly inspired, impotent, wobbly, hypothetical, afterthought not available to the Appellant as the prosecution who has proved the case beyond reasonable doubt cannot controvert the plea of the defence of self-defence at that stage.

2. Whether the learned Justices of the Court of Appeal did not err in law when they held that the prosecution has proved beyond

reasonable doubt all the ingredients of the offence with which the Appellant was charged in spite of the failure and refusal to consider the plea of the defence of self-defence properly and/or at all, thus Appellant was not heard at all and/or properly on his plea of self-defence.

B *3. Whether the entire decision of the Justices of the Court of Appeal is not unreasonable, unwarranted and cannot be supported having regard to the evidence before he panel of honourable learned justices?"*

C The Respondent on the other hand, distilled only two issues for determination as follows:

"1. Whether the Court of Appeal was wrong in agreeing with the trial court that the defence of self-defence did not avail the Appellant.

D *2. Whether the decision of the Court of Appeal can be supported having regard to the evidence before the court."*

I have considered the preliminary objection raised by the prosecution. Their contention that the grounds of appeal are incompetent because as grounds are on questions of facts and mixed law and facts (and leave of court was not obtained) hold no water.

The Respondent apart from stating that grounds are on questions of facts and mixed law and facts, they did not demonstrate further showing clearly which of the grounds is of facts or mixed law and facts and thereby requiring the leave of court. In the circumstance the ground of objection lacks substance and I hereby overrule it.

It is even more ridiculous for the Respondent to argue in his second leg of objection that the 5th ground of the Notice of appeal having not been duly argued must be deemed abandoned. It is trite that issues set out in an appeal for determination are required to be argued not the grounds of appeal. Despite this, the Respondent did not specifically state what his complaints were. It is not the duty of the respondent to contend generally that the issues distilled by the appellant which he considered "grossly incorrect must not be looked into by the Court. This is the duty of the court, where the appellant canvasses argument on an issue properly distilled to determine same and came to the right conclusion. Again I do not see the basis for this objection. It is accordingly overruled.

The sum total of appellant grouse herein is that the lower court did not consider the defence of self-defence alongside that of provocation in determining his faith.

I agree that in criminal jurisprudence it is trite that no matter how weak, funny, stupid, fanciful, doubtful and inconsequential, the pieces of defence put up by the accused must be considered by the court so as to make a sound finding, this does not mean that conflicting defences raised by the accused person must not be considered. The court has a duty to consider them and decide which of the defence is relevant or applicable to the case, having regard to the evidence on record. I do not quite agree with the learned counsel for the appellant that the defence of self-defence only avail the appellant despite the finding of the fact by the courts that it is rather the provocation that actually applies in the case, based on the evidence before it.

The court is saying that the appellant had earlier in his statement to the police raised a defence of provocation and that the new defence of self-defence was an afterthought. The Court considered Exhibit 2, and 3 in which the appellant stated that he hit or stabbed the deceased because he could not bear the attacks heaped on his mother and sister by the deceased which led to the unconsciousness. On that the trial court rightly held that the defence of provocation had been made out.

By the provisions of S.221 (1) of the Penal Code an accused person is entitled to defence of provocation. The following 4 elements must be proved at the time of committing the crime that viz:

- (i) He was deprived of the power of self control and
- (ii) The provocation was grave and sudden and
- (iii) The act of retaliation is proportion to the provocation and
- (iv) Was there a time for the passion of the accused to cool?

The defence of the foregoing elements reduces an offence of Culpable Homicide punishable with death to that of culpable homicide not punishable with death under the Penal Code.

However, where a defence of self-defence is raised under S.222 (2L) of the Penal Code is raised; an accused person must prove or establish the following:

- (i) That there was a real and actual threat or damage to the life of the accused person.

(ii) The act of the accused person must be the only option he had to save or preserve his own life, etc.

It is the case of *LAOYE v. THE STATE* (1985) 2 NWLR (pt.10) 8 at 32 that this section has been made clear by this court when it was held that:

B *“The law would excuse a killing if the killer had reasonable ground for believing that his own life was in danger and that he had to kill in order to preserve it. The belief of the accused in such a case would be tested on objective grounds and several factors would necessarily arise in determining the objective belief for example the quality of the force used on the deceased must be the same as that with which the accused defends himself.”*

C I too have no doubt from the above that the defence of self-defence does not extend to the defence of a mother, sister, child or D wife, or a relation of the accused person, but as the phrase implies, it is limited to the defence of self that is the life of the accused person. In this case the defence of provocation can avail the appellant who witnessed the brutal beating and infliction of injuries on his mother, and sister. For these few reasons I adumbrated and for more detailed E ones in the lead judgment of my learned brother OKORO, JSC. I too, find no merit in the appeal and I hereby dismiss it.

RHODES-VIVOUR JSC

F I have had the advantage of reading in draft the judgment of my learned brother, Okoro, JSC. So completely do I agree with it that I have hesitated for some time before finally deciding to add a few words of my own on the defence of provocation which both G courts below found was a good defence for the appellant in the charge of culpable homicide punishable with death?

The facts, including the eventual death of the deceased after being stabbed by the appellant were set out in the leading judgment. They need not be repeated.

H Any acts or words may be provocation. Provocation is an act or series of acts done by the deceased (when alive) to the accused person which would cause a reasonable person, a sudden and temporary loss of self control rendering the accused person so subject to passion as to make him for the moment not master of his mind. See

Aganmonyi v. A.G. Bendel State (1987) N.S.C.C. Vol.18 (Pt 1) p.30,
Queen v. Eseno (1960) N.S.C.C. Vol.1 p.36.

If the facts are such that a reasonable person in consequence of the severe beating of his mother and sister with injuries inflicted on them by the deceased might lose self control and use violence with fatal results, it is the duty of the trial judge to decide whether manslaughter or murder is the proper verdict and in making that decision the court must examine carefully the act which resulted from the provocation. B

At the earliest opportunity to defend himself was when the appellant wrote his statement to the Police, Exhibits 2 and 3. He said he stabbed the deceased in a fight because he could not bear to see his mother and sister beaten up by the deceased with injuries inflicted on them. C

A reasonable man, especially a young man who the appellant happens to be, who sees someone beating up his mother and sister mercilessly is expected to react violently in defence. To be involved in a fight is a reaction that comes naturally in such a situation. D

In a charge for murder a successful defence of provocation has the effect of reducing the charge to Manslaughter. Once the accused person is convicted for manslaughter the trial judge has discretion on sentence. Sentence can be a custodial sentence ranging from one day to life imprisonment. Whereas for a conviction for murder there is no discretion. The sentence is death. The sentence of 10 years imprisonment was correct in the circumstances. E F

For this and the fuller reasoning in the leading judgment, I find no merit in this appeal. The appeal is dismissed.

AKA'AH S JSC

The Court of Appeal, Abuja Division dismissed the appellant's appeal against his conviction by the Kogi State High Court Abejokolo for Culpable Homicide not punishable with death contrary to Section 224 of the Penal Code and which sentenced him to ten years imprisonment. The judgment of the lower court was delivered on 20th October, 2010. G H

My learned brother, Okoro JSC set out in the leading judgment the facts leading to this appeal. Before the fateful day which

was Sunday, 15/7/2007, a lingering boundary dispute between the mothers of the appellant and deceased re-occurred and the village/ward head called “Gago” was invited by the appellant’s mother to demarcate the boundary between the two families. During the process of the demarcation, there was altercations between members of the two disputing families which resulted into a fight in the course of which the appellant stabbed the deceased on the chest which led to his instantaneous death. Upon his arrest, the state brought an application under Section 185 (b) of the Criminal Procedure Code for leave to prefer a charge against the appellant. The charge read as follows:-

“That you, Adamu Sheidu on or about 15th day of August, 2007 at Abejukolo in Omale Local Government Area of Kogi State within the Kogi Judicial Division did commit culpable homicide punishable with death in that you caused the death of Abdul Angulu by doing an act of stabbing him with a knife in his chest with the knowledge that his death would be the probable consequence of your act you thereby committed an offence punishable under Section 221 of the Penal Code”.

At the trial, the Prosecution called four witnesses and tendered some exhibits while the accused gave evidence in person and called two other witnesses who are relations to testify on his behalf.

The learned trial Judge found that the defence of provocation was validly raised and invoked Section 222 (1) Penal Code to hold that a person who commits culpable homicide and validly raises the defence of provocation can only be guilty of culpable homicide not punishable with death under Section 224 of the Penal Code. He consequently sentenced him to 10 years imprisonment.

The appellant was dissatisfied and appealed against the conviction and sentence arguing that the defence of self - defence was not considered by the trial court. The lower court dismissed the appeal thereby prompting a further appeal to this Court.

My learned brother, Okoro JSC went to a great extent to consider the issue of self - defence. While provocation has a mitigating effect of reducing the sentence which could be imposed on the finding of culpable homicide; where self - defence is properly raised and proved, it exculpates the accused of the alleged offence of culpable homicide and entitles him to a discharge and acquittal. The two de-

fences are however not available to an accused person at the same time; it is either that he killed in self - defence or was provoked into committing the offence. In the case of self - defence the appellant is saying that he is fully conscious that if he does not kill his assailant, he will not live to tell the story but in the case of provocation he was made to temporarily lose his self control at the time he dealt the fatal blow on the deceased. Any self-defence raised only at the stage of giving evidence would be considered an after thought and the Prosecution is not expected to speculate on the kind of defence an accused person would raise during his trial.

With this comment I fully endorse the in-depth consideration of the issue by my Lord, Okoro JSC and find that the appeal lacks merit and it is accordingly dismissed. The conviction and sentence imposed by the trial Judge which was affirmed by the lower court is further affirmed by me. Appeal is dismissed.

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