

**SUPREME COURT OF NIGERIA**  
FRIDAY 27TH JUNE, 2014. SC. 186/2011  
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,  
C. B. OGUNBIYI, JJSC**

ABDULLAHI UMAR ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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APPEALS - Issues - Formulation - Issues are distilled from grounds of appeal - And not from particulars of grounds - And if an issue is not related to any ground - It is liable to be struck out (H1)

APPEALS - Hearing - Basis for - Supreme Court determines appeal solely on issues - Formulated from grounds of appeal - And does not hear arguments on a ground - From which no issue has been raised (H2)

CRIMINAL PROCEDURE - Interpreter - Record of - CPC s. 242(2) - Where interpreter is used - It is mandatory to state his name - Language in which he interprets - And that he is bound by s. 242(1) (H3)

CHARGES - Plea - Irregularity - Effect - Appellant having stated that he understood the charge - Failure of court to strictly follow requirements of CPC s. 242(2)(4) - Cannot vitiate the proceedings - As it is a mere irregularity (H4)

***FACTS***

Accused/appellant was arraigned before the High Court of Sokoto State on one count charge of murder punishable under section 221(b) of the Penal Code. Appellant pleaded not guilty to the charge. Prosecution/respondent stated that appellant stabbed the deceased one Jamilu Muhammed with a pair of scissors on the chest. To prove its case, respondent called three witnesses and tendered exhibits A-C and urged the court to convict and sentence appellant accordingly.

Appellant testified in his defence but called no witness. He admitted stabbing the deceased but put up the defence of accident pursuant to section 48 of the Penal Code. Appellant contends that respondent has not proved all ingredients of the offence of murder against him. Hence, he urged the court to discharge and acquit him. The case proceeded to trial and at the end of which the court convicted and sentenced appellant to death. Upon appellant's appeal to the Court of Appeal Sokoto Division, the conviction and sentence passed by the trial court was affirmed. Aggrieved further, appellant appealed to Supreme Court.

### **ISSUE FOR DETERMINATION**

Whether the guilt of the Appellant was proved and established beyond reasonable doubt having regard to the evidence adduced at the trial to warrant the conviction of the Appellant under section 221 (b) of the penal code as affirmed by the Court of Appeal.

**HELD** (Dismissing the appeal per **MUNTAKA-COOMASSIE JSC**, NGWUTA JSC dissenting)

*APPEALS - Issues - Formulation*

**1. The law is this that issues are distilled or formulated from the ground or grounds of appeal and from no other. One cannot lawfully formulate issue or issues from the particulars of the ground of appeal. If he or she does that in the eyes of the law there is no issue worth considering.**

**An issue could cover one or more grounds of appeal and therefore, if an issue is not related to any ground of appeal as the 2 here, it becomes irrelevant and liable to be struck out as it goes to no issue.** (pp. 2449 E/2450 G)

*APPEALS - Hearing - Basis for*

**2. It is settled that an appellate court as this court, I must emphasize, determines appeal before it solely on the issues formulated from the grounds of appeal filed in the appeal before it. Consequently, where as it is being urged here that no competent issue has been raised from ground 3 it is settled, it would be deemed abandoned and to be discountenanced. In**

**other words, the court should not hear any submissions or arguments in regard to a ground of appeal from which no issue has been raised.** (p. 2450 G)

*CRIMINAL PROCEDURE - Interpreter - Record of - CPC s. 242(2)*

**3. Section 242(2) Criminal procedure code now makes it mandatory for the record of any criminal proceedings at which an interpreter has been used to “state the name of the interpreter, the languages in which he interprets and the fact that he has been bound in accordance with the provisions of subsection (1) to state the true interpretation of the evidence.”** (p. 2453 H)

*CHARGES - Plea - Irregularity - Effect*

**4. Having read the provisions of Section 242 (2) and (4) and the provision of Evidence Act thereof and having considered the arguments and the submissions of both counsel I discovered that there is no strict compliance with the requirements of that Section 242 (2) and (4) of the C. P. C.**

**However when asked by the court the accused stated that he understands the charge and pleaded not guilty to charge as read and explained to him. I refer to page 16 of the record. It was also deduced that the language of that trial court is English.**

**The accused indicated that he speaks Hausa language. The record also stated that one H. S. Kuwwa appeared for the accused. In that situation the failure of the court to strictly follow and apply the requirements of section 242 (2) (4) C. P. C cannot vitiate the proceedings. It is a mere irregularity in the proceedings.** (p. 2454 G)

## NOTABLE POINTS OF INTEREST

### **MUHAMMAD JSC**

#### **1. Murder – Proof – Ingredients of**

In proof of the offence charged, the requirement of the law and the practice is that the prosecution has the burden to prove the following:

- (a) that the death of a human being has actually taken place.
- (b) that such death has been caused by the accused,
- (c) that the act was done with the intension of causing death; or that it was done with the intension of causing bodily injury as:
  - (i) the accused knew or had reason to know that death would be the probable and not only the likely consequence of his act; or
  - (ii) that the accused knew or had reason to know that death would be the probable and not only the likely consequence of any bodily injury which the act was intended to cause. (p. 2455 H)

C **2. Murder – Proof – Means of**

- It is thus, my understanding that the offence of culpable homicide punishable with death as provided under section 221(b) of the Penal Code can be proved to the standard required by the law, that is,
- D proof beyond reasonable doubt by any of the following methods:
- (i) by confession of the accused person,
  - (ii) by direct evidence,
  - (iii) by circumstantial evidence and or;
  - (iv) by the combination of all or any of the above methods.
- E (p. 2461 B)

**ARIWOOLA JSC**

**3. Defence of accident – Conditions for**

- F However, a willed deliberate act will negative the defence of accident. In other words, for the defence of accident to avail the appellant in the instant case, it must be shown that the stabbing of the deceased with a pair of scissors by the appellant occurred independent of the exercise of his will. It must be borne in mind that the law,
- G pursuant to which the appellant was tried does not deal with an “act” but an “event” and the event within the meaning of the Section, is what apparently follows from an act. (p. 2467 A)

**4. Criminal procedure – Motive not relevant**

- H It is now settled that what is relevant in our criminal law is that the act of the accused person which resulted in the death of the deceased must be unlawful. The mens rea, or malice afore-thought no longer governs the criminal responsibility of the accused person as these are common law concepts. Motive is also said to be irrelevant except that

where it is proved, it strengthens the case of the prosecution.  
(p. 2467 C)

**NGWUTA JSC** (Dissenting)

**5. Withholding of evidence – Implication of**

Perhaps of more importance is the fact that no reason was advanced by the prosecution as to why the statement was not tendered in evidence notwithstanding its manifest materiality to the prosecution's case. B

Two possibilities explain the conduct of the prosecution with regard to the statement allegedly made to it by the appellant: C

“(a) *No such statement was made.*

(b) *The statement was made but its contents are fatal to the case of the prosecution. See Section 167 of the Evidence Act 2011 which provides, inter alia, in subsection (d) that the Court may presume that evidence which could be and is not produced would, if produced, but unfavourable to the person who withhold it..”*

From the evidence of both parties, the evidence exists. PW2 claimed the statement was recorded in his presence and DW1 said he was asked to sign a statement which was not read to him. The prosecution who ought to have produced the statement, vital evidence in its case, failed to do so for no apparent reason. E

In *Onwujuba v. Obieniu* (1991) 4 NWLR (pt. 183) 16 SC, Uwais, JSC (as His Lordship then was), stated that before the presumption under section 149 (d) of the Evidence Act (now Section 167 (d) of the Evidence Act 2011 can operate, it must be shown and established: F

(a) that such evidence existed, and

(b) that it was that party that withheld it. G

The two conditions for the operation of the presumption in section 167 (a) of the Evidence Act 2011 are shown and established in this case. (p. 2474 E)

**6. Judgments – No basis for guilty finding** H

The trial Court erred in law in determining the guilt of the appellant in absence of the statement relied on by the State to the effect that the appellant said he killed the deceased under the influence of a solution substance. This is more so as the appellant denied making

such statement. On the facts before the trial Court, the prosecution did not prove its case beyond reasonable doubt as required by Section 135 (1) of the Evidence Act, 2011 and the Court below ought not to have affirmed the judgment of the trial Court. (p. 2475 D)

**B 7. Inviolability of concurrent findings – Limit to**

This Court does not, as a matter of principle or practice, disturb concurrent findings of the trial Court and the appeal Court.

However, the principle of inviolability of concurrent findings of fact of the two Courts below is not cast in stone like the Ten Commandments. It has its limitations and can and ought to be disturbed where the findings are either perverse or there is substantial error either in substantive or procedural law which if uncorrected will lead to miscarriage of justice. (p. 2476 C)

D

**REPRESENTATION**

Nnamonso Ekanem Esq., with Iniabasi Udobong Esq., Joseph Inyang Esq., for the Appellant

Nuhu Adamu A-C Sokoto State with Mrs. Helen Dickson Esq. , for the Respondent

**CASES REFERRED TO**

- Bada v. State (1991) 8 NWLR (pt. 208) 134
- Ogbuinyinya v. Okudo (1990) 7 SC (pt. 1) 66
- F Adelaja v. Fanoiki (1990) 3 SC (pt. 1) 130
- Nzekwe v. Nzekwe (1989) 3 SC (pt. II) 76
- Momodu v. Momoh (1991) 2 SC 1
- Onifade v. Olayiwola (1990) 11 - 12 SC 1
- G Bankole v. Pelu (1991) 11 - 12 SC 116
- Enang v. Adu (1981) 11 - 12 SC
- Igwe v. State (1982) 9 SC 174
- Isibor v. State (2002) 2 SC (pt. 11) 110
- Maiyaki v. State (2008) 7 SC 128
- H Ajayi v. State (1964) NNLR 61
- Akpanor v. State (2002) JSCN 110
- Eyorokoromo v. State (1976) 6 - 9 SC 3
- Kajubo v. State (1988) 1 NWLR (pt. 73) 72

**STATUTES REFERRED TO**

Penal code, ss. 48, 221(b)

Criminal Procedure Code, s. 242(2)(4)

Evidence Act 2011, ss. 67, 135(1)

**LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC**

This is an appeal against the decision of the Court of Appeal, Sokoto Division hereinafter called the lower court. The latter court unanimously dismissed the appeal by the appellant herein and affirmed the judgment of the trial court which convicted the appellant and sentenced him to death. There are therefore two concurrent decisions of the two lower courts.

**CHARGE**

*“That you Abdullahi Umar on or about 2355hrs at Emir Yahaya Road Sokoto judicial Division did commit the offence of culpable homicide punishable with death in that you caused the death of one Jamilu Muhammed by stabbing him with a scissors on the chest with the knowledge that his death would be the probable and not only likely consequence of your act and thereby committed an offence punishable under section 221(b) of the Penal code”.*

The accused person, now Appellant, pleaded not guilty to the charge. It was stated in the record of proceedings that the accused person/Appellant “*speaks Hausa*”.

The prosecution called three witnesses who testified on their behalf and closed its case. The accused person testified as Dw1 and called no witness. Parties then addressed the court.

The defence counsel addressed the high court, now trial court, and submitted that the prosecution failed to prove all the ingredients of murder against the accused person. The defence further stated that the prosecution could not adduce evidence to show that the accused intentionally caused the death of Jamilu Muhammed with the knowledge that the injury caused to the deceased would cause his death. He said and urged that the trial court should give the benefit of the accident to the accused person and to discharge and acquit him under Section 48 of the penal code.

The prosecution also addressed that court and urged the trial court to find the accused guilty, convict and sentence him to death. Since the prosecution according to the prosecution, proved all the

ingredients of the offence of murder, the court should convict the accused person as charged.

After the conclusions of evidence and addresses in a reserved judgment, the trial court delivered its judgment convicting the accused person and sentenced him to death.

B *“Looking at the circumstances of this case, with respect, it cannot be said that the act of the accused of stabbing the deceased was done without any criminal intention or knowledge or that it was done in the course of doing a lawful act and in a lawful manner and by lawful means. From the foregoing it is my considered view that the*  
C *prosecution had proved this ingredient by establishing that there was an intention to cause grievous bodily harm by the accused see Uche v. The State (supra).*

*In the circumstance therefore, having carefully examined the*  
D *entire evidence presented before me including consideration of some possible defences opened to the accused which I found do not avail him from the circumstances of the case, leading to the conclusion that the accused caused the death of Jamilu Muhammed (Now deceased) by stabbing him on the ribs with a scissors. I therefore hold*  
E *that the prosecution has proved its case against the accused beyond any reasonable doubt.*

*I find the accused guilty for the offence of culpable homicide punishable with death contrary to section 221 (b) of the penal code as charged, and I convict him accordingly.”*  
F

Dissatisfied with the judgment of the trial court the Appellant un-successfully appealed to the Court of Appeal Sokoto Division and filed a Notice of Appeal containing one single ground of appeal thus:-

G *“The decision of the trial court is unreasonable, unwarranted and cannot be supported having regard to the evidence adduced at the trial”.*

The lower court after considering the record of appeal and submissions and the addresses of counsel to the parties in a considered judgment dismissed the appeal of the Appellant.

H Ahmed Belgore JCA read the lead judgment of the court. He has this to say on page 116:-

*“... I do not see how section 48 of the penal code assists the case of the Appellant. It cannot be argued in this case that the act of the Appellant in causing the death of the deceased was lawful. Nei-*



*ther can it be argued that he had acted in a lawful manner nor can it be said that he employed a lawful means in causing the death of the deceased. I find the finding by the lower court to be unassailable and I have no reason to disturb the same as I find the findings not to be perverse. The appeal fails and it is accordingly hereby dismissed”.* Per Ahmed Belgore JCA. B

Being dissatisfied with the above judgment the Appellant appealed to the Supreme Court and filed a Notice of appeal containing one single ground of appeal, thus:-

*“The learned justices of the Court of Appeal erred in law when they held that Section 48 of the penal code does not assist the appellant in that it cannot be argued that his (appellant’s) act of causing the death of deceased was lawful, neither can it be argued that Appellant acted in a lawful manner nor can it be said that he employed lawful means in causing the death of the deceased.”* C  
D

#### PARTICULAR OF ERROR

1. There was evidence at the trial court as borne out of the records that the death of the deceased was accidental and not intentional and same was the plank of the Appellant’s argument at the Court of Appeal. E

2. PW3 testified that the Appellant intended to stab him but he dodged and Appellant ended up stabbing the deceased instead and that it was the deceased destiny.

In accordance with our rules the parties have filed and served their respective briefs of argument which were adopted on 13/3/14. F

The Appellant formulated one issue as follows:-

a. Whether the guilt of the Appellant was proved and established beyond reasonable doubt having regard to the evidence adduced at the trial to warrant the conviction of the Appellant under section 221 (b) of the penal code as affirmed by the Court of Appeal. G

The respondent in turn distilled the following single issue thus:-

*“Whether the defence of accident under Section 48 of the penal code avails the appellant in the circumstances of this case as to adversely affect the conviction and sentence of the appellant”.* H

In the course of arguing the issue the Appellant’s counsel has this to say:

‘This issue arises from sole ground of the appeal and deals with the affirmation of the Court of Appeal of the conviction of the Appel-

lant under section 221 (b) of the Penal code having regard to the evidence before the court.” He said that Section 221 (b) of the penal code states: -

“...*Except in the circumstances mentioned in section 222 culpable homicide shall be punishable with death.*

B        *b) If the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended.”*

Learned counsel for the Appellant contended that for the prosecution to secure conviction under the above section it is trite that three ingredients are required to be proved and must co-exist.

The three elements are thus:-

a) That the death of a human being has occurred.

b) That such death was caused by the accused.

D        c) That the act was done with the intention of causing death or that it was done with the intention of causing such bodily injury as;

1. The accused knew or had reason to know that death would be the probable and not only the likely consequence of any bodily injury which the act was intended to cause. Learned counsel cited in support the case of *Dare Bada v. State* (1991) 8 NWLR (pt 208) 134 at 144 para - E - H. Counsel then submitted that the key operative word in the above section is intention.

Intention of causing death. Death being likely consequence of the act or bodily injury which the act was intended to cause.

F        Various definitions of intention were stated by the Appellant’s counsel to the effect that intention is the willingness to bring about something planned or foreseen. It was the contention of the Appellant that the deceased Jamilu was not the intended target in the use of the scissors. The evidence of Pw3, both in chief and under cross-examination confirmed that the accused had no reason to stab Jamilu Mohammad on that day. Under cross-examination, the PW3 maintained that *“the injury sustained by Jamilu came as a destiny”*.

H        My lords it was the argument of both the Appellant and the witness (Pw2) that the deceased was not meant to be killed by the accused. Counsel maintained that the trial court accepted the above position of the witness and the accused and stated in its judgment that *“the appellant was trying to stab Pw3 who dodged and the scissors landed on the deceased”*.

The appellant's counsel further contended that there was no evidence to show that the accused intended to hit the Pw3 at the delicate parts of the body therefore he the appellant cannot be said to have intended death or had cause to believe that death would be probable or likely consequence of the act or any bodily injury. He finally contended that taking everything into consideration including the definition of intention defined by the Black's law dictionary, it is obvious that the Appellant had no purpose or design to kill the deceased. He had no foreknowledge of the act or desire to cause the death of deceased. Based on the above argument and contentions the Appellant's counsel submitted that the prosecution could not prove all the ingredients of that offence to warrant the conviction of the accused for culpable homicide punishable with death under Section 221 (b) of the penal code. He lamented that both the trial court and lower court held that the Appellant was not covered by the defence of Section 48 of the penal code.

My lords, the Respondent at the outset, submitted that the appellant's issue for determination as framed in his brief of argument is at variance with his ground of appeal and the arguments submitted in his brief. The submissions of the Respondent's counsel my lords, are these that the Appellant failed to formulate issue from the grounds of appeal.

***The law is this that issues are distilled or formulated from the ground or grounds of appeal and from no other. One cannot lawfully formulate issue or issues from the particulars of the ground of appeal. If he or she does that in the eyes of the law there is no issue worth considering.***

The worst part of it is that the appellant argued the grounds of appeal as framed. It is with this badly framed grounds of appeal that the Appellant faulted the finding or decision of the learned justices of the lower court for agreeing with the learned trial judge that the defence of accident under Section 48 of the penal code did not avail the appellant. The stance taken by the Appellant appears to be confusing.

Learned counsel for the Respondent again submitted that how can the Appellant ask this court to determine, "in such ground" which has no issue formulated, whether the guilt of the Appellant has been proved and established beyond reasonable doubt having regard to

the evidence. This is a confused situation we therefore urged this court to discountenance the Appellant's issue as raised in his brief and to determine this appeal on the respondent's sole issue. Certainly the issue, so called, formulated by the appellant does not relate to his ground of appeal and it has to be discountenanced. Learned  
 B counsel for the respondent Inuwa Abdulkadir A-G Sokoto State, (who signed the respondent's brief) cited in support of the above argument and submissions the following decided cases of the Supreme Court as follows:- a. Odeh V. Federal Republic of Nigeria (2008) 3 -  
 C 4 SC 147 at pages 159/160.

*"Every issue for determination must be formulated from and related to or distilled from a competent ground of appeal. In other words, an issue not distilled from any of the grounds of an appeal is incompetent and must be discountenanced together with the argu-  
 D ment or arguments advanced there-under. I accordingly strike out the third issue and all the arguments canvassed by the Appellant on it".*

In a more clear tone on this issue the apex court in the case Agbakoba v. INEC 12 SC. (part III) page 198 to 199 my learned  
 E brother Chukwuma-Eneh JSC has this to say:-

*"However, it is settled as in the case of Sha v. Kwan (2000) 5 SC. 178; (2000) FWLR (pt II) 1798, as in so many other decided cases of this court that the main purpose of formulating issues for  
 F determination is to enable the parties get focused on the real questions in controversy in the ground (s) of appeal. In any appeal in this court, only issues formulated within the parameters of the grounds of appeal and stemming from the decision appealed from are competent to be ventilated." See: Oniah v. Onyia (1989) 2 SC. (pt.1) 69;  
 G (1989) 2 SCNJ 69. **An issue could cover one or more grounds of appeal and therefore, if an issue is not related to any ground of appeal as the 2 here, it becomes irrelevant and liable to be struck out as it goes to no issue.** See: Ogbuinyinya v. Okudo (1990) 7 SC (Pt 1) 66; (1990) 4 NWLR (pt 146) 551 at 568. **It is  
 H settled that an appellate court as this court, I must emphasize, determines appeal before it solely on the issues formulated from the grounds of appeal filed in the appeal before it. Consequently, where as it is being urged here that no competent issue has been raised from ground 3 it is settled, it would***

***be deemed abandoned and to be discountenanced. In other words, the court should not hear any submissions or arguments in regard to a ground of appeal from which no issue has been raised.***

I refer and rely on the following decided cases for the foregoing conclusions. See: Attorney-General Anambra State V. Onuselogu Enterprises Ltd. (1987) 4 NWLR (pt. 66) 547; Oniah V. Onyia (1989) 2 SC. (pt. 1) 69; (1989) 1 NWLR (pt. 99) 514; Adelaja V. Fanoiki (1990) 3 SC. (pt 1) 130; (1990) 2 NWLR (pt 131) 137 at 148; Nzekwe V. Nzekwe (1989) 3 SC. (pt II) 76; (1989) 2 NWLR (pt. 104) 373 at 423; Momodu V. Momoh (1991) 2 SC. 1; (1991) 1 NWLR (169) 608 at 621; Onifade V. Olayiwola (1990) 11 - 12 SC. 1; (1990) 7 NWLR (pt. 161) 130; John Bankole & Ors. V. Mojidi Pelu & Ors. (1991) 11 - 12 SC 116; (1991) 8 NWLR (pt 24) 523 at 537.

However, learned counsel for the respondent contended that learned trial judge made at least two important findings that were considered by the justices of the lower court in affirming the conviction of the appellant by the trial court. It would be reproduced by me in this judgment thus:-

*“on the third ingredient of the offence of culpable homicide punishable with death, it is trite law that such cases as in the instant case, it is sufficient for the prosecution to established (sic) an intention to cause grievous bodily harm, even though such intention might (sic) fall short of an intention to kill or to endanger life.... see page 74 of the record”.*

Secondly on page 77 of the records say, or holds:-

*“The defence of accident sought to be relied upon by the defence is also untenable in my view, since all the ingredient (sic) that would entitled (sic) the accused to benefit from that defence has not being (sic) proved...”*

*Looking at the circumstances of this case, with respect, it (sic) cannot be said that the act of the accused of stabbing the deceased was done without any criminal intention or knowledge or that it was done in the course of doing a lawful act and in a lawful manner and by lawful means.”*

The learned judge concluded thus:-

*“In the circumstance therefore, having carefully examined the entire evidence presented before me including consideration of some*

possible defences opened (sic) to the accused which I found do not avail him, from the circumstances of the case, leading to the conclusion that the accused caused the death of Jamilu Muhammed (now deceased) by stabbing him on the ribs (sic) with a scissor (SIC). I therefore hold that the prosecution has proved its case against the accused belong (sic) any reasonable doubt. I find the accused guilty of the offence of culpable homicide as charge (sic), and I convict him accordingly". Per Sifawa J., on pages 77 - 78 of the records.

The lower court unanimously affirmed the conviction and sentence of the appellant Ahmed Belgore JSC has this to say:-

"It has been argued for the appellant, in few words, that he did not intend to cause the death of the deceased and that what had happened was accidental".

Ekanem Esq; learned counsel for the defence, made a thorough research and came up with a definition of intention as provided by Black's Law Dictionary thus intention is *"the willingness to bring about something planned or foreseen"*.

My lords, learned counsel to the appellant submitted that the testimonies, both of Pw3 and of the appellant, agreed that the deceased was not an intended target. In fact learned counsel was saying that it was a case of "transferred malice" or accident.

Learned justices of the court below rightly in my view, debunked the position taken by the appellant. It is clear that the appeal lacks merit. I resolve that issue in favour of the prosecution. There is no way this court can set aside the concurrent findings of the two lower courts, which are not perverse. It would be extremely difficult to do so. Enang v. Adu (1981) 11 - 12 SC; (1981) 11 - 12 SC (reprint) 17; See also the case of Igwe v. State (1982) 9 SC 174. Isibor V. State (2002) 2 SC (pt. 11) 110.

I have to admit that I am impressed by the position taken by the respondent's counsel Inuwa Abdul-Kadir Esq., and I accept it as correct the case he cited Alhassan Maiyaki v. The State (2008) 7 SC 128 at 152.

My lords I seek permission to digress a bit that after we reserved judgment on 13/3/14 and after our usual conference we could not agree on whether the appeal shall be allowed or dismissed in view of the allegation by the appellant's counsel Mr. Ekanem that the accused/appellant at the trial indicated that he speaks Hausa. He con-

tended that the trial court did not assign an interpreter to the Appellant and that the language is in English. Our panel then asked the parties and their respective counsel to address us which they did on 13/3/2014.

On that day Nnamonso Ekanem Esq. adopted his brief dated and filed on 24/6/11. He urged this court to allow the appeal and set aside the judgment of the lower court and to discharge and acquit the appellant. B

The respondent adopted their respondent's brief of argument and urged this court to dismiss the appeal.

Learned counsel for the Appellant insisted that the confessional statement of the accused at the trial court was not regularly and properly admitted since it was not translated into the courts language which is English. He again referred to page 16 of the records and argued that on the face of the records the charge was not translated from English, the courts language to Hausa the language of the Appellant. C

Learned Respondent's counsel Mr. Nuhu, the Hon. Attorney General of Sokoto State contended that going by page 16 of the records, the Registrar of the trial court affirmed to translate Hausa to English. There was in fact no such translation; however, there are numerous decisions of the Supreme Court not to record verbatim what the accused person has to say. E

Learned Attorney-General admitted that there is no such recording on translation. This legally means there is an irregularity which cannot in law vitiate the proceedings. He relied on the following decisions:- 1. Onyia v. The State (2008) 12 SCNJ (pt. II) p 610 at 631 - 640; 2. Sampson Nkemiju Uwaekweghnya V. The State (2005) M. J. S. C. p. 1. F

In the trial court this issue was held to the satisfaction of the judicial stakeholders. In the famous case of Shinfida v. Commissioner of Police (1970 - 1972) LRNN pages 113 - 117 it was held that when services of an interpreter are used it is mandatory by virtue of Section 242 (2) Criminal procedure for the record to name the interpreter and state the languages to and from which he interpreted, and that he was sworn or affirmed to do so. That was not done here. G

***Section 242(2) Criminal procedure code now makes it mandatory for the record of any criminal proceedings at which an interpreter has been used to "state the name of the inter-*** H

***preter, the languages in which he interprets and the fact that he has been bound in accordance with the provisions of sub-section (1) to state the true interpretation of the evidence.”***

This is so especially if the Appellant has made it a ground of appeal. In the case of *Shinfida v. COP* (supra) that court found that the proceedings were never interpreted to the Appellant, the law then is therefore behind him and he is justified to make that lapse a ground of appeal. The appeal was then allowed, *Buraimole Ajayi v. The State* (1964) NNLR 61.

In that case of *Jerome Akpanor & 3 Ors V. The State* (2002) JSCN p.110, the charge or information shall be read over and explained to the accused/Appellant in a language that he understands to the satisfaction of the court by the Registrar or other officer of the court. That court continued and held that failure to comply with these conditions would render the whole trial nullity.

It goes on to state that the record of the court must show that this procedure is followed. It is a good practice, the court says, for the trial court to specifically record that:-

*“Charge was read and fully explained to the accused to the satisfaction of the court”.*

In the case supra, it was stated that it was the submission of the appellant that the proceedings of that date did not comply with conditions (2) and (4). It was contended that there is nothing on record to show in which language the charge was read to the appellant before he was asked to plead thereto.

It was also argued that there was nothing on record to show that the charge was fully read and explained to the appellant to the satisfaction of the court. It was submitted that non-compliance with these requirements rendered the trial a nullity. The Appellant relied on the following cases:- i. *Eyorokoromo v. The State* (1976) 6 - 9 SC 3, ii. *Kajubo v. The State* (1988) 1 NWLR (pt.73) 72.

***Having read the provisions of Section 242 (2) and (4) and the provision of Evidence Act thereof and having considered the arguments and the submissions of both counsel I discovered that there is no strict compliance with the requirements of that Section 242 (2) and (4) of the C. P. C.***

***However when asked by the court the accused stated that he understands the charge and pleaded not guilty to charge***



**as read and explained to him. I refer to page 16 of the record. It was also deduced that the language of that trial court is English.**

**The accused indicated that he speaks Hausa language. The record also stated that one H. S. Kuwwa appeared for the accused. In that situation the failure of the court to strictly follow and apply the requirements of section 242 (2) (4) C. P. C cannot vitiate the proceedings. It is a mere irregularity in the proceedings.**

The position therefore taken by Mr. Nnamonso Ekanem, cannot hold water. Same is dismissed. The proceedings can be accepted as fair and correct. The appellant's issue lacks merit same is hereby dismissed. That lone issue is resolved against the appellant. The appeal therefore is devoid of any merit same is dismissed.

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### **MUHAMMAD JSC**

My learned brother, Coomassie, J.S.C, made available to me a draft copy of the judgment just delivered. I am in agreement with his conclusion that the appeal lacks merit and it should be dismissed.

The appellant formulated one issue for our consideration of the appeal which was reproduced in the lead judgment. That issue has to do with proof of the offence charged beyond reasonable doubt.

The appellant was placed before the trial Court on a lone count charge of culpable homicide punishable by death under Section 221(b) of the Penal Code. The charge placed by the Prosecution before the trial Court reads as follows:

#### **CHARGE**

That you Abdullahi Umar on or before 31st of October, 2000 at about 2355 hrs at Emir Yahaya Road Sokoto, within the Sokoto judicial division did commit the offence of culpable homicide punishable with death in that you caused the death of one Jamilu Muhammed by stabbing him with a scissors on the chest with the knowledge that his death would be the probable and not only likely consequence of your act and thereby committed an offence punishable under Section 221(b) of the penal code.

In proof of the offence charged, the requirement of the law and the practice is that the prosecution has the burden to prove the

following:

- (a) that the death of a human being has actually taken place.
- (b) that such death has been caused by the accused,
- (c) that the act was done with the intension of causing death;

or that it was done with the intension of causing bodily injury as:

- B (i) the accused knew or had reason to know that death would be the probable and not only the likely consequence of his act; or
- (ii) that the accused knew or had reason to know that death would be the probable and not only the likely consequence of any
- C bodily injury which the act was intended to cause.

The learned trial judge having considered the totality of the evidence before him including all the possible defences (pages 77 and 78 of the record), made a finding that the prosecution had established its case against the accused beyond any reasonable doubt.

- D The Court below agreed with the trial Court in its finding and added that the finding is unassailable, not perverse and could not be disturbed.

The main submissions of the learned counsel for the appellant in his brief of argument are that the ingredients that must co-exist to secure conviction under Section 221 (b) of the Penal Code were not proved. Secondly, that the trial Court did not consider all the possible defences available to the appellant including section 48 of the Penal Code. The Court below, it is argued, fell into the same error by not properly considering the defence raised by the appellant.

- F My attention is focused herein, on the second challenge that is, non-consideration of the defences by the two lower Courts. But can it be correct to say that both Courts did not consider the defences (if any) raised by the appellant? My lords, records of proceedings, as
- G permanent feature in trials do not lie. In his address to the trial Court, the learned counsel for the appellant (as an accused) stated, inter alia:

*“PW3 and DW1 we (sic) agree that the injury inflicted on Jamilu was not intentional but accidental. We submit that S.48 PC can be called in aid of accused person. Our submission is that the accused has met all the requirement of S.48 PC to entitled (sic) him benefit from the defence of accident... The effect of a success fell (sic) (successful?) Plea of defence of accident is as stated in the case of AGBO V. THE STATE (2004) 31 WRN 116 at page 128 ... 19-25. We urged*

- H

*(sic) the Court to uphold this defence and accordingly acquit the accused person...*

In his Judgment, the learned trial judge held, on the defence of accident, inter alia, as follows:

*"The defence of accident sought to be relied upon by the defence is also untenable in my view, since all the ingredient that would entitled (sic) the accused to be benefit (sic) from that defence has not being (sic) proved;*

*...In the circumstance therefore, having carefully examined the entire evidence presented before me including consideration of some possible defences do not avail him..."*

The Court below, on the said defences, held, inter alia, as follows:

*"Learned counsel's allusion to the defence of accident is not very attractive enough to commend itself to the lower Court and indeed to this Court..."*

*I do not see how section 48 of the penal Code assists the case of the appellant. It cannot be argued in this case that the act of the Appellant in causing the death of the deceased was lawful. Neither can it be argued that he had acted in a lawful manner nor can it be said that he employed a lawful means in causing the death of the deceased"*

It is therefore, not correct, to say that the two lower Courts did not consider the defences raised by the appellant.

Section 48 of the Penal Code (PC) provides as follows:

*"Nothing is an offence which is done by accident or misfortune and without any Criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution"*

Ordinarily, an offence is that act which is clearly prohibited by Law. It may be a crime and it may be a civil offence.

Accident, ordinarily too, is an unpleasant event that happens unexpectedly and causes injury or damage. H. C. Black, defines the word "accident", elaborately. He says, inter alia, that it is an event which is unusual, fortuitous, unexpected, unforeseen or unlooked for. It is some sudden and unexpected event taking place without expectation, upon the instant, rather than the something which continues, progresses or develops. It is something happening by chance,

something unforeseen, unexpected, unusual, extraordinary or phenomenal, taking place not according to the usual course of things or events. It may be in a form of calamity, casualty, catastrophe, disaster, an undesirable or unfortunate happening that causes injury, loss, suffering or even death. S. S. Richardson, in his Notes on the Penal Code (3rd edition, annotated, Gaskiya Corporation Limited Zaria, 1967, page 25) made the following comments:

*“3. An accident is something which happens outside the ordinary course of events. An effect is accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence is so unexpected that a person of ordinary prudence would not be expected to take reasonable precautions against such an occurrence.”*

*4. The act leading to the accident must be a lawful act done in a lawful manner.”*

My lords, I think I may be better understood through illustrations:

(ii) A is at work with an axe, the head flies off and kills a man who is standing by. Here, if there was no negligence on the part of A, his act is excusable and would not amount to an offence

(ii) A takes up a gun, not knowing whether it is loaded or not, points it in play to B and pulls the trigger. B is shot dead, the death would have been accidental but in this example he did not know whether the gun was loaded or not and had not shown proper care and caution. This cannot amount to accident.

In the appeal on hand, PW3 was an eye witness of what transpired during the incident. I shall reproduce a small portion, verbatim, of what he told the trial Court:

*“My full name is Abubakar Aliyu. I am a tailor. I know Jamilu Muhammed. Jamilu Muhammed is now dead. I know the accused person. I know him by his name he is Mainasara Masu. On the 31/10/2000 of about 2355 hrs I was of the shop at Emir Yahaya road together with Jamilu Muhammed the accused met us. He knock our door. I ignore him but latter I open the shop. He asked me (the accused) to give him a piece of cloth to take a solution substance. I refuse to give him, he then hit me on the face we started fighting then people came to our place and separated us. As we went back into the shop the accused came back and rushed into the shop he took a*

*scissors as he was trying to stab me and he could not get me he stab Jamilu Muhammed.”*

PW3 was cross-examined and he stated, inter alia, as follows:

*“On 31/10/2000 of (sic - at) about 11.55pm what happen (sic) between me and the accused was fight. Neither me (sic) nor the accused person was incepting (sic) any fight. The fight was outside the tailoring shop. It is about 2-3mts from the shop to the seen (sic - scene). It was not in the process of the fight that the accused stab (sic) Jamilu but after. The accused has no reason to stab Jamilu on that date. The injury sustained by Jamilu came as a destiny. — I do not know if the accused person had no intention to stabbing Jamilu.”*

Now, having considered the evidence of PW3, the learned trial judge made two important findings:

(a) that this piece of evidence was not controverted, contradicted or discredited by the defence (p. 76 of the record of appeal).

(b) looking at the circumstances of this case, with respect, it cannot be said that the act of the accused of stabbing the deceased was done without any criminal intention or knowledge or that it was done in the course of doing a lawful act and in a lawful manner and by lawful means.

After evaluating the entire evidence presented before him, the learned trial judge held that the prosecution had proved its case against the accused person beyond any reasonable doubt. He found the accused guilty of the offence charged; convicted and sentenced him to death by hanging.

The Court below found the finding of the trial court unassailable and had no reason to disturb same. It dismissed the appeal and affirmed the trial Court’s decision. In dismissing the appeal, the Court below, per Belgore, JCA, commented as follows:

*“I do not see how section 48 of the Penal Code assists the case of the appellant. It cannot be argued in this case that the act of the Appellant in causing the death of the deceased was lawful. Neither can it be argued that he had acted in a lawful manner nor can it be said that he employed a lawful means in causing the death of the deceased”*

The single issue raised by the appellant is that the guilt of the appellant was not proved beyond reasonable doubt having regard to the evidence before the trial Court. But the learned trial judge

who saw, heard and evaluated the evidence placed before him held, *inter alia*:

*“In the circumstance therefore, having carefully examined the entire evidence presented before me including consideration of some possible defences opened to the accused which I found (sic-found).*

*B Do not avail him — I therefore hold that the prosecution has proved its case against the accused beyond (sic-beyond) any reasonable doubt”.*

The Court below agreed with the trial Court and found no reason to disturb the findings, conviction and sentence of the trial Court.

*C* My lords, the law of proof in criminal matters, particularly those relating to murder or culpable homicide is very clear and straight forward. We should all be reminded of the concurrent dictum made each by OPUTA and KARIBI-WHYTE, former Justices of the Supreme *D* Court, in the case of BAKARE V. THE STATE (1987) 1 NWLR (part 52) 581, that:

*“prove beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt, not beyond the shadow of doubt that the person accused is guilty of the offence charged.*

*E* *Absolute certainty is impossible in any human adventure including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible and fanciful possibilities but it does admit of a high degree of cogency consistent with an equal/high degree of probability.”*

*F* Further, there are several methods laid down by the law in proof of such a crime in discharging the burden of proof beyond *G* reasonable doubt. Several authorities of this Court, repeatedly, made the point clear. For instance, in ADIO V. THE STATE (1986) 5 SC 194 at page 219-220, it was stated as follows:

*H* *“How is a case proved beyond reasonable doubt? A case can be proved by direct oral evidence if the testimony of the witness who saw and heard them are believed, there will be proof beyond reasonable doubt... the local case of Joseph Ogunbadejo V. The Queen (1954) 14 WACA 458 (otherwise known as Apalara’s case) is an excellent example of proof beyond reasonable doubt based purely on inference from circumstantial evidence but far above these two*

*methods of proof is voluntary confession of guilty by an accused person if it is direct and positive and satisfactorily proved should occupy the highest place of authority when it comes to proof beyond reasonable doubt.*

*This is why such a confession by itself is sufficient without further consideration to warrant a conviction unless the trial court is satisfied that the case has not been proved beyond reasonable doubt”*

It is thus, my understanding that the offence of culpable homicide punishable with death as provided under section 221(b) of the Penal Code can be proved to the standard required by the law, that is, proof beyond reasonable doubt by any of the following methods:

- (i) by confession of the accused person,
- (ii) by direct evidence,
- (iii) by circumstantial evidence and or;
- (iv) by the combination of all or any of the above methods.

I cannot recall from the record of appeal, any reliance placed by the learned trial judge on any confessional statement (if any at all, placed before him). Yes! it is true that on pages 7 - 9 of the record of appeal, a statement credited to the appellant was among the proof of evidence which accompanied the application filed by the prosecution for leave to prefer a charge against the appellant. That statement, my lords, whether confessional or otherwise; whether made by the accused himself or by any person proposed to give evidence, is no more than any proof of evidence which has not been tendered in evidence. This Court has made it abundantly clear in the case of OZAKI & ANOR. V. THE STATE (1990) 1 NWLR (part 124) 92 at page 125 (1991) 21 NSCC (part 11) 79 at page 101), where NNAEMEKA - AGU, a former Justice of the Supreme Court, said:

*“...although the previous statement of PW2 is contained in the proof of evidence exhibited by prosecution while seeking the consent of the learned trial judge to the information, it is no legal evidence before us. It was neither tendered in the Courts below nor even in this Court. A statement of an accused person which forms part of the documents for seeking the consent of the trial judge is no legal evidence before this Court or Courts below. I am therefore, of the view that before we can use the statement it ought first to be made evidence before this Court”.*

The choice of how to establish the offence(s) against an ac-

cused person is entirely that of the prosecution. The court should not concern itself with the method of proof as may be adopted by the prosecution provided proof beyond reasonable doubt as required by the law will be secured.

B Thus, in attempt to secure conviction, the prosecution is at liberty to rely on the evidence of a witness or witnesses or on the proven confession of the accused person or on strong circumstantial evidence.

C In the appeal on hand, the learned trial judge, relied particularly on the evidence of PW3 (an eye witness). In summarizing the evidence of PW3, he held, inter alia:

*“This piece of evidence was not controverted, contradicted or discredited by the defence...”*

D *It is therefore settled that an accused person can be convicted on the evidence of a single witness provided the offence charged is not one which requires corroboration and the evidence of such a single witness is material enough to be capable of being believed as in the instant case. See USUFU V. THE STATE (2007) 1 NWLR (part 1020) 94 at page 112 - 113.”* (Page 76 of the record of appeal).

E In the case of THE STATE V. AJIE (2000) 7 SCNJ 1 page 14, this Court, per Onu, a former Justice of the Supreme Court, held:

F *“The need to call witnesses at all arises from the duty the law has imposed on the prosecution to prove the essential ingredients of the crime... A lone witness, if believed, can establish this issue.”*

*An appellate Court will only intervene where an essential witness has not been called. See: ALI V. THE STATE (1988) 1 NWLR (part 68) 1 at page 17 G-18C”*

G As I said earlier, this is an obligation upon the prosecution. Achike, a former Justice of the Supreme Court, solidified that position of the law in the following words:

H *“The prosecutorial responsibility is to establish its case beyond reasonable doubt in order to secure the conviction of the appellant. How they get around achieving this is entirely the business of the prosecution. Whether they field one, two or more witnesses in satisfaction of such proof will surely depend on the circumstances of each case. But under no circumstances will the accused person dictate to the prosecution regarding the person or number of persons that they must field as witness or witnesses. (See: LIJOFOR V. THE STATE (2001)*



*9 NWLR (part 718) 393 at page 397.”*

In the appeal on hand, it is my belief that the production of the appellant’s “*confessional*” statement, in view of the strong and convincing eye witness account rendered by PW3, is immaterial. The alleged confessional statement (if any) and its recorder cannot, by any stretch of imagination be regarded, in this case, as essential in proving the offence of culpable homicide preferred and effectively prosecuted against the appellant. B

Further, the decision taken by the two Courts below, is a concurrent one. Nothing perverse or which has semblance of miscarriage of justice is shown by the appellant to warrant our interference. C

On the issue of defences put forward by the appellant, I am in total agreement with the Court below in upholding the dictum of the learned trial judge. It has to be made clear that “*accidents do not just happen. They are caused*”. The fundamental issue is the motive behind the cause. Was it really accidental? Not pre-meditated? Not negligently caused? To negative the intention or negligence, it has to be shown, now by the appellant, that he really did not intend the act or negligence that caused injury to his victim. Or, in the alternative, he again has to show that he was carrying out a lawful act in a lawful manner and with proper care and caution. In the case of *ABDULBAKI V. KATSINA NATIVE AUTHORITY* (1961) NNCN 12, a person was killed whilst engaged in an unlawful fight. The High Court held on appeal that the defence of accident was not open to the appellant unless he could show that he acted in the lawful exercise of his right of private defence. D  
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In the present appeal, is it a private defence for the appellant who engaged PW3 in a fight, and after being separated by others, to go into the shop of PW3 (a tailor) to take a scissors to intend striking it at PW3? Whether it was PW3 that suffered the striking of the scissors or not, the fact still remains that the appellant intended, or had knowledge to believe that death would be the probable and not only the likely consequence of any bodily injury which the act was intended to cause. G  
H

In trying to measure the act of the accused whether reasonable or otherwise, Reed, Ag. S. P.J. formulated two tests:

“(i) *Where, in testing whether the consequence of a person’s acts is a reasonable or a likely consequence within the meaning of*

*S.19, a court asks itself how a reasonable man would view that consequence, the court must take into consideration the background of education and worldly knowledge of the individual person. A person from a remote, backward part of the country might well differ in this respect from an educated person.*

B *After the court has given due consideration to the person's way of life it must apply the test to the average person in that way of life.*

(ii) *whether death is a likely or a probable consequence of a person's act is a question of degree. If a weapon is used, the question will generally resolve itself by a consideration of the weapon used, the part of the deceased's body where it was struck and the amount of force used. A thin stick is not as dangerous as sword, knife or other lethal weapon; a blow struck on a limb is not as dangerous as a blow struck on the head; a hard blow is more dangerous than a light one. All these are matters which the trial court must consider."*

In fairness to the trial Court, it considered such tests and yet found the appellant guilty of the offence charged. I have no reason to disbelieve the trial Court.

E For the above reasons and the fuller reasons adumbrated in the lead judgment, I too, hereby, dismiss the appeal.

### **ARIWOOLA JSC**

F This is an appeal against the decision of the Sokoto Division of the Court of Appeal, delivered on the 16th day of June, 2010.

The appellant had been tried, found guilty, convicted and sentenced for the offence of culpable homicide punishable with death for having caused the death of one Jamilu Muhammed who was said to have been stabbed with a pair of scissors on the chest, with the knowledge that death would be the probable and not likely consequence of his act and thereby committed an offence punishable under Section 221(b) of the penal Code.

H At the trial, the prosecution called three witnesses and tendered three Exhibits A, B and C. The appellant testified in defence but did not call any other witness. The appellant admitted that he stabbed the deceased but put up the defence of accident pursuant to Section 48 of the Penal Code.

The trial court had in its considered judgment found the appellant guilty as charged, convicted and sentenced him to death by hanging as prescribed by the law. Upon an appeal to the Court below, the conviction and sentence were affirmed which has led to his further appeal to this court. In this appeal, the following sole issue was raised by the appellant for determination of the appeal. B

*“Whether the guilt of the appellant was proved and established beyond reasonable doubt to warrant his conviction and sentence.”*

It is already settled beyond controversy in several decisions of this Court, that in order to secure a conviction on a charge of murder, the prosecution must prove the following: C

- (a) that someone had died;
- (b) that the death of the person so identified was caused by the accused standing trial.
- (c) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence. D

It is note worthy that these three ingredients must co-exist and where one of them is absent or tainted with some doubt, the prosecution cannot be said to have proved the charge beyond reasonable doubt. See; *Obudu vs. The State* (1991) 6 NWLR (pt 198) 433; *Ogba vs. The State* (1992) 2 NWLR (pt 222) 164; *Monday Nwaeze V. The State* (1996) 4 NWLR (pt 443) 375. *Solomon Adekunle V. The State* (2006) 10 - 11 SCM 147; (2006) 14 NWLR (pt 1000) 717. E  
F

It is trite that the evidence relied upon by the prosecution to establish a charge of murder may be direct or circumstantial. However, whether the evidence is direct or circumstantial, it must necessarily establish the guilt of the accused person beyond reasonable doubt. G

From the testimony of PW3 - one Abubakar Aliyu - an eye witness, stated that the appellant at about 11.55pm in his tailoring shop attempted to stab him with a pair of scissors, ended up in stabbing the deceased with the same scissors when he dodged the stabbing. The said scissors landed on the left side of the chest of the deceased and he died from the stabbing. The appellant ran away before he could get the police to the scene and the deceased was then confirmed dead. H

Even though the appellant earlier at the trial attempted to deny that he ever made the confessional statement credited to him, his defence was that he never intended to stab the deceased. And that it was indeed an accident.

The defence of accident is clearly defined in Section 48 of the Penal Code which is applicable to this case. It reads thus:

*“Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the cause of doing a lawful act in a lawful manner by lawful means and with proper care and caution.”*

There is no doubt that out of the three ingredients the prosecution was required to prove to establish the charge of murder against the appellant, the fact that a person died and that the death resulted from the act of stabbing him with a pair of scissors by the appellant, are not in dispute or controversy. The only ingredient left to be cleared is whether that act of the appellant in stabbing the deceased with scissors which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequence.

As I stated earlier, the appellant after admitting that in actual fact a scissors he had held and meant to deal with yet another person, PW3 landed accidentally on the deceased. The law is that for an act to qualify as an accident, it must be a surprise to the ordinary man of prudence.

That is a surprise to all sober and reasonable people. In *Ali Bello & Ors, Vs. Attorney General of Oyo State* (1986) 5 NWLR (pt 45) 825 this court, per Karibi - Whyte, JSC had stated, inter-alia, that,

*“An accident is the result of an unwilled act, and means an event without the fault of the person alleged to have caused it.”*

In otherwords, an accident is described as, “an unintended and unforeseen injurious occurrence, something that does not occur in the usual course of events or that could not be reasonably anticipated. See *Black’s Law Dictionary*, 9th Edition Page 16.

Furthermore, it should be noted that the test of the plea or defence is always objective and the act said to have led to the accident must be a lawful act done in a lawful manner. See *Adulumola V. The State* (1988) 3 SCNJ 68; *Abdulkabi vs. The State* (2009) 8 SCM

177. Frank Uwagboe Vs. The State (2008) 12 NWLR (pt. 1102) 621. (2008) 7 SCM 152; (2008) 34 NSCQR (pt 11) 664; Solomon Adekunle V. The State (Supra).

However, a willful deliberate act will negative the defence of accident. In other words, for the defence of accident to avail the appellant in the instant case, it must be shown that the stabbing of the deceased with a pair of scissors by the appellant occurred independent of the exercise of his will. It must be borne in mind that the law, pursuant to which the appellant was tried does not deal with an “act” but an “event” and the event within the meaning of the Section, is what apparently follows from an act. See Audu Umaru V. The State (1990) 3 NWLR (Pt 138) 363 at 370; Chukwu V. The State (1992) 1 NWLR (pt 217) 225; (1992) 1 SCNJ 57. It is now settled that what is relevant in our criminal law is that the act of the accused person which resulted in the death of the deceased must be unlawful. The mens rea, or malice afore-thought no longer governs the criminal responsibility of the accused person as these are common law concepts. Motive is also said to be irrelevant except that where it is proved, it strengthens the case of the prosecution. See Adekunle V. The State (supra) per Ogbuagu, JSC. Nwali Vs. The State (1991) 5 SCN 14.

There is therefore no way that the plea or defence of accident can avail the appellant in the instant case as the act of stabbing with scissors was a deliberate one even if it can be claimed that he did not intend the eventual result.

It is interesting to note that it was argued for the appellant that the deceased was not the actual target of the appellant. But the fact remains that he had intended to use the scissors, a naturally sharp and dangerous object to cause grievous bodily harm on a person, even though he claimed not to have intended the person of the deceased.

As the saying goes - “*Just too bad for him*”. What is important, in the instant case, is the fact that the death of the deceased resulted from the act of the appellant which, if it had not been the result expected could have been avoided totally. The act itself was unlawful and could not have been expected to be carried out in a lawful manner. It is ordinarily a punishable act in law.

In the final analysis, I am convinced that the prosecution proved

the charge against the appellant and he was properly convicted and sentenced.

In the same vein, the court below rightly affirmed the conviction and sentence.

B For the above reason and the fuller reasoning in the lead judgment of my learned brother, Muntaka-Coomassie, JSC with which I am in entire agreement that this appeal is unmeritorious and is liable to dismissal. Accordingly, it is also dismissed by me.

C

### **OGUNBIYI JSC**

The appellant was arraigned for the offence of culpable homicide punishable with death in that he caused the death of one Jamilu Muhammed by stabbing him with a pair of scissors on the chest, with D the knowledge that death would be the probable and not likely consequence of his act and thereby committed an offence punishable under Section 221(b) of the penal Code.

E The prosecution in proof of its case called three witnesses and tendered exhibits A, B and C. The appellant testified in his own defence but did not call any witness. The accused admitted stabbing the deceased but proceeded to raise the defence of accident under Section 48 of the penal Code.

F In its considered judgment, the trial court convicted and sentenced the appellant to death by hanging.

On an appeal to the Court of Appeal Sokoto Division, the court also found against the appellant and affirmed the judgment of the trial court. The appellant has now further appealed before us and raises one issue as follows:-

G Whether the guilt of the appellant was proved and established beyond reasonable doubt to warrant his conviction and sentence.

H The provision of Section 221(b) of the Penal Code under which the appellant was convicted and sentenced provides that the doer of the act must know or had reason to know that death would be the probable and not only a likely consequence of his act.

The law is well settled that for the prosecution to secure the conviction of the accused, it must prove the following three ingredients:-

(a) That death has taken place;

(b) such was caused by the act or commission of the accused; and

(c) that the accused knew or had reason to know that death would be the probable consequence of his act or any bodily injury.

The prosecution has the onerous duty of proving the accused guilty beyond all reasonable doubts. It is also settled that a man is presumed to intend the natural consequence of his act. B

Section 48 of the Penal Code under which the appellant sought defence reads as follows:-

*“Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution.”* C

It is obvious that on a careful perusal of the foregoing section, it has no bearing whatsoever in aiding the appellant’s unlawful act. It is on record that the appellant intended to use the scissors on one Abubakar, the shop owner, but missed him and stabbed the deceased in his chest. I wish to restate at this point that the fact that the appellant missed his intended victim, or target, is not of any relevance for the determination of the appellant’s guilt. The act done by the appellant was neither accidental nor lawful. It was also not done by lawful means with proper care and caution. It follows therefore, that the provision of Section 48 of the Penal Code cannot assist the appellant who engaged himself in an unlawful act with a criminal intention or knowledge of causing death. This is especially when regard is had to the nature of the instrument used and also the part of the body stabbed. D  
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In otherwords, the argument by the appellant alleging a case of transferred malice is not a defence; whether or not the intended target was the victim, the fact remains intact that the appellant had caused the death of the deceased by an act which was not lawful. G

Briefly and on the submission as to whether the appellant was provided with the services of an interpreter at the trial, I wish to restate that the contention raised by the appellant’s counsel was an afterthought. This is moreso especially where the appellant was adequately represented by a counsel throughout the trial. Such a complaint did not also reflect against the prosecution’s case on the record. The move in that direction will not be sustained at this stage to dis- H

credit the well reasoned concurrent judgments of the two lower courts. The appellant has not proffered any convincing reason why his conviction and sentence should be reversed.

My learned brother Muntaka-Coomassie, JSC has adequately dealt with the lone issue raised. I also subscribe to the reasoning and conclusion arrived thereat that the appeal is devoid of any merit. It is also dismissed by me.

### **NGWUTA JSC (DISSENTING)**

I have had the opportunity of considering the exhaustive reasons in the lead judgment prepared by my learned brother Muntaka-Coomassie, JSC. I stand by the position I took at the Conference on this appeal and consistent with same, I write this dissent.

Appellant was arraigned before the High Court of Sokoto State, Sokoto Judicial Division on 21/3/2007. The one count charge against him reads:

*“That you Abdullahi Umar on or about 31st day of October, 2000 at about 2355 hrs at Emir Yahaya Road, Sokoto, within the Sokoto Judicial Division did commit an offence of culpable homicide punishable with death in that you caused the death of one Jamilu Muhammed by stabbing him with a scissors on the chest with the knowledge that his death would be the probable and not only likely consequence of your act and thereby committed an offence punishable under Section 221 (b) of the Penal Code.”*

Appellant pleaded not guilty to the charge on 21/3/2007. The prosecution called three witnesses and closed its case. The appellant testified as the sole witness for the defence.

Learned Counsel for the parties addressed the Court and on 23/06/2008, the learned trial Judge, Sifawa, J., convicted the appellant and sentenced him to death by hanging. Appellant appealed to the Court of Appeal, Sokoto Judicial Division. His appeal was dismissed on 16/6/2010. The Court below affirmed the judgment of the trial Court.

Appellant then appealed to this Court on a lone ground from which the following issue was distilled for determination:

*“Whether the guilt of the appellant was proved and established beyond reasonable doubt having regard to the evidence adduced at*



*the trial to warrant the conviction of the appellant under Section 221 (b) of the penal Code as affirmed by the Court of Appeal.”*

*In his brief of argument, learned Counsel for the respondent formulated the following issue for determination:*

*“Whether the defence of accident under Section 48 of the Penal Code avails the appellant in the circumstances of this case as to adversely affect the conviction and sentence the (sic) appellant.”* <sup>B</sup>

Arguing the lone issue in his brief, learned Counsel for the appellant, Ekanem, Esq., said that the lone issue arose from the sole ground of appeal. He reproduced Section 221 (b) of the Penal Code and contended that for the prosecution to secure conviction under the said Section, the following ingredients must be proved: <sup>C</sup>

(a) That the death of a human being has occurred.

(b) That the death was caused by the accused.

(c) That the act was done with the intention of causing death <sup>D</sup> or that it was done with the intention of causing such bodily injury as;

(i) the accused knew or had reason to know that death would be the probable and not only the likely consequence of any bodily injury which the act was intended to cause.

He relied on *Dave Dada v. State* (1991) 8 NWLR (pt. 208) <sup>E</sup> 134 at 144 para. E-H.

He argued that intention to cause death was not proved or that death was the likely consequence of the act or bodily injury which the act was intended to cause. He referred to *Black’s Law Dictionary* <sup>F</sup> for the definition but failed to state the edition or the page he referred to. Learned Counsel reproduced portions of the evidence of the prosecution witnesses which he said were in agreement that the deceased was not the intended target in the use of the scissors. He said this statement was supported by the trial Court that the appellant was trying to stab PW2 who dodged and the scissors landed on the accused. <sup>G</sup>

He argued that even if it is assumed that the appellant used the scissors there was no evidence that the appellant aimed at a delicate part of the deceased and so he cannot be said to have intended to cause death or bodily injury. He contended that the Court of Appeal <sup>H</sup> erred in its decision that Section 48 of the Penal Code did not avail the appellant.

He argued that based on *Ada v. State* (2003) 13 NWLR (pt.

1103) 149 at 177 para. E-H, the Court was bound, but failed, to consider all the exculpatory evidence in favour of the appellant. He relied also on *Uluebeka v. State* (2011) 13 NWLR (pt. 1237) 358. Relying on *Samson Uzoka v. State* (1990) 6 NWLR (pt. 159) 680 at 690 para. F, 692 para. B; he urged the Court to allow the appeal, vacate the judgment of the Court below and discharge and acquit the appellant.

Dealing with the issue he formulated from the appellant's ground of appeal, the learned Attorney-General of Sokoto State, Inuwa Abdul-Kadir, Esq., drew attention to the fact that the issue framed by the appellant is at variance with the sole ground of appeal, adding that the issue was framed from the particulars of the ground of appeal rather than the ground itself. He relied on *Odeh v. Federal Republic of Nigerian* (2008) 3-4 SC 147 at 130-160; *Okwejimor v. Gbakeji* (2008) 1 SC (pt. 111) 263 at 273-274; *Agbakoba v. INEC* (2008) 12 SC (pt. 111) 171 at 198-199 and urged the Court to strike out the issue which was not framed from the lone ground of appeal.

Presumably in alternative, the learned Attorney-General stated that under Section 221 of the Penal Code, the necessary ingredients to sustain the charge are:

- (a) That the death of a human being has actually taken place.
- (b) That such death was caused by the accused.
- (c) That the act was done with the intention of causing death or that the accused knew that death would be the probable consequence of his act.

He referred to the appellant's brief and said that the first and second ingredients were not disputed but issue was joined in the third ingredient of the offence. He however referred to page 119 of the record and argued that the appellant did not challenge the concurrent findings of the two lower Courts that the offence under Section 221 was proved.

He referred to the ground of appeal and contended that the only issue arising therefrom is whether or not the lower Court was right in its decision on page 116 lines 7-16 of the record. He urged the Court to disregard all arguments unrelated to consideration of the defence of accident under Section 48 of the Penal Code. He maintained that both Courts below were right in their decision that

the appellant could not benefit from the provisions of Section 48 of the Penal Code.

He reproduced some findings of the trial Court and contended that the Court below considered and affirmed same in dismissing the appeal. He cited and relied on *Alhassan Mai Yaki v. The State* (2008) 7 SC 128 at 152 on the application of Section 48 of the Penal Code. B Placing reliance on *Michael v. State* (2008) 5-6 SC (pt. 11) 203 at 225; *Alhassan Mai Yaki v. The State* (supra), learned counsel urged the court not to disturb the concurrent findings of the two Courts below as the appellant has failed to advance a reason for so doing. C

He urged the Court to dismiss the appeal and affirm the conviction and sentence of death by hanging passed on the appellant pursuant to Section 221 (b) of the penal Code.

My noble Lords, I have given careful consideration to the proceedings in the trial Court leading to the conviction of the appellant D as affirmed by the Court below. In my humble view, there is a lacuna in the proceedings of the trial Court leading to a miscarriage of justice in the conviction of the appellant and in view of which the Court of Appeal should not have affirmed the judgment.

Police Sergeant Musa Mohammed, who testified as PW2, said E at page 21 of the record:

*“After going through the case file I detail (sic) Cpl Musa Mudi to record the statement of the accused. Musa Mudi is a co-investigator...”*

At page 24 of the record, the witness (PW2) continued: F

*The (sic) closing the recording of the statement and in my presence the accused said he killed the deceased under the influence of solution substance...”*

The above pieces of evidence were given in examination in G chief. Under cross-examination by learned Counsel for the defence, the witness said, inter alia:

*“It took Cpl Musa Mudi 1hr and some minutes to record the statement of the accused.”* (See page 25 of the record).

The accused person (appellant) when examined in chief by his H Counsel stated inter alia:

*“I was here when Insp. Musa testified. I did not discuss solution substance with Insp. Musa and I do not take that substance... I did not intend to stab anybody with the scissor (sic) nor even Alhaji.”*

Under cross-examination, the appellant (as accused) said:

*"I was taken to Area Commander's office at the CID. I told him what I told the Court. The police brought a statement that I should signed (sic) and I asked why should I signed (sic) what was not read to me. I know PW2 Inspector Muhammed Musa who asked me to signed (sic)..."*

In his judgment, the learned trial Judge repeated the statement of PW2 that *"the accused said that he killed the deceased under the influence of solution substance..."*

Arising from the evidence of both parties is the question whether or not the appellant made a statement to Cpl Musa as claimed by PW2 or whether or not the appellant was told to sign a prepared statement which was not read to him before the Area Commander as stated by the appellant. And to make a bad situation worse, the alleged statement which took over one hour to record and in which the appellant admitted killing the deceased under the influence of a solution substance was not before the trial Court.

Why was the statement not tendered either by the officer who recorded it or by the PW2 who was present when it was recorded?

Perhaps of more importance is the fact that no reason was advanced by the prosecution as to why the statement was not tendered in evidence notwithstanding its manifest materiality to the prosecution's case.

Two possibilities explain the conduct of the prosecution with regard to the statement allegedly made to it by the appellant:

*"(a) No such statement was made.*

*(b) The statement was made but its contents are fatal to the case of the prosecution. See Section 167 of the Evidence Act 2011 which provides, inter alia, in subsection (d) that the Court may presume that evidence which could be and is not produced would, if produced, but unfavourable to the person who withhold it..."*

From the evidence of both parties, the evidence exists. PW2 claimed the statement was recorded in his presence and DW1 said he was asked to sign a statement which was not read to him. The prosecution who ought to have produced the statement, vital evidence in its case, failed to do so for no apparent reason.

In *Onwujuba v. Obieniu* (1991) 4 NWLR (pt. 183) 16 SC, Uwais, JSC (as His Lordship then was), stated that before the pre-

sumption under section 149 (d) of the Evidence Act (now Section 167 (d) of the Evidence Act 2011 can operate, it must be shown and established:

- (a) that such evidence existed, and
- (b) that it was that party that withheld it.

The two conditions for the operation of the presumption in B section 167 (a) of the Evidence Act 2011 are shown and established in this case. See also NSC (Nig) Ltd v. INNIS-Palmer (1992) 1 NWLR (pt. 218) 422; Nsirim v. Onuma Const. Co. Nig. Ltd (2001) FWLR (pt. 4) 405 SC; Eze v. State (1985) 2 NSCC 1340; Omo v. JSC Delta C State (2001) FWLR (pt. 20) 676.

The facts and circumstances of this case tend to destroy the myth that Policemen are neutral simple crime fighters with no axe to grind. In any given investigation, the Police mindset usually fixes quicker than mercury. Once there is a suspect, no matter how scant the evidence, the Police point with the relentless force of a compass, to a magnet.

The trial Court erred in law in determining the guilt of the appellant in absence of the statement relied on by the State to the effect that the appellant said he killed the deceased under the influence of a solution substance. This is more so as the appellant denied E making such statement. On the facts before the trial Court, the prosecution did not prove its case beyond reasonable doubt as required by Section 135 (1) of the Evidence Act, 2011 and the Court below F ought not to have affirmed the judgment of the trial Court.

In the judgment of the trial Court at page 73 of the record, the Court referred to the evidence of PW3 that the appellant:

*"...brought Exhibit 'A' trying to stabbed (sic) him but he dogged (sic) as a result the accused stabbed the deceased on the ribs (sic) G near his chest. This much was partly corroborated by the evidence of the accused as DW1 who said in trying to removed (sic) exhibit A from PW3 he pulled it, as a result the rubber handle removed and it 'A' land on the deceased."*

H Even though there is enough unpardonable errors to suggest that the proceedings might have been concluded in a haze, the substance of the above quoted portion of the judgment is clear. The evidence of PW3 is that appellant brought out Exhibit A with which he tried to stab him, PW3. He said he dodged and the appellant

stabbed the deceased.

In contrast, appellant as DW1, said that in trying to remove Exhibit A from PW3, he pulled it and as a result the rubber handle fell and Exhibit A landed on the deceased.

B The Court is entitled to believe or disbelieve the evidence of the appellant as DW1, but it is an error of monumental dimension to say that the statement of the appellant is a corroboration (even partial) of the evidence that the appellant trying to stab the PW3 stabbed the deceased. It is a wrong interpretation of evidence before the Court. C The trial Court assumed a fact not in evidence and arrived at a wrong conclusion to convict the appellant. The Court has no business mas-

saging the evidence before it to support its own design.  
This Court does not, as a matter of principle or practice, disturb concurrent findings of the trial Court and the appeal Court. See D Njoku & ors v. Eme & ors (1973) 5 SC 213 at 306; Kale v. Coker (1982) 12 SC 252 at 271.

However, the principle of inviolability of concurrent findings of fact of the two Courts below is not cast in stone like the Ten Commandments. It has its limitations and can and ought to be disturbed E where the findings are either perverse or there is substantial error either in substantive or procedural law which if uncorrected will lead to miscarriage of justice. See Lokoyi & Anor v. Olojo (1983) 8 SC 61 at 68; Bankole v. Pelu (1991) 8 NWLR (pt. 211) 23; Dibiamaka v. F Osakwe (1989) 3 NWLR (Pt. 97) 101.

The withholding of a vital evidence in the case, the statement credited to the appellant upon which the prosecution relied and the flawed interpretation of the evidence of the appellant vis-à-vis that of the prosecution individually and collectively results/result to a gross G miscarriage of justice.

I resolve the lone issue in favour of the appellant. I allow the appeal and set aside the judgment of the Court of Appeal affirming that of the trial court.

H