

SUPREME COURT OF NIGERIA
FRIDAY 6TH JUNE, 2014. SC. 347/2011
CORAM:- W. S. N. ONNOGHEN, J. A. FABIYI,
S. GALADIMA, B. RHODES-VIVOUR, J. I. OKORO, JJSC

UDEH KINGSLEY EMEKA APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Issues - Formulation by court - Appellate court has discretion to modify or formulate issue(s) - Which in its view would fairly resolve complaints in appeal (H1)

APPEALS - Criminal procedure - Fair hearing - Appellant was not denied fair hearing - Since while considering respondent's issue 2 - CA considered appellant's defences in his issues 3, 4 and 5 (H2)

EVIDENCE - Prosecution's case - Contradictions in - Weight - For inconsistencies to be fatal - It must go to substance of the case - And not to be of minor or trivial nature (H3)

COURTS - Evidence - Contradiction - Determination of - In determining materiality of the inconsistency - Court needs to view the inconsistency - Against elements of the offence charged (H4)

ARMED ROBBERY - Ingredients - Proof - Prosecution must prove that there was robbery - That the robbery was armed robbery - And that accused was one of those who took part in the armed robbery (H5)

APPEALS - Conviction - Correctness of - Having held that there were no material contradiction in prosecution's case - CA rightly affirmed conviction of appellant (H6)

JUDGMENTS - Perverse judgment - Meaning of - Decision is perverse where it is speculative and not based on any evidence - Or court took into account extraneous matters (H7)

FACTS

Before the High Court of Akwa-Ibom State, accused/appellant was arraigned for armed robbery, contrary to section 1(2)(G) of the Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990. Prosecution/respondent's case is that appellant (then a member of the National Youth Service Corps) had while in the company of others, trailed, attacked and robbed PWs 1 and 2 who were at the material time driving in their Peugeot 504 car. The robbers made away with the vehicle and some other valuable items belonging to the occupants of the car. During the course of the robbery, a wallet containing a higher institution ID card belonging to appellant was left behind at the crime scene. PW2 picked up the wallet.

The matter was thereafter reported to the Police. Investigation was carried out in the matter leading to the arrest and arraignment of appellant. At the trial, respondent called five witnesses and tendered 10 exhibits in support of its case. Appellant denied the crime, testified for himself, called two witnesses and tendered four exhibits. After hearing from both sides, the learned trial Judge found appellant guilty as charged. He was therefore convicted and sentenced to death by hanging. Aggrieved, appellant appealed to the Court of Appeal Calabar Division. The appeal was dismissed and judgment of the trial court affirmed. Further determined to regain his freedom, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

"3.01. Whether the lower court did not fail in its legal duty to consider and resolve all the issues placed before it particularly issues No. 3 and 4 in the appellant's brief of argument.

3.02. Whether by failing to consider all the issues placed before it the lower court did not breach the constitutional right of the appellant to fair hearing.

3.03 Whether the decision of the lower court upholding the conviction and sentence of the appellant was not perverse having been reached without any judicial reasoning.

3.04 Whether the lower court was right to have held that there were no material contradictions in the prosecution's case when it did not even consider what the contradictions were."

HELD (Unanimously dismissing the appeal per GALADIMA JSC)

APPEALS - Issues - Formulation by court

1. It is rather a triable argument or merely frivolous for the appellant to contend that the appellate court, in considering an appeal before it has no discretion to either adopt the issues formulated for determination by the parties or alternatively formulate such issue(s) it believes would adequately determine the grievance in the appeal. Recently, what this court said in AGBAREH v. MIMRA (2008) 2 NWLR (Pt. 1071) 378 at 410, further emphasis the triteness of the law on this trig-point. It was held thus:

“Finally an appellate court can prefer an issue or issues formulated by any of the parties and can itself and on its own, formulate an issue or issues which in its considered view, is/are germane to and is or are pertinent in the determination of the matter in controversy.

What else is apt in the circumstance for the appellate court to do if it cannot be given the discretion of mandate to adopt, modify or even formulate an issue or issues, which in its view would adequately and fairly resolve the complaints in an appeal.

What else is apt in the circumstance for the appellate court to do if it cannot be given the discretion of mandate to adopt, modify or even formulate an issue or issues, which in its view would adequately and fairly resolve the complaints in an appeal. (p. 2684 H)

Criminal procedure - Fair hearing

2. In spite of the foregoing the court below while considering the Respondent’s issue No. 2 also went ahead to consider the defences put up by the appellant in his issues 3, 4 and 5 which he complains that they weren’t considered.

In the circumstance, I cannot fathom out what the appellant could possibly mean when he complained that all the issues placed before the lower court, particularly issues No. 3 and 4

in the appellant's brief of argument were not considered.

Having resolved and answered issue No. 2 in the negative, it has become clear that the lower court did not deny the appellant his constitutional right to be fairly heard.

(p. 2686 C/F)

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EVIDENCE - Prosecution's case - Contradictions in - Weight

3. The general principle in a criminal trial is that the prosecution's case must not be so riddled with material contradictions and inconsistencies that would make it unsafe to convict the accused person.

C

It follows therefore that every contradiction or inconsistency would be fatal to the prosecution's case.

For contradictions or inconsistencies to be fatal, it must go to the substance of the case and not to be of minor or trivial nature. The contradictions and sometimes mix-ups in the evidence of prosecution witnesses must be substantial and fundamental amounting to a disparagement of other pieces of evidence adduced. (p. 2687 A)

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Evidence - Contradiction - Determination of

4. However, the court in determining the materiality of the contradiction or inconsistency of testimony of a witness, it would need to view contradiction or inconsistency against the elements of the offence charged. (p. 2689 D)

F

ARMED ROBBERY - Ingredients - Proof

5. In the instant case the ingredients that the prosecution needs to prove or sustain a charge of armed robbery are:

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(i) That there was robbery or series of robberies.

(ii) That the robbery or each robbery was an armed robbery.

(iii) That the accused was one of those who took part in the armed robbery.

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In this case all the foregoing ingredients were proved against the appellant. The appellant did not deny or dispute that on the 30th November, 2004, armed robbery in which he was part of took place. PW1 and PW2 properly identified the

appellant as one of the robbers. According to their evidence a wallet containing appellant's identity card, with his clear photograph was recovered at the scene of the crime.

(p. 2689 E)

Conviction - Correctness of

6. In view of the foregoing, I am therefore of the firm conviction that the court below duly considered the alleged contradictions and was right to have concluded and held that there were no material contradictions in the prosecutions' case and thereby rightly affirmed the conviction of the appellant. I cannot disturb the concurrent findings of fact of the lower courts. I am of the firm view that the lower court in upholding the conviction and sentence of the Appellant was not perverse. In this case it is not shown that the court has failed in its function to properly and dispassionately appraise the evidence placed before it.

The court below based its decision on the evidence before it.

As rightly observed by the learned counsel for the respondent, the decision of the lower court upholding the conviction and sentence of the appellant was not in any way perverse.

(pp. 2689 H/2690 E/H)

JUDGMENTS - Perverse judgment - Meaning of

7. I must say from onset that the appellant has erroneously misapplied the principle of "Perverse decision" in the instant case. "Perverse" literally means unacceptable or unreasonable. A decision of court will be regarded as perverse where it is speculative and not based on any evidence; or the court took into account matters, which it ought not to have taken into account; or it shuts its eyes to the obvious. (p. 2690 B)

REPRESENTATION

F. A. Onwuzulike, Esq., for the Appellant
Essien E. Udom, Esq., for the Respondent

CASES REFERRED TO

- Omogodo v. State (1981) 5 SC 5
 Ozo v. State (1971) 1 All NLR 111
 Agbo v. State (2006) 6 NWLR (pt. 977) 545
 Uwaeghinya v. State (2005) 1 NWLR (pt. 930) 250
 B Atolagbe v. Shorun (1985) 3 NWLR (pt. 80) 1
 Adeosun v. Jibesin (2001) 11 NWLR (pt. 724) 290
 Osuji v. Ekeocha (2009) 16 NWLR (pt. 1166) 81
 Olowolagba v. Bakare (1998) 2 NWLR (pt. 543) 528
 C Kabirikam v. Emefor (2009) All FWLR (pt. 494) 1425
 Uzuda v. Egbah (2009) All FWLR (pt. 493) 1224
 Agbare v. Mimra (2008) 2 NWLR (pt. 1071) 378
 Okulate v. Awosanya (2000) 2 NWLR (pt. 640) 530
 Victor v. State (2013) 12 NWLR (pt. 1369) 465
 D A.C.N. v. Lamido (2012) 2 SC (pt. ii) 163
 Tunbi v. Opawole (2000) 2 NWLR (pt. 644) 275

STATUTE REFERRED TO

- Robbery & Firearms (Special Provisions) Act Cap. 398 LFN 1990, s.
 E 1(2)(G)

LEAD JUDGMENT BY GALADIMA JSC

- This appeal is against the judgment of the court of appeal,
 F Calabar Division delivered on the 13th day of July, 2011, affirming
 the conviction and sentence of the trial court presided over by HON.
 JUSTICE GODWIN J. ABRAHAM of Uyo High Court who sentenced
 the appellant herein to death, for the offence of armed robbery.

- The appellant's appeal to the court of appeal was not success-
 G ful hence he has now further appealed to this court. In the brief of
 the appellant and pursuant to the rules of this court, the following
 four issues are posed for determination:

- “3.01. Whether the lower court did not fail in its legal duty to
 consider and resolve all the issues placed before it particularly issues
 H No. 3 and 4 in the appellant's brief of argument.*

*3.02. Whether by failing to consider all the issues placed be-
 fore it the lower court did not breach the constitutional right of the
 appellant to fair hearing.*

3.03 Whether the decision of the lower court upholding the

conviction and sentence of the appellant was not perverse having been reached without any judicial reasoning.

3.04 Whether the lower court was right to have held that there were no material contradictions in the prosecution's case when it did not even consider what the contradictions were."

On the part of the respondent the following four issues are submitted for determination:

"1 Whether or not the lower court failed in its legal duty to consider and resolve all the issues placed before it particularly issues No. 3 and 4 in the appellant's brief of argument.

2. If issue No.1 is answered in the negative, whether or not the lower court breached the constitutional right of the appellant to fair hearing.

3. Whether or not the decision of the lower court upholding the conviction and sentence of the appellant was perverse and reached without any judicial reasoning.

4. Whether the lower court was right to have held that there were no material contradictions in the prosecution's case and thereby rightly upheld the conviction of the appellant."

Before I go into the consideration of the issues raised in the briefs of the respective parties, it is necessary to set out the facts of the case, as can be gleaned from the records of appeal and particularly the prosecution witnesses.

The appellant was a member of the National Youth Service Scheme posted to Comprehensive Secondary School, Ukpom in Ikono Local Government Area of Akwa Ibom State.

On the 13th August 2005, he was arraigned before the High Court of Akwa Ibom Ikono Judicial Division on four count charge of armed robbery, contrary to Section 1(2) (G) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990. The charge against him was that on the 31st November, 2004 one Dr. Clement Adolf Bassey (who later testified in this case as PW1) traveled with one Pius Akpan (who later testifies as PW2) from Uyo to Ukpom Ita. At Edet Ukpom market, PW1 who was driving his official car, a Peugeot 504 saloon Car Bestline 2000 series, turned into the premises of Edet Community bank. It was at this point a Mercedes Benz car with three occupants, which had apparently been trailing him, overtook his car. Two of the three occu-

pants in the Mercedes Benz car alighted and fired their automatic rifles sporadically and ordered PW1 and PW2 out of their car. The attackers robbed them of the Peugeot car, valued N2,000,000, driving licence, 3 cheque books, 2 GSM handsets valued N75,000.00 and numerous official documents, properties of PW1.

B In the course of the robbery, one of the robbers, (discovered later to be the appellant) dropped a wallet, which PW2 retrieved after the robbers had driven off. The wallet contained an ID Card issued from the Institute of Management Technology, Enugu (IMTE).

C PW1 and PW2 reported the matter to the police at Ukan Uwana and made statements to the police; and after thorough investigations; the appellant was arrested and subsequently arraigned before the trial court. At the trial Prosecution called 5 witnesses and tendered 10 exhibits, to prove its case. On his part, the appellant D who denied the charges against him gave evidence in his defence and called two witnesses, and tendered 4 exhibits.

The learned counsel for both the appellant and the respondent addressed the trial court. Godwin Abraham (J) in a considered judgment convicted and sentenced the appellant to death by hanging. E He concluded at page 86 of the record appeal thus:

"I believe from the evidence adduced that the accused person was one of those that robbed PW1 and PW2 on 30/11/2004 as stated in counts one and two of the charge I believe that in the process of the robbery the accused person's wallet containing among other items F his identity card fell from his pocket. I have found that PW1 and PW2 effectively identified the accused person as one of the robbers..."

Affirming the appellant's conviction and sentence Court of Appeal, concluded as follows:

G *"It is to be made clear that the trial court rightly convicted the appellant having regard to his identification by PW1 and PW2 as one of the robbers who robbed them on 30th November, 2004 and whose identity as such was proved beyond reasonable doubt at the trial court."*

H As I have said, it is from the judgment of the court below that the appellant has now further appealed to this court. It is clear therefore that this appeal is against the concurrent finding made on the facts placed before the two courts.

It is to be noted however, that the parties each formulated

three issues for determination. The second issue canvassed in the alternative to the first issue by the respondent's that the trial court denied him constitutional right to fair hearing. I do not see the need for this stance, because all said and done, the appellant's complaint is all about not having been fairly heard and grave injustice done to him. B

I shall now turn to the issues raised in this appeal seriatim. The appellant's first issue relates to the alleged failure on the part of the lower court to consider all the issues, particularly issues 3 and 4 placed before it in the appellant's brief of argument. It is submitted that the lower court having failed to consider in its judgment all issues particularly 3 and 4 this has resulted or occasioned miscarriage of justice; and the effect of this denial could vitiate the entire proceedings and renders the same null and void. Reliance has been placed on the cases of *DA KABIRI KIM v. HON. JUSTICE LUKE EMEFO* (2001) All FWLR (Pt. 494) 1425 4 NWLR (Pt. 702) 147 at 1445. *UZUDA v. EGBAM* (2009) All FWLR (Pt. 493) 1224 at 1251; *Military Government, Imo State v. NNAWA* (1997) 2 NWLR (Pt. 490) 575 at 708; *LONGJOHN v. BLACK* (1998) 6 NWLR (Pt. 555) 524 at 550. C D

It is in the light of the foregoing that the appellant has urged this court, in his brief, that issues 1 and 2 be resolved in his favour. E

Learned counsel for the respondent in his own wisdom, considers it necessary to argue issues 1 and 2 together. He has submitted that the lower court in the exercise of its discretion adopted all the issues formulated by the respondent, in determining the appeal. He refers to the judgment of the lower court contained on pages 241, 242 and 243 of the record of appeal that this notwithstanding, that court while considering the respondent's issue No.2 also considered the defence put up by the appellant in his issues 3, 4, and 5. F G

It is on the basis of the foregoing, learned counsel for the respondent finally submitted that the contention of the appellant that the lower court failed in its legal duty to consider all the issues placed before it is entirely misconceived. He has urged us to resolve issues 1 and 2 in favour of the respondent and accordingly hold that the lower court did not fail to consider and resolve all the issues placed before it and consequently, it did not breach the constitutional right of the appellant to fair hearing. H

On the third issue, the appellant has contended that there were

material contradictions in the case of prosecution and these were fatal and crucial for the lower court to have carefully considered them, particularly in the evidence of PW1 and PW2. It is submitted that the contradictions, as pointed out in issue No.1 in the appellant's brief in the lower court, should have led to the rejection of the evidence of PW1 and PW2 on the issue of how the identity card of the appellant was recovered.

It is the contention of the learned counsel for the prosecution that there were no material contradictions in the prosecution's case, even if material contradictions had been duly considered by the lower court so as to know whether they were material or not.

There is the fourth issue which poses that the decision of the lower court upholding the conviction and sentence of the appellant was perverse having been reached without any judicial reasoning. It is contended by the appellant that the lower court arrived at a decision on the guilt of the appellant without any judicial reasoning. It is argued that the decision of the lower court was perverse because it made the conclusion that the appellant was rightly convicted, even before setting out to discuss the issues raised for determination in the appeal.

On the other hand, the learned counsel for the respondent has submitted that the decision of the lower court upholding the conviction and sentence of the appellant was not perverse because the decision did not in any way take into account matters which it ought not to have taken into account. Reliance was placed on the following cases: OSUJI v. EKEOCHA (2009) 16 NWLR (Pt. 116) 81 at 117, ADIMORA v. AJUFO (1998) 3 NWLR 1 MAKANJUOLA v. BALOGUN (1989) 3 NWLR (Pt.108) p.192. ATOLAGBE v. SHORUN (1985) 1 NWLR (Pt. 2) p.360 etc.

Now to the consideration of the arguments canvassed on the issues raised in the appeal. The first and second issues can be conveniently taken together. It poses the question whether or not the lower court failed in its legal duty to consider and resolve all the issues before it particularly issues No.3 and 4 in the appellant's brief of argument.

It is rather a triable argument or merely frivolous for the appellant to contend that the appellate court, in considering an appeal before it has no discretion to either adopt the is-

issues formulated for determination by the parties or alternatively formulate such issue(s) it believes would adequately determine the grievance in the appeal. Recently, what this court said in AGBAREH v. MIMRA (2008) 2 NWLR (Pt. 1071) 378 at 410, further emphasis the triteness of the law on this trig-point. It was held thus:

“Finally an appellate court can prefer an issue or issues formulated by any of the parties and can itself and on its own, formulate an issue or issues which in its considered view, is/are germane to and is or are pertinent in the determination of the matter in controversy. See the cases of Musa Sha (Jnr.) 1 & Anor v. Da Rap. Kwan & 4 Ors (2000) 8 NWLR (Pt. 670) 685, (2000) 5 SCNJ 101; Lebile v. The Registered Trustees of Cherubim & Seraphim Church of Zion of Nig. Ugbebla & 3 Ors (2003) 2 NWLR (Pt. 804) 399, (2003) 1 SCNJ 463 at 479 and Emeka Nwana v. Federal Capital Development Authority & 5 Ors (2004) 13 NWLR (Pt. 889) 128 at 142 - 143; (2004) 7 SCNJ 90 at 99 citing several others cases therein.”

What else is apt in the circumstance for the appellate court to do if it cannot be given the discretion of mandate to adopt, modify or even formulate an issue or issues, which in its view would adequately and fairly resolve the complaints in an appeal. See also NATIONAL ASSEMBLY v. C.C.L. Co. LTD. (2008) 5 NWLR (Pt. 1081) 519 at 536.

In the instant case, the Respondent in the court below also as the Respondent in its brief of argument contained on page 186 of the Record of Appeal formulated two issues for determination of the appeal in the following terms:

1. Whether the Trial Court was right in holding that there were no contradictions in the testimonies of the prosecution witnesses in respect of the identity of the Appellant as one of the robbers who robbed PW1 as PW2 on November, 2004 and thereby rightly convicted the Appellant as charged.

2. Whether the trial court properly considered all the defences put forward by the Appellant and thereby rightly convicted him as charged.

It is clear that the lower court in the exercise of its discretion adopted the issues formulated by the Respondent in determining the

appeal. This can be seen at page 24 of the Record of Appeal where the Court stated as follows:

“The vital evidence in respect of issue No.1 as formulated by the respondent is that PW1 and PW2 properly identified the appellant as one of the robbers who attack them at gun point on 30th November, 2004.”

Again, at page 242 of the Record of Appeal containing the judgment of the court below, the court stated as follows:

“The 2nd issue is whether the trial court properly considered all the defences put forward by the appellant and thereby rightly convicted him as charged.”

In spite of the foregoing the court below while considering the Respondent’s issue No. 2 also went ahead to consider the defences put up by the appellant in his issues 3, 4 and 5 which he complains that they weren’t considered. At page 243 of the record of appeal, the court stated, inter alia thus:

“...It is trite that court has the mandatory duty to consider all the defences in the course of his trial as canvassed by the appellant under issues No. 3, 4, and 5 of his brief. Having read the arguments of the learned counsel for the respondent and having gone over the available record of the trial court, I am satisfied that this appeal ought to be dismissed for the following reasons...”

The reasons the court adumbrated will form the core basis for the resolution of issue No. 3 shortly to be considered. Suffice to say, however that on the foregoing passages, the lower court failed in its legal duty to consider all the issues placed before it is misconceived in its entirety.

In the circumstance, I cannot fathom out what the appellant could possibly mean when he complained that all the issues placed before the lower court, particularly issues No. 3 and 4 in the appellant’s brief of argument were not considered.

Having resolved and answered issue No. 2 in the negative, it has become clear that the lower court did not deny the appellant his constitutional right to be fairly heard.

The third issue under consideration is the appellant’s complaint against the finding of the lower court that there were no material contradictions in the prosecutor’s case and thereby rightly upheld

the conviction of the appellant.

The general principle in a criminal trial is that the prosecution's case must not be so riddled with material contradictions and inconsistencies that would make it unsafe to convict the accused person. See PHILIP OMOGODO v. THE STATE (1981) 5 SC 5; R v. SAMUEL ABENGOWE 3 WACA 85 and RAYMOND OZO v. THE STATE (1971) 1 ALL NLR 111. ***It follows therefore that every contradiction or inconsistency would be fatal to the prosecution's case.*** See JOHN AGBO v. THE STATE (2006) 6 NWLR (Pt. 977) 545 at 563. ***For contradictions or inconsistencies to be fatal, it must go to the substance of the case and not to be of minor or trivial nature. The contradictions and sometimes mix-ups in the evidence of prosecution witnesses must be substantial and fundamental amounting to a disparagement of other pieces of evidence adduced.*** See UDOSEN v. THE STATE 4 NWLR (Pt. 1023) 125 at p.161 and the case of UWAEGHINYA v. STATE (2005) 1 NWLR (pt. 930) 250.

In the instant case the aspect of the testimony of the prosecution's witnesses that the appellant claims are contradictory were clearly set out on pages 237-239 of the record of appeal by the court below as follows:

"The learned appellant counsel avers that upon a dispassionate consideration of the situation it is clear that the viva voce evidence of the PW1 contradicts his statement to the police on the issue of recovery of the purse and by extension the 'identity card' since it was said to have been retrieved from the purse."

Also while describing the operation of the robbers the PW1 also contradicted himself. In the statement to the police on 30/11/2004 PW1 stated thus:

"They ordered me into their Mercedes Boot. I pleaded with them that I would not be able to."

But in his oral evidence on 28/11/2005 the PW1 stated thus:

"I was escorted to the boot of the Mercedes Benz. The one escorting me tried to push me into the boot, at this point I could not differentiate between fear and death. I looked at the one who was ordering me more closely and sternly asked me to do whatever he wanted me to that I will not get into the boot."

On the foregoing the court below then carefully reviewed the

arguments of both counsel. The Learned appellant therein queried as to what can be more contradictory than the above two statements. He submitted on page 239 of the record that with regard to the two contradictions pointed out above the trial court ought to have rejected both statements of the incident, similarly, in the court below, B the appellant's counsel has maintained that the trial court had relied on the recovery of the said purse in convicting the appellant since the identity card was said to have been recovered from him. Relying on OGUONZE v. THE STATE (1998) 5 NWLR (Pt. 551) 52, learned C counsel has submitted that where there should be explanation so as to clear the contradiction in the testimony of witnesses, it is the duty of the prosecution to do so and not that the court. The Respondent's counsel has maintained that the contradictions complained of were not so fatal to the prosecution's case.

D Having set out the contradictions complained of by the appellant, the court below then duly considered them at pages 241-242 of the record of appeal and held as follows:

"The vital evidence in respect of issue No.1 as formulated by the respondent is that PW1 and PW2 properly identified the appellant as one of the robbers who robbed them at gun point on 30th November, 2004. They had ample opportunity and so were in proper position to do so since according to their evidence they recovered a wallet containing an ID card belonging to the appellant at the scene of the crime, which ID card carried a clear photograph of the appellant PW1, based on this, recognized and identified the appellant in court. Nothing stops the trial court from relying on such concrete evidence of identification to convict the accused on it particularly as there were no material contradictions in the prosecution's case."

G It seems to me the court below took pains to further consider the appellant's alleged contradictions in the testimonies of the prosecution witnesses, on page 243 of the record of appeal, when it held, inter alia, as follows:

H *"Having read the argument of the learned counsel for the appellant and the arguments of the learned counsel for the respondent, and having gone over the available record of the trial court, I am satisfied that this appeal ought to be dismissed for the following reasons:*

1. There is no doubt or conflict arising from or regarding the

recovery of the appellant's ID Card at the scene of the robbery in this case because the appellant has not controverted or successfully challenged the evidence of PW1 and PW2 on how they recovered his ID card.

2. There were no contradictions at all in the testimonies of the prosecution in this case. The prosecution witnesses properly proved the ingredients of the offence charged.

3. The trial court adverted its mind to and considered the effect of what the appellant inappropriately termed contradictions in this case and decided that they were not contradictions in law and thereby satisfied the requirement of the law in this regard."

I have stated that for the principle of inconsistency of testimony of witnesses to apply, it must be shown that the contradiction or inconsistency is material and that the trial judge failed to advert his mind to the inconsistency in his judgment thereby resulting in a miscarriage of justice.

However, the court in determining the materiality of the contradiction or inconsistency of testimony of a witness, it would need to view contradiction or inconsistency against the elements of the offence charged. In the instant case the ingredients that the prosecution needs to prove or sustain a charge of armed robbery are:

- (i) That there was robbery or series of robberies.***
- (ii) That the robbery or each robbery was an armed robbery.***
- (iii) That the accused was one of those who took part in the armed robbery.***

In this case all the foregoing ingredients were proved against the appellant. The appellant did not deny or dispute that on the 30th November, 2004, armed robbery in which he was part of took place. PW1 and PW2 properly identified the appellant as one of the robbers. According to their evidence a wallet containing appellant's identity card, with his clear photograph was recovered at the scene of the crime.

In view of the foregoing, I am therefore of the firm conviction that the court below duly considered the alleged contradictions and was right to have concluded and held that there were no material contradictions in the prosecutions' case and

thereby rightly affirmed the conviction of the appellant. I cannot disturb the concurrent findings of fact of the lower courts.

In the fourth and final issue, the appellant contended in his brief of argument that the decision of the lower court upholding the conviction and sentence of the appellant was perverse, having been reached without any judicial reasoning. He has argued that the decision of the lower court was perverse because it made the conclusion that the appellant was rightly convicted before setting out to discuss the issues raised for determination in the appeal.

I must say from onset that the appellant has erroneously misapplied the principle of “Perverse decision” in the instant case. “Perverse” literally means unacceptable or unreasonable. A decision of court will be regarded as perverse where it is speculative and not based on any evidence; or the court took into account matters, which it ought not to have taken into account; or it shuts its eyes to the obvious. See ATOLAGBE v. SHORUN (1985) 3 NWLR (Pt. 80) P.1; ADEOSUN v. JIBESIN (2001) 11 NWLR (Pt. 724) 290 and OSUJI v. EKEOCHA (2009) 16 NWLR (Pt. 1166) 81.

I am of the firm view that the lower court in upholding the conviction and sentence of the Appellant was not perverse. In this case it is not shown that the court has failed in its function to properly and dispassionately appraise the evidence placed before it.

The court below based its decision on the evidence before it. See again the passage on pages 242 of the record of appeal set out earlier above and its reasons for decision on pages 243, 244 and 245 of the record as earlier referred and set out when in the course of considering the third issue.

The appellant has further, in vain, argued in paragraph 7.04 of his brief of argument that the court below failed to look at the evidence before the trial court or the facts upon which it acted before reaching its decision on the guilt of the appellant; that the court in the first paragraph of page 11 of its judgment indicated that it went through the available record of the trial court before being satisfied that the appeal ought to be dismissed.

As rightly observed by the learned counsel for the respondent, the decision of the lower court upholding the con-

viction and sentence of the appellant was not in any way perverse.

Having resolved all the above issues against the appellant and in favour of the respondent I hold that the appeal is devoid of any merit and is hereby dismissed.

B

ONNOGHEN JSC

This appeal is against the Judgment of the Court of Appeal Holden at Calabar in appeal No. CA/C/38/2010 delivered on the 13th day of July, 2011 in which the court dismissed the appeal of appellant against the Judgment of the High Court of Akwa Ibom State delivered on the 23rd day of January, 2009 convicting appellant of the offence of armed robbery and sentencing him accordingly. The instant appeal is therefore a further appeal.

D

The facts of the case have been stated in detail in the lead Judgment thereby making it unnecessary for me to repeat them herein except as may be needed for the point being made/emphasized.

The issues identified for determination by learned counsel for appellant in the appellant brief filed on 21/10/2011 F. A. ONUZULIKE Esq. are as follows:

E

“1. Whether the lower court did not fail in its legal duty to consider and resolve all the issues placed before it particularly issues No. 3 and 4 in the appellant’s brief of argument - GROUND 3.

F

2. Whether by failing to consider all the issues placed before it the lower court did not breach the constitutional right of the appellant to fair hearing.

3. Whether the decision of the lower court upholding the conviction and sentence of the appellant was not perverse having been reached without any judicial reasoning - GROUND 1.

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4. Whether the lower court was right to have held that there were no material contradictions in the prosecution’s case when it did not even consider what the contradictions were - GROUND 2”

In arguing issue 1, learned counsel for appellant contended that the lower court was under obligation to consider all the issues raised by appellant for determination, though the court has the power to merge, compress or reformulate the said issues; that the lower court failed to consider appellant’s issues 3 and 4 submitted for de-

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termination; neither did the court merge, compress or reformulate the said issues, relying on the case of *OLOWOLAGBA v. BAKARE* (1998) 2 NWLR (Pt. 543) 528 at 534, *Kabirikam v. Emefor* (2009) All FWLR (Pt. 494) 1425 at 1445 and 1459.

B Relying on the case of *Uzuda v. Egbah* (2009) All FWLR (Pt. 493) 1224 at 1251 learned counsel submitted that the consequences of non consideration of the issues so submitted for determination is retrial/rehearing of the matter and urged the court to resolve the issue in favour of appellant.

C On his part learned counsel for respondent, Uko Udom, Esq. in a respondent's brief deemed filed and served on 13/6/2012 agreed with the contention of counsel for appellant that an appellate court has a discretion to either adopt the issues formulated for determination, or formulate such issues which it believes would adequately
D determine the complaint or grievance in the appeal, relying on *Agbare v. Mimra* (2008) 2 NWLR (Pt. 1071) 378 at 410; *National Assembly v. C.C.I. Co. Ltd* (2006) 5 NWLR (Pt. 1081) 519 at 536, that in the instant case the lower court in determining the appeal adopted the issues as formulated by learned counsel for the respondent in the
E respondent brief as being the relevant issues for the determination of the appeal, as indicated at page 241 of the record of appeal. It is the further contention of learned counsel that despite the adoption of the two issues formulated by counsel for the respondent in the determination of the appeal the lower court also, at pages 242 and 243 of
F the record considered appellant's issues 3, 4 and 5 before coming to the decision it reached in the appeal and consequently submitted that appellant's issue 1 is very much misconceived and urged the court to resolve same against appellant.

G I have carefully gone through the record of appeal, argument of counsel before the lower court and in this court as well as the decision of the lower court on appeal before us and can confirm that the lower court actually considered appellant's issues 3 and 4 before arriving at the Judgment now on appeal. At pages 242 and 243 of
H the record of appeal, the lower court stated as follows:-

"The 2nd issue is whether the trial court properly considered all the Defences put forward by the appellant and thereby rightly convicted him as charged. It is trite that court has the mandatory duty to consider all the defences put up by the accused person in the

course of his trial as canvassed by the appellant under issues No. 3, 4 and 5 of his brief. Having read the argument of the learned counsel for the appellant and the arguments of the learned counsel for the respondent and having gone over the available record of the trial court I am satisfied that the appeal ought to be dismissed for the following reasons:"

From the above passage, it is very clear that the complaint of appellant in issue 1 has no foundation in fact neither is it grounded on law. It is very much misconceived and is consequently resolved against the appellant.

On issue 2, it is very clear that with the resolution of issue 1 in the negative, issue 2 has become a non issue. The lower court having considered and resolved the issues including appellant's issues 3 and 4, it cannot be legally said to have breached the constitutional right of appellant to fair hearing. Consequently the said issue 2 deserves no further consideration and is therefore discountenanced by me.

There is evidence on record that the identity card of appellant was found at the scene of the robbery the same haven fallen off during the robbery operation. That piece of evidence completely fixed appellant at the scene of crime admitting of no plausible alibi neither did appellant controvert or successfully challenge the evidence of PW1 and PW2 on how the said ID card was recovered at the scene of the robbery.

It is for the above and the more detailed reasons contained in the lead Judgment of my learned brother, GALADIMA, JSC that I too find no merit whatsoever in the appeal and consequently dismiss same. Appeal dismissed.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Galadima, JSC. I agree with the reasons therein advanced as well as the conclusion reached that the appeal lacks merit and deserves an order of dismissal.

At the trial High Court, the appellant was arraigned for the offence of armed robbery. The charge was that the appellant along with two others at large robbed with arms P.W.1 and P.W.2 of official car, cash and other valuables. The appellant's wallet containing his ID

card dropped at the locus criminis. With same, P.W.1 and P.W.2 identified the appellant in his house and in court. P.W.2 saw when the appellant's wallet which contained his ID card dropped at the scene of crime as he was trying to pocket the money removed from him (P.W.2). As it were, the ID card of the appellant gave him away. The trial court convicted the appellant and sentenced him accordingly. He appealed to the Court of Appeal which found same wanting in merit and dismissed it. This is a further appeal to this court.

In this court, the four issues decoded on behalf of the appellant read as follows:-

"(1) Whether the lower court did not fail in its legal duty to consider and resolve all the issues placed before it particularly issues No. 3 and 4 in the appellant's brief of argument - GROUND 3.

(2) Whether by failing to consider all the issues placed before it the lower court did not breach the constitutional right of the appellant to fair hearing.

(3) Whether the decision of the lower court upholding the conviction and sentence of the appellant was not perverse having been reached without judicial reasoning - GROUND 1.

(4) Whether the lower court was right to have held that there was no material contradiction in the prosecution's case when it did not even consider what the contradictions were - GROUND 2."

Put bluntly, the complaint of the appellant with respect to issue 1 is out of tune with the position of the court below at pages 242-243 of the record of appeal wherein issues 3 and 4 before it were considered. The three reasons given by the court below for dismissing the appeal are:-

(1) That there is no doubt or conflict arising from or regarding the recovery of the appellant's ID card at the scene of the robbery.

There were no contradictions at all in the testimonies of the prosecution witnesses in this case. The prosecution properly proved the ingredients of the offence charged.

(3) The trial court adverted its mind to and considered the effect of what the appellant inappropriately termed contradictions in this case and decided that they were not contradictions in law and thereby satisfied the requirements of the law in this regard.

I wish to say it here that it does not fall within the realm or duty of counsel to criticize or attempt to disparage the mode or style of

writing of judgment by a judge. See: Okulate v. Awosanya (2000) 2 NWLR (Pt. 640) 530. In my view, the complaint of the appellant fell flat. The court below did not fail in its legal duty to determine the issues placed before it.

The issue touching on breach of appellant's constitutional right to fair hearing hangs in the air, as it were. This is so since the lower court considered appellant's issues 3 and 4 before it. The complaint has no basis at all. This court has consistently warned counsel to desist from unnecessarily throwing up in the wind want of fair hearing on behalf of an appellant for no justifiable cause shown. The appellant herein should leave right of fair hearing to where it rightly belongs. See: Saburi Adebayo v. Attorney-General of Ogun State (2008) 7 NWLR (Pt. 1085) 201 at 221-222.

It is clear to me that the identity card of the appellant which dropped at the scene of crime gave him away as one of the robbers who carried out the armed robbery operation on the fateful day as found by the trial court and affirmed by the court below. I cannot see my way clear in interfering with the concurrent findings of the two lower courts as same were not in any respect, perverse. See: Victor v. The State (2013) 12 NWLR (Pt. 1369) 465 at 485.

For the above reasons and those fully adumbrated in the lead judgment, I too feel that the appeal clearly lacks merit. It is hereby dismissed as I hereby affirm the judgment of the court below.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment prepared by my brother, Galadima, JSC. I am in full agreement with his lordships reasoning and conclusion that there is no merit in this appeal. I adopt the facts as set out by his lordship. While the Robbery was ongoing a wallet fell from the pocket of the appellant. In it was an identification card with the photograph of the appellant. PW1 and PW2 had no difficulty in identifying the appellant as one of the Robbers that stole their car, N50,000, cell phones and some personal effects. Both courts below found these facts to be true. The appellant was unable to challenge the testimony of PW1 and PW2 as to how his ID card was found at the scene of the Robbery. On these facts the appellant was convicted by the trial court for

the offence of armed robbery. That judgment was affirmed by the Court of Appeal.

This court rarely disturbs concurrent findings of facts of the two courts below except where there has been an exceptional circumstance such as the findings are found to be perverse, or cannot be supported by evidence, or there was a miscarriage of justice violation of some principle of law or procedure. See *A.C.N. v. Lamido & 4 Ors.* (2012) 2 SC (Pt. ii) p.163

Learned counsel for the appellant was unable to show to this court that concurrent findings of both courts below are perverse or cannot be supported by evidence. In the circumstances the said findings are true and the conviction is correct.

For these brief reasons as well as these more fully given by Galadima, JSC I would dismiss the appeal. Appeal dismissed.

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OKORO JSC

My learned brother, Suleiman Galadima, JSC, obliged me in draft a copy of the judgment he has just delivered. I had a preview of same and I am in full agreement with both the reasons adduced and the conclusion that this appeal is devoid of any scintilla of merit and ought to be dismissed. The facts of this case are straight forward and precise.

On 31st November, 2004, one Dr. Bassey (PW1) travelled with Pius Akpan (PW2) from Uyo to Ukpom Ita in Ikono Local Government Area of Akwa Ibom State. As they got to Edet Ukpom market, the PW1 who was driving in his car, a Peugeot 504 saloon car - Bestline 2000 series, slowed down to turn into the premises of Edet Community Bank. At this point a Mercedes car that had apparently been trailing them overtook them and blocked their car. PW1 was robbed of the car, cell phones and other personal effects. The sum of N50,000.00 was stolen from PW2. During the incident a wallet fell off the pocket of one of the robbers but the robbers did not notice it.

Inside the wallet was an I.D. card issued by Institute of Management Technology, Enugu, bearing the photograph of the appellant. This gave him out.

Based on the facts above, the trial High Court convicted and sentenced the appellant to death. His appeal to the Court of Appeal

was dismissed. Appellant has further appealed to this court. Four issues are formulated by the appellant as follows:-

1. Whether the lower court did not fail in its legal duty to consider and resolve all the issues placed before it particularly issues No. 3 and 4 in the appellant's brief of argument. Ground 3.

2. Whether by failing to consider all the issues placed before it, the lower court did not breach the constitutional right of the appellant to fair hearing. B

3. Whether the decision of the lower court upholding the conviction of the appellant was not perverse having been reached without any judicial reasoning. Ground 1 C

4. Whether the lower court was right to have held that there were no material contradictions in the prosecution's case when it did not even consider what the contradictions were. Ground 2

The main complaint of the appellant in issues 1 and 2 is that the court below failed to consider issues 3 and 4 submitted to it for the determination of the appeal and as such he was denied fair hearing. As I see it, issue 2 is dependent on the determination of the first issue. It is trite law that an appeal court must consider all issues for determination raised before it except where it is of the view that a consideration of one or more issues is enough to dispose of the appeal. In such a situation, the court may adopt such issues as may dispose of the appeal and may not be bound to consider all the other issues he considers irrelevant and unnecessary. Even in cases where an appellant files five issues for instance, and the respondent formulates one or two issues only, the court can adopt the one or two issues of the respondent if it finds that they are more cogent and able to determine the appeal better than the five issues formulated by the appellant. See *Tunbi v. Opawole* (2000) 2 NWLR (Pt. 644) 275, *Anyanduba v. NRTC Ltd* (1992) 5 NWLR (Pt. 243) 535, *Okonji v. Njokama* (1991) 7 NWLR (Pt. 202) 131. In some cases, some issues may be subsumed in another or other issues. So, there is flexibility in this matter. E F

In the instant appeal, it is not correct as the learned counsel for the appellant has argued that the court below failed to consider issues 3 and 4 submitted by the appellant. The record of appeal clearly comes to the rescue. The Court of Appeal stated on pages 242 - 243 of the record of appeal as follows:- H

“The 2nd issue is whether the trial court properly considered all the defences put forward by the appellant and thereby rightly convicted him as charged. It is trite that the court has the mandatory duty to consider all the defences put up by the accused person in the course of his trial as canvassed by the appellant under issues No. 3, 4 and 5 of his brief. Having read the argument of the learned counsel for the appellant and the arguments of the learned counsel for the respondent, and having gone over the available record of the trial court, I am satisfied that this appeal ought to be dismissed for the following reasons:-”

It can be seen from the above extract from the judgment of the lower court that issues 3 and 4 were considered contrary to the allegation made by the learned counsel for the appellant. That being the case as regards issue No. 1, issue 2 as it were, is of no moment.

The fact remains in this appeal that there was an armed robbery attack on 31st November, 2004 at Ukpom Ita wherein the PW1 and PW2 were thoroughly robbed of their belongings at gun point. In the process, a wallet fell from one of the robbers. An identification card bearing the photograph of the appellant was found in the wallet. The appellant was a youth corper serving around the vicinity of the robbery. PW1 and 2 identified the appellant as one of the robbers. Both the trial court and the court below found the facts to be true and acted on them. The findings are not found to be perverse. I have no reason to disturb these concurrent findings. It is settled that where there is sufficient evidence to support concurrent findings of fact by two lower courts, such findings should not be disturbed unless there is a substantial error apparent on the record that is, the findings have been shown to be perverse, or some miscarriage of justice or some material violation of some principle of law or of procedure is shown. This is not the case here. See *Ogoala v. State* (1991) 2 NWLR (Pt. 175) 509, *Sobakin v. The State* (1981) 5 SC 75, *Nwiboko v. The State* (1985) 4 SC (Pt. 11) 183.

Based on the above reasons and the elaborate ones enunciated in the lead judgment I also hold that there is no merit in this appeal. It is hereby dismissed. I affirm the judgment of the Court of Appeal.