

**SUPREME COURT OF NIGERIA**  
FRIDAY 3RD JULY, 2015. SC. 334A/2012  
**CORAM:- S. GALADIMA, O. ARIWOOLA,**  
**C. B. OGUNBIYI, J. I. OKORO, C. C. NWEZE, JJSC**

SHINA OKETAOLEGUN ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CONVICTION - Circumstantial evidence - Weight - It is often the best evidence but sparingly applied - Hence to ground a conviction - Such evidence must point to the guilt of accused (H1)

MURDER - Proof - Exception - No matter the reckless conduct of accused - So long as the killing that resulted from his act was not intended - The act would not constitute murder (H2)

**FACTS**

2<sup>nd</sup> accused/appellant and one other were arraigned before the High Court of Ogun State on a two count charge of conspiracy to commit murder and murder, contrary to Sections 324 and 316 (2) of the Criminal Code Law Cap 29, Laws of Ogun State of Nigeria, 1978 and punishable pursuant to Section 319 (1) of the same Law. 1<sup>st</sup> accused - one Kingsley Omoregie (an employee of the deceased) went to the deceased's house in company of appellant. PW1 (a school teacher who lived with the deceased) was at the compound when 1<sup>st</sup> accused and appellant visited the house. PW1 suspicion was aroused as to the mission of 1<sup>st</sup> accused and he had to call the vigilante men. On his return to the house, he met the main door locked. He used a ladder to get to the balcony where he saw 1<sup>st</sup> accused in the sitting room. On sighting him, 1<sup>st</sup> accused took to his heels and disappeared. PW1 thereafter saw the deceased severely wounded with blood stains. PW1 took the deceased to a hospital where he later died. Appellant and 1<sup>st</sup> accused were arrested and charged to court.

To prove its case, prosecution/respondent called five witnesses and tendered three Exhibits - a marine rope, two knives and the Medical report. Appellant and the other testified in their separate

defence and called no witness. Their no case submission was overruled by the court. At the end of the trial, the court found them guilty of murder and passed a sentence of death by hanging. Aggrieved, both convicts filed separate Notices of Appeal at the Court of Appeal Ibadan Division, challenging their conviction and sentence. In its judgment, the court found that a case of attempted murder has only been made out and not murder. Accordingly, the appeal was allowed in part and the death sentence was substituted with life imprisonment. Still not satisfied, appellant appealed to Supreme Court.

**ISSUE FOR DETERMINATION**

*“Whether in the circumstances of this case, the prosecution has proved its case beyond reasonable doubt that the appellant was guilty of the offence of attempted murder.”*

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

*CONVICTION - Circumstantial evidence - Weight*

**1. Circumstantial evidence is nothing more than evidence of surrounding circumstances which by their nature is capable of establishing a proposition, such as the criminality of an accused person with the highest exactitude. It is a combination of evidence of circumstances against an accused when taken together; creates strong conclusions of his guilt with high degree of certainty. It is very often the best evidence, sparingly applied because of possibility of fabrication which may cast suspicion on innocent person. For circumstantial evidence to ground a conviction, it must lead to one conclusion, that is, the guilt of the accused person.**

**Very important point has been made here to the effect that since the 1st accused said that it was the deceased who called him on phone that he should come for his arrears of salary the deceased was owing, one would have expected that the reasonable thing 1st accused should have done on sighting his boss in a pool of blood was to quickly raise alarm, instead of escaping through the back door of the premises of the deceased. Moreover, the Appellants could not explain how the**

**door to the main house was locked when they were already in the house. These circumstances pointed to the fact that they and none else carried out the stabbing and tying up the deceased. The learned trial judge in the circumstance rightly found that it was the accused persons who had the first opportunity to commit this heinous and barbaric crime. The prosecution therefore, satisfactorily discharged the burden of proving that it was the accused persons that killed the deceased.** (pp. 2542 C/2545 A)

#### *MURDER - Proof - Exception*

**2. The prosecution must in a criminal trial establish the cause of the death of the deceased.**

**The position of the law is that to establish a charge of murder or manslaughter, it must be proved not merely that the act of the accused could have caused the death of the deceased but that it actually did. No matter how reckless the conduct of the accused might be, so long as the killing that resulted from his act was not intended, that act would not fall within the provision of S.316 of the Criminal Code (supra) and therefore would not constitute murder. The court below correctly reviewed the evidence led by both the prosecution and the defence, particularly the testimonies of PW1 and DW1 and DW2 and rightly concluded that Sections 320 and 325 of the Criminal Code respectively apply to the circumstances of this case, which warrant an interference with the verdict of the trial court. I agree that the appellant was appropriately found guilty of attempted murder or manslaughter.** (pp. 2545 G/2546 B)

## NOTABLE POINTS OF INTEREST

### **GALADIMA JSC**

#### ***1. Counsel to display skills and diligence in brief writing***

One noticeable trend which this court has over and over deprecated is the lack of diligence shown by some counsel in settlement of their brief of argument. It must be remembered that brief is a very important process in the appellate court. It is in it the parties posit propositions of law or facts as issue(s) for determination in the appeal, which

determination by the appeal court would decide the fate, the success or failure of the appeal. The issues for determination must arise directly from or directly relate to the grounds of appeal already filed. Both counsel, particularly counsel for the Respondent, have not demonstrated the diligence required of them.

- B The language used in the brief should be clear and precise. References, cross - references and citations of authorities should be indicated with due care. This is what the court will consider at the hearing of the appeal. The oratory or charming advocacy would not prevail over written brief; hence the need for the counsel for the  
C respective parties to display skills and diligence in the preparation of their briefs. (p. 2539 B)

### **ARIWOOLA JSC**

#### **D 2. *Murder – Doctrine of last seen***

- However, I am of the firm view that the doctrine of “Last seen” readily come to play. That if a person who was last seen alive in company of another is found dead, that other in whose company the deceased was last seen alive, in law, is presumed to bear full responsibility of  
E the death of the deceased. He certainly has some explanation to give as to what caused the death, if he says he did not kill the deceased. (p. 2548 G)

### **REPRESENTATION**

- F Oladipo Olasope Esq., for the Appellant  
Olaitan Ajose Adeogun Esq., for the Respondent

### **CASES REFERRED TO**

- G Abeke v. State (2007) 9 NWLR (pt. 1040)  
Akpan v. State (2008) 14 NWLR (pt. 1106) 72  
Nwali v. State (1991) 3 NWLR (pt. 180)  
State v. Rabiw (1980) 1 NCR 47  
Ijiofor v. State (2001) FWLR (pt. 49) 1457  
H Ajose v. State (2007) 7 NWLR (pt. 215)  
Igago v. State (1999) 14 NWLR (pt. 637) 1  
Shosimbo v. State (1974) All NLR 603  
Omini v. State (1999) 12 NWLR (pt. 630) 168  
Ubani v. State (2003) 18 NWLR (pt. 851) 224

Igbele v. State (2006) 3 SCM 143

Ndike v. State (1994) 8 NWLR (pt. 360) 33

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

Emeka v. State (2001) 14 NWLR (pt. 734) 666

**STATUTE REFERRED TO**

Criminal Code Law Cap. 29 Laws of Ogun State 1978, ss. 316(2), 319(1), 325

**LEAD JUDGMENT BY GALADIMA JSC**

This is an appeal against the Judgment of Court of Appeal Ibadan Division delivered on the 14th day of April, 2008. The Appellant herein was arrested along with one Kingsley Omoregie on the grounds that they murdered one Engineer Samuel Fakoya. They were accordingly arraigned before the High Court of Ogun State sitting at Ijebu-Ode, presided over by Hon. Justice Ibikunle Adesalu on a two count charge of Conspiracy to commit murder and murder contrary to Section S. 325 and 316(2) and punishable under Section 319(1) of the Criminal Code Law cap 29 Laws of Ogun State of Nigeria 1978. The charge reads thus:

*“STATEMENT OF OFFENCE:*

*COUNT 1:*

*CONSPIRACY TO MURDER contrary to Section 324 of the Criminal Code Law (Cap.29) Laws of Ogun State of Nigeria, 1978.*

*PARTICULARS OF OFFENCE:*

*KINGSLEY OMOREGIE (M) and SHINA OKETAOLEGUN (M) on or about the 27th day of August, 2002 at Ikoto-Ijebu in the Ijebu-Ode Judicial Division conspired to murder one Engineer Samuel Fakoya.*

*STATEMENT OF OFFENCE:*

*COUNT II:*

*Murder, contrary to Section 316 (2) and punishable under Section 319 (1) of the Criminal Code Law (Cap.29) Laws of Ogun State of Nigeria, 1978.*

*PARTICULARS OF OFFENCE*

*KINGSLEY OMOREGIE (M) and SHINA OKETAOLEGUN (M) on or about the 27th day of August, 2002 at Ikoto-Ijebu in the Ijebu-Ode Judicial Division murdered on (sic) Engineer Samuel Fakoya.”*

To prove the charge, at the trial High Court, against the accused, the prosecution called 5 witnesses and tendered Exhibits, namely a yellow marine rope, two knives and Medical Report.

The evidence adduced at the trial by the prosecution revealed that on 24/8/2002 at about 3:30pm, Kingsley Omoregie, the 1st  
 B accused, who was an employee of the deceased went to the deceased's house in company of the Appellant herein. He saw PW1, a school teacher who lived with the deceased, sitting under a tree in the compound. His suspicion was aroused as to the mission of the 1st  
 C accused and he had to call the vigilante men, on his return he met the door of the main house locked. He used a ladder to get to the balcony where he saw the 1st accused in the sitting room on sighting him, the 1st accused ran into one of the rooms, took to his heels and disappeared. PW1 shouted and when he called the deceased but he  
 D received no response. On getting down the stairs he saw the deceased in a sitting posture with his two hands tied to the railings of the steps with blood on his head and three deep wounds on his chest and abdomen. PW1 untied the deceased and rushed him to a nearby hospital and later transferred him to Ogun State University Teaching  
 E Hospital, Shagamu, where he died. The vigilante men whom PW1 had earlier sought for their assistance surrounded the deceased's house and arrested the accused persons and handed them over to the police. The investigating police officer, one Goddy Osuyi, who testified  
 F as PW3, told the court that he recovered the marine rope, which was tendered as Exhibit 'B', and two knives marked as Exhibits 'C' and C1 and, the Medical Report from the Medical Doctor, who performed the post - mortem examination on the deceased, Exhibit D.

When the prosecution sought to tender the statements of the  
 G accused persons but objection was taken on the voluntariness of the statements and it was sustained, hence the statements were rejected. It is also note worthy that at the end of prosecution's case, the accused made a no - case submission but they were overruled and were therefore called upon to enter into their defence.

H Each of the accused testified to his defence and was cross-examined but called no further evidence.

They both denied killing the deceased. Learned counsel for the accused and defence submitted a lengthy address at the trial. In his reserved considered judgment delivered on 7/3/2005, the learned

trial judge found the accused persons guilty on both accounts, convicted them and sentenced them to death by hanging. They both appealed against the conviction and sentence by filing separate Notices of Appeal on 1/4/2005. In their well considered judgment, the learned justices of the Court of Appeal, considered the sentence of the Appellant herein, and reduced same to attempted murder. It is against this conviction and sentence for life imprisonment that the appellant has appealed to this court. He sought for leave to appeal and it was granted on 28/11/2012 and in the Notice of Appeal 7 grounds are reproduced hereunder, with their particulars:

**GROUNDS OF APPEAL:**

“(1) The learned Justices of Court of Appeal erred in law in convicting the 2nd appellant of attempted murder when there was no evidence to establish a charge of attempted murder against the 2nd appellant.

(2). The learned justices of Court of Appeal erred in law in upholding the conviction of the 2nd appellant on merely circumstantial evidence.

**PARTICULARS**

(a) The prosecution’s case was based solely on circumstantial evidence.

(b) It is trite that circumstantial evidence must point to no other fact but that the accused committed the crime.

(c) In this case the circumstantial evidence was not conclusive to warrant a conviction.

(3) The learned justices of Court of Appeal erred in law in upholding the conviction of the 2nd appellant of attempted murder when it had not been shown that the 2nd appellant had any motive for killing the deceased.

**PARTICULARS:**

(a) In convicting an accused of a crime there must be men’s rea and actus reus.

(b). If this case no motive of men’s rea was shown before the court to warrant a conviction.

(c). This was an error committed by the court.

(4) The learned justices of Court of Appeal erred in law by reducing the sentence of death to life imprisonment.

**PARTICULARS**

(a) The Court of Appeal found that the stab wound did not kill the deceased.

(b) As a result the conviction was reduced to attempted murder from murder.

(c) This ought not to be as the court ought to have freed the 2nd accused.

(5) The learned justices of Court of Appeal erred in law in reducing the sentence of death to life imprisonment when there was no evidence to sustain a conviction and the court ought to have freed the 2nd accused.

(6) The learned justice of Court of Appeal erred in law in upholding the conviction based on circumstantial evidence when the available evidence before the court was not sufficient to establish a conviction based on circumstantial evidence.

(6) The learned justice of Court of Appeal erred law in upholding the conviction against the 2nd accused when there was no evidence to support such a conviction against the 2nd accused.

(7) The learned appeal justices erred in law in convicting the 2nd appellant of conspiracy to commit murder.

**PARTICULARS:**

(a) To found a conviction of conspiracy, there must be common intention shown.

(b) In this case no common intention was shown to warrant a conviction for conspiracy.

#### RELIEFS SOUGHT FROM THE SUPREME COURT.

The 3 issues formulated on behalf of the Appellant by learned counsel, Oladipo Olasope Esq, in the brief argument filed on 28/3/2013, for determination of the appeal, are as follows:

“(i). whether the Court of Appeal was right in convicting the accused of attempted murder (Grounds 1, 4, 5)

(ii) whether it was shown before the court that the accused had any motive (mens rea) for killing the deceased (Grounds 3, 7).

(iii) whether the Court was right in convicting the accused based on circumstantial evidence which was not conclusive.”

On the other hand, the learned counsel for the Respondent in the brief of argument deemed filed on 28/1/2015, raised the following 2 issues for determination.

*“A. Based on the facts of the case was there enough circum-*



*stantial evidence adduced by the prosecution to prove beyond reasonable doubt that the Appellant herein was guilty of the offence of attempted murder - (Grounds 2 and 6).*

*B. Based on the facts of the case did the prosecution prove the offence of Conspiracy against the Appellant to warrant a conviction - (Ground 7.)”*

One noticeable trend which this court has over and over deprecated is the lack of diligence shown by some counsel in settlement of their brief of argument. It must be remembered that brief is a very important process in the appellate court. It is in it the parties posit propositions of law or facts as issue(s) for determination in the appeal, which determination by the appeal court would decide the fate, the success or failure of the appeal. The issues for determination must arise directly from or directly relate to the grounds of appeal already filed. Both counsel, particularly counsel for the Respondent, have not demonstrated the diligence required of them.

The language used in the brief should be clear and precise. References, cross - references and citations of authorities should be indicated with due care. This is what the court will consider at the hearing of the appeal. The oratory or charming advocacy would not prevail over written brief; hence the need for the counsel for the respective parties to display skills and diligence in the preparation of their briefs.

What the 3 issues raised by the Appellant and the two by Respondent for determination, boil down simply to in my mind is:-

*“Whether in the circumstances of this case, the prosecution has proved its case beyond reasonable doubt that the appellant was guilty of the offence of attempted murder.”*

The grouse of the appellant herein is that he had no connection or relation with the deceased; that he was only a friend of Kingsley Omeregie, a co-accused who was a former employee of the deceased. That all he did on that fateful day was only to escort his friend to the house of the deceased to collect his outstanding salaries. With this background information, the learned counsel has contended apparent that it is that the appellant had no motive at all to kill the deceased. That throughout the trial, the prosecutor did not establish that he could have formed any intention (*mens rea*) and he did kill (*actus reus*) the deceased. That the two basic elements required to

ground criminal responsibility, that is, mens rea, actus reus are lacking in this case. Reliance was placed on the cases of ABEKE v. STATE (2007) 9 NWLR (Pt.1040); AKPAN v. THE STATE (2008) 14 NWLR (Pt.1106) 72.

It is further submitted that since no common intention was shown to have existed warranting conviction for murder or attempted murder, a charge of conspiracy ought to fail, relying on NWALI v. STATE (1991) 3 NWLR (Pt.180). That the court below reduced the conviction of the appellant from murder to attempted murder because death was not established nor was it caused by the alleged stabbing of the deceased; and therefore the appellant ought to have been freed.

Relying on the medical Report Exhibit 'D' learned counsel submitted the said report shows that the cause of death was attributed to acute cardiac pulmonary failure due to his diabetic and hypertensive conditions. It is argued that in a trial for murder, there must be clear evidence before the court that the death of the deceased was caused by the accused, to the exclusion of all other reasonable probable cause. It is submitted that the findings by the court below at page 181 of the record showed that the necessary ingredients for the offence of murder were missing. That the reference of the court below to Section 315 and 317 of the Criminal Code, contemplate a situation where the unlawful acts of the accused caused the death of the deceased, unlike in this case where it has been shown that the acts of the appellant, if any, did not result in the death of the deceased.

On the issue of whether the circumstantial evidence was sufficient to convict the appellant; learned counsel submitted that for a court to convict on circumstantial evidence, the said evidence must point to one possibility only and that is the offence was committed by the accused. That when the evidence is capable of two interpretations, such conviction must fail. Refers to STATE v. NAFIU RABIU (1980) 1 NCR 47 at 71.

It is further submitted that circumstantial evidence must be cogent, compelling and irresistible to warrant the conviction of the accused. That in this case the circumstantial evidence is not conclusive because the three basic conditions were not satisfied namely: the fact that there are some pieces of evidence against the accused and none against anyone else; that the accused is more likely to have

been guilty than anyone else; and that the accused had the opportunity of committing the crime. On this last ingredient, the learned counsel submitted that there is no iota of evidence cogent to point to the conclusion that the accused had the opportunity of committing the crime; That the evidence of PW1, a key prosecution witness, did not state that he saw the deceased alive, prior to the time the accused entered the house. It is contended that there is a window of doubt capable of more than one interpretation and as such the circumstantial evidence cannot ground the conviction of the appellant; and the accused must be set free. He relies on *NAFIU v. STATE* (supra), *IJIOFOR v. STATE* (2001) FWLR (Pt.49) 1457 at 1474; *AJOSE v. STATE* (2007) 7 NWLR (Pt.215). B  
C

On the part of the Respondent, the learned counsel has submitted that the case of the prosecution at the trial court was that there was enough circumstantial evidence adduced to prove beyond reasonable doubt that the Appellant herein was guilty of the offence of attempted murder. He submitted that it is not disputed that at all material time only the appellant and his friend Kingsley Omoregie, PW1 and the deceased were in the premises where the deceased was murdered in cold blood. It is submitted that all the circumstantial evidence adduced by PW1 against the appellant points irresistibly, positively, conclusively that after the deceased had macheted and murdered the deceased, took to their heels with the appellant with a machete in his hand but was arrested along with his co-accused with the aid of the villagers three days after. It was the appellant who led, the investigating police officer to the bush where the machete with which they hacked the deceased was hidden. D  
E  
F

Learned counsel submitted that the appellant and his co-accused had formed common intention to go to the house of the deceased to collect salaries owed to the appellant's friend (Kingsley Omoregie). That they had intention to cause grievous bodily harm. That there was no need to prove that the Appellant intended to cause the death of the deceased, so long as he acted willfully in doing the act which led to the death of the deceased. He relies on *KINGSLEY OKORO v. STATE* (unreported - Appeal No.CA/B/90/2009 delivered 11/12/2010, *IGAGO v. THE STATE* (1999) 14 NWLR (Pt.637) 1. G  
H

In the final analysis the learned counsel submitted that the evidence against the Appellant was overwhelming and although circum-

stantial in nature but very cogent, clear and convincing. That the possibility of another person (apart from the Appellant and the co-accused committing the crime was remote. He urged the court to affirm the decision of the court below and to dismiss the appeal.

May it be noted from outset that the evidence relied upon at the trial of the Appellant and his co-accused was on circumstantial evidence but not on their confessional statement, which the learned trial judge had rejected on the ground that there was no compliance with the procedure laid down in the Police Regulations and Authorities, to determine the voluntariness of the Exhibits.

**Circumstantial evidence is nothing more than evidence of surrounding circumstances which by their nature is capable of establishing a proposition, such as the criminality of an accused person with the highest exactitude.** See AKPAN v. THE STATE (supra). **It is a combination of evidence of circumstances against an accused when taken together; creates strong conclusions of his guilt with high degree of certainty. It is very often the best evidence, sparingly applied because of possibility of fabrication which may cast suspicion on innocent person.** See: MOSES JUA v. THE STATE (2010) 1-2 SC. 96, AKPAN ARCHIBONG v. THE STATE (2006) 5 SCNJ 202, NAFIU RABIU v. THE STATE (Supra), IJIOFOR v. STATE (Supra). **For circumstantial evidence to ground a conviction, it must lead to one conclusion, that is, the guilt of the accused person** (sic) whose evidence helps appellant to acquittal, as it leaves room for such acquittal. In that case the prosecution is said not to have proved its case beyond reasonable doubt.

To my mind the following pieces of circumstantial evidence are considered sufficient enough for a conviction of the appellant herein. At pp 35 -36 of the record, one Aina Ibukunola Babatunde, a neighbor of the deceased testified as PW1 in his evidence - in - chief admitted as Exhibit 'A' as follows:

*"I am a teacher at Ijebu - Ode Grammar School, Ijebu - Ode. I live at 1, Fakoya Street, Ikoto via Ijebu-Ode. I know the accused persons. I remember 27/8/2002: On that day I was sitting under a tree at the Late Chief Fakoya's compound. No.1. Fakoya Street, Ikoto, Ijebu-Ode. The time then was 3.30pm. Then I looked up and saw the two accused persons entered through the gate of the compound.*

*I was surprised to see the 1st accused because a few weeks previously he had stolen the Bus belonging to the Late Chief Fakoya. O.P.C. people had then arrested him and brought him to Ijebu to the house of the Late Chief Fakoya. This was before 27/8/2002. Somehow he managed to escape. I was then surprised to see him again on 27/8/2002 with the 2nd accused. I then jumped the fence and alerted the vigilante around. Then the vigilante people and I entered the compound but could not entered through the main house because the accused persons had locked the collapsible gate of the main house from inside. I then had to use a ladder to climb the balcony. As I landed at the balcony I saw 1st accused from the sitting room. 1st accused was shocked to see me and the 1st accused ran into the rooms and escaped. Then I called on the vigilante people in the compound to gather round the house to arrest him. The accused persons were later arrested outside the house by the vigilante people. I then started to call late Chief Fakoya's name round the rooms but I heard no answer. But as I got down the stairs I saw deceased sitting there with his two hands tied to the railings of the step. I saw blood on his head and three deep wounds - one on the chest and two at the abdomen. I untied the rope, carried him into the Bus and rushed him to Lanik Hospital at Imoru and from there he was transferred to OSUTH at Shagamu. I left the late Chief Fakoya at Lanik Hospital and came back home. I then went to report at the Police Station Igbeta Ijebu-Ode. On the stairs where late Chief Fakoya was tied I also saw a knife and another similar but broken knife in the bedroom. I also saw children school bag on the floor of the bedroom."*

The accused persons testified in their defence, after their no case submission had been overruled. The 1st accused, Kingsley Omoregie, denied killing Chief Fakoya but admitted that he visited his house in the company of his friend (appellant herein) on the fateful day to collect the arrears of salary the deceased was owing him. In his evidence at page 76-77 of the record he stated as follows:

*"I did not conspire with 1st accused to kill Engineer Fakoya. I did not kill the deceased with 1st accused by stablimg him and tying him with rope. 1st accused was our customer in our workshop at Ibadan, then he brought his father's car to our workshop for repairs. My master told him that the spare part can only be obtained in Lagos, 1st accused told my master that he had no money on him. Then he*

came back the following day and asked my master to give him someone to accompany him to Ijebu-Ode where he would collect his salary from his boss and proceed from there to Lagos to buy the spare part. Then my master asked me to follow 1st accused. Then we got to Ijebu-Ode and enter the company (sic) ‘compound’ where 1st accused saw someone sitting under the tree and he waved him and we entered the house. As we were going on the steps we saw the deceased on the step in a pool of blood and tied. 1st accused became afraid and 1st accused ran towards the back of the house and I followed him. We got outside I asked 1st accused who was that in a pool of blood and he answered that, that was his boss. The people accosted us and asked what happened inside. We were brought back into the compound. Later we were handed over to the Police.”

The evidence of the 1st accused was corroborated by the Appellant when he stated that when they were climbing up the steps they saw the deceased who was tied to the railings of the step. The 1st accused became afraid and ran towards the back of the house and the appellant followed him. He then asked about the identity of the person in the pool of blood and the 1st accused told him that the man was his boss. These pieces of evidence were corroborated by those of PW1.

The Learned trial judge when considering the evidence of the PW1, the star witness along side of those of the accused persons, believed the evidence of PW1 that the 1st accused stole the bus of the deceased and that was why PW1 was surprised when he saw the 1st accused again in the compound on 27/8/2002. After a careful assessment of the evidence proffered by the prosecution and the accused persons, the learned trial judge at page 90 of the record stated thus:

“Leaving aside PW1’s version on this point, it is clear from the evidence of the accused persons that they were the first to see the deceased tied and in a pool of blood as they also testified that they never saw PW1 in the house nor did he also see them inside the house. The accused persons presence alone in the house that crucial time gave them opportunity to commit the crime.”

I agree with the learned counsel for the appellant that the circumstantial evidence adduced by the prosecution should be used sparingly with great care before relying on it to convict the accused

because such evidence may be fabricated to cast suspicion on innocent persons. However, in this case, learned counsel, with due respect, has not shown why PW1 should fabricate any evidence to implicate the accused persons.

**Very important point has been made here to the effect that since the 1st accused said that it was the deceased who called him on phone that he should come for his arrears of salary the deceased was owing, one would have expected that the reasonable thing 1st accused should have done on sighting his boss in a pool of blood was to quickly raise alarm, instead of escaping through the back door of the premises of the deceased. Moreover, the Appellants could not explain how the door to the main house was locked when they were already in the house. These circumstances pointed to the fact that they and none else carried out the stabbing and tying up the deceased. The learned trial judge in the circumstance rightly found that it was the accused persons who had the first opportunity to commit this heinous and barbaric crime. The prosecution therefore, satisfactorily discharged the burden of proving that it was the accused persons that killed the deceased.**

The medical report produced by Dr. Izebu Matthew Chukuma was received in evidence as Exhibit 'D'. He stated that the cause of death was due to acute cardio-pulmonary failure due to diabetes hypertension. He however stated that the post mortem examination he conducted on the deceased did not show that the injuries found on the body of the deceased were self-inflicted. That fact that the deceased did not die immediately, therefore it cannot be said with absolute certainty that it was the stab wounds the deceased received that caused his death. He was found to be diabetic and hypertensive. **The prosecution must in a criminal trial establish the cause of the death of the deceased.** On this point the Court of Appeal at page 181 of the record had this say:

*"The prosecution has therefore not established conclusively that the death was caused by the act or omission of the accused persons. There is no dispute that Engineei Samuel Fakoya is dead and the act of the accused was intentional and was done with the knowledge of causing grievous bodily harm. The diabetes and hypertensive he was*

*suffering from must have contributed to his eventual death. The prosecution in my view established a case of attempted murder against the accused.”*

Section 316 sets out the circumstances in which an unlawful killing would amount to murder. Section 317 provides:

B *“A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter.”*

***The position of the law is that to establish a charge of murder or manslaughter, it must be proved not merely that the act of the accused could have caused the death of the deceased but that it actually did. No matter how reckless the conduct of the accused might be, so long as the killing that resulted from his act was not intended, that act would not fall within the provision of S.316 of the Criminal Code (supra) and therefore would not constitute murder.*** See SHOSIMBO v. THE STATE (1974) ALL NLR 603; (1974) 10 SC.59, OMINI v. THE STATE (1999) 12 NWLR (pt.630) 168 at 182; (1999); 72 LRCN 3044.

***The court below correctly reviewed the evidence led by both the prosecution and the defence, particularly the testimonies of PW1 and DW1 and DW2 and rightly concluded that Sections 320 and 325 of the Criminal Code respectively apply to the circumstances of this case, which warrant an interference with the verdict of the trial court. I agree that the appellant was appropriately found guilty of attempted murder or manslaughter.***

I need not waste my time in going into the conspiracy theory as this point did not necessarily arise in the court below and did not form the basis for the conclusion arrived at by that court.

G In the circumstance, the appeal is hereby dismissed. The judgment of the court below is hereby affirmed.

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### ARIWOOLA JSC

H I had the privilege of reading in draft the lead judgment of my learned brother, Galadima, JSC just delivered.

The appellant and one other had been tried on two count charge of conspiracy to commit murder and murder, contrary to Sections 324 and 316 (2) of the Criminal Code Law Cap 29, Laws of



Ogun State of Nigeria, 1978 and punishable pursuant to Section 319 (1) of the same Law.

To prove the charge against the accused persons, the prosecution called five (5) witnesses and tendered three (3) Exhibits, namely, a marine rope, two knives and the Medical report. Each of the two accused persons testified in defence but called no other witness after a no case submission on their behalf had been overruled by the trial court. B

The accused persons were found guilty as charged. They were convicted and each was sentenced to death by hanging. Both convicts filed separate Notices of appeal to challenge their conviction and sentence. C

Upon thorough consideration of the case put forward by the convicts on appeal, the court below found that the prosecution only established a case of attempted murder against the accused persons but not that of murder. Accordingly, the court below allowed the appeal in part and found that the appellants ought to have been found guilty of attempted murder or manslaughter. Their conviction for murder was substituted with that of attempted murder and the sentence of death was set aside and substituted with a sentence of life imprisonment. D E

The appellant was further dissatisfied with the decision of the court below hence he appealed to this court, having been granted leave so to do.

The three issues distilled by the appellant from the grounds of appeal filed were adequately dealt with in the lead judgment of my learned brother that I need not repeat same except where necessary for the purpose of emphasis only. F

It is clear from the record and this was not disputed, that the appellant and his friend, co-accused were the last to be seen entering the deceased's house and must have to explain what led to the death of the deceased, if they were not the ones that killed him or caused his death. G

From the record of appeal, the victim of the alleged murder was one Engineer Samuel Fakoya. Sometime on the 27th August, 2002, at about 3.30p.m., PW1 had seen the appellant and Kingsley Omoregie, a former employee of the deceased entered into the deceased's house. Upon his approach of the entrance door to the H

house through which the appellant and the co-accused had entered, it had been locked up from inside by the appellant after they entered.

It is also clear from the record that there was evidence that the co-accused of the appellant had been dismissed by the deceased from his employment as a driver. He had also recently been arrested with the stolen bus of the deceased. The PW1 became suspicious and then raised an alarm. And as the door had been locked up from inside, he climbed up a ladder to get to the balcony of the house and then the top floor. He further testified that upon being sighted, the appellant and his co-accused attempted to escape but were later rounded up by the Vigilante people who were alerted on the event.

There is no doubt that the prosecution in a murder charge, owes it a duty to discharge by proving the death of the victim as the responsibility of an accused by act or omission, intentional act or omission of the accused with knowledge that it could cause grievous bodily harm or death. In other words, it is trite law that in a charge of murder, the burden is on the prosecution to prove that the deceased died, that the death was caused by the accused, that the accused intended to either kill the victim or grievously harm him. See; Idemudia v. State (2001) FWLR (Pt.55) 549 at 564; (199) 7 NWLR (Pt.610) 202; Akpan Vs. State (2001) FWLR (Pt.56) 735; Madu Vs. State (2012) 15 NWLR (Pt.1324) 405. Indeed, the Prosecution is expected to prove that the act of the accused or omission actually caused the death but not that it could have caused death. See; Ubani & Ors Vs. State (2003) 18 NWLR (Pt.851) 224; (2004) FWLR (Pt.191) 1533; Godwin Igabele Vs. The State (2006) 3 SCM 143; (2006) 6 NWLR (Pt.975) 100.

There is no doubt that in the instant case, there was no direct eye witness to the murder of the deceased by the appellant and co-accused. What was relied on by the trial court was circumstantial pieces of evidence.

However, I am of the firm view that the doctrine of “Last seen” readily come to play. That if a person who was last seen alive in company of another is found dead, that other in whose company the deceased was last seen alive, in law, is presumed to bear full responsibility of the death of the deceased. He certainly has some explanation to give as to what caused the death, if he says he did not kill

the deceased.

Generally, and this court had held that, it is not a condition or legal imperative that there must be an eye witness to sustain or prove a murder charge beyond reasonable doubt. The proof of the commission of the offence may proceed on circumstantial evidence. See; Ndiike Vs The State (1994) 8 NWLR (Pt.360) 33, (1994) 9 SCNJ 46; Lori & Anor Vs. State (1980) 8-11 SC 81.

In Emeka Vs. The State (2001) 14 NWLR (Pt.734) 666 at 685; (2001) 9 SCM 34, this court held as follows:

*“Where the accused person was the last person to be seen in the deceased’s company and circumstantial evidence is not only overwhelming but leads to no other conclusion, it leaves no room for acquittal.”*

In the instant case, where the appellant and his co-accused were the persons last seen entering the house of the deceased and locking up the entrance door from inside after they entered and there was no evidence that there was any other person inside with the deceased. And shortly after the appellant realized that they had been discovered they attempted to escape from the scene of the crime, there is no doubt that the circumstantial evidence connecting the appellant to the death of the deceased is not only overwhelming but leaves no room for acquittal. He should be and was rightly held responsible for the death of the deceased.

However, since providence has enabled the court below to reduce the culpability of the appellant from murder to manslaughter leading to the substitution of the punishment of death with life imprisonment, I have no reason to tamper or interfere with the decision of the Lower Court in so doing. I shall leave it as it is and say nothing more.

For the above reason and the fuller reasoning of my learned brother Galadima, JSC, that this appeal is devoid of merit and should be dismissed, the judgment of the Lower Court is affirmed. Appeal is dismissed by me.

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### OGUNBIYI JSC

The appellant was arraigned and tried before the High Court of Ogun State sitting in Ijebu-Ode. He was tried on a two count charge

of conspiracy to commit murder and murder contrary to Section 324 and 316(2) respectively and punishable under Section 319(1) of the Criminal Code Law Cap 29 Laws of Ogun State of Nigeria. The appellant was charged along with one Kingsley Omoregie.

The facts briefly are that the appellant and the said Kingsley Omoregie, a former employee of the deceased, one Engineer Samuel Fakoya, both went to the home of the deceased. They were seen entering the house of the deceased by P.W.1 Aina Ibukunola Babatunde, who testified that he alerted the vigilante group in the area as to the presence of the two accused persons who entered the house of the deceased.

On arrival of the vigilante group P.W.1 and the members of the group were unable to gain entry into the house of the deceased which was locked from the inside. They resorted to using a ladder to climb the balcony on the top floor and P.W.1 stated categorically that he saw the 1st accused person face to face in the house although he tried to escape. Eventually the deceased was found in the house bound with stab wounds to his chest and abdomen with blood all over the floor. The witness P.W.1 saw also on the floor where he found the deceased, a knife and another one in the bedroom of the deceased. The two accused persons were arrested outside the house when they were trying to escape. The appellant herein was convicted of murder by the High Court, but had his conviction substituted for attempted murder by the Court of Appeal. It is against this conviction for a lesser offence by the Lower Court that the appellant has now appealed to this court.

The appellant raised three issues for the determination of this appeal while the respondent formulated two issues. Appellant however consolidated his first two issues and argued them together. It is pertinent to say that there was no direct eye witness evidence to the commission of the offence charged. Therefore, the main question begging for an answer in this appeal is, whether from the totality of the facts before the trial court, there was enough circumstantial evidence adduced by the prosecution to prove beyond reasonable doubt that the appellant herein was guilty of the offence of attempted murder.

It is the submission on behalf of the appellant that his conviction, which was based solely on circumstantial evidence, was not es-

tablished beyond reasonable doubt. In otherwords, that the circumstantial evidence in this case did not point solely to the guilt of the accused as it was capable of two interpretations; that the evidence which was sufficient to show a mere suspicion only should not be relied upon for the conviction of the accused.

The law is trite and well established that the credibility of evidence for purpose of securing conviction of an accused is not dependant ordinarily on the number of witnesses that testify on the point. In otherwords, the evidence of one credible witness, if accepted and believed by a trial court is sufficient to justify a conviction. See the decision of this court in the case of Nwaeze V. State (1996) 2 NWLR (Pt.428) page 1 where the prosecution's case was based entirely on circumstantial evidence and conviction was grounded thereupon. Again, the law is firmly established that where strong circumstantial evidence is led against an accused in a criminal trial and it gives strong reason for drawing of a presumption or inference, which irresistibly points to the accused only as the perpetrator of the offence to the exclusion of any other person, then a court would be entitled to act and convict on such inference that the accused and non other must have committed the offence. See the case of Esai V. The State (1976) 11 SC 39 and Ukorah v. The State (1977) 4 SC 167, also Kim V. The State (1991) 2 NWLR (Pt.175) 622.

There is ample evidence in this case which confirms that the appellant and his friend were the people last seen with the deceased and must rightly bear full responsibility for injuries caused on him and his subsequent death. It is obvious also that there was an opportunity sufficient to enable the appellant and other to commit the murder taking into consideration the surrounding circumstances of the entire case. In otherwords, by locking the door to the main house from inside, the appellant had foreclosed the possibility of someone else carrying out the stabbing and tying up the deceased. There is therefore every opportunity on the circumstantial evidence which points unequivocally to the appellant and his colleague as the only people who could have attacked the deceased and tied him up with the rope.

As rightly found and held by the trial court, also affirmed by the Lower Court, it is the appellant and his companion who had the first opportunity to commit the crime and consequent to which I hold

that the prosecution had discharged its burden of proof against the appellant satisfactorily that he was one of those who carried out the stabbing of the deceased.

However and despite the proof, I feel inclined to say that the Lower Court took the lenient path and ruled that the prosecution had succeeded and established a case of attempted murder against the appellant and thereby substituting the conviction for murder with attempted murder, and proceeded to sentence the appellant to a term of life imprisonment. The appellant in my view must have a cause to celebrate the unmerited favour (grace) done to him which is not common normally or easy to come by. He cannot equate death with sleep. He was condemned to die and the circumstantial evidence had sufficiently earned him the maximum punishment leading to a total extermination. He is doomed to die but providence worked in his favour and he gained life. He should be celebrating his freedom to life.

My brother Galadima, JSC had considered the appeal adequately. I agree with the lead judgment and adopt same also as mine.

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### **OKORO JSC**

I have had a preview of the lead judgment of my learned brother, Galadima, JSC just delivered with which I am in complete agreement that this appeal is devoid of any scintilla of merit and warrants an order of dismissal. I shall make a few comments in support of the judgment.

Let me state clearly from the outset that in this case, there is no direct evidence that the appellant killed the deceased in the sense that nobody saw when the deceased was stabbed to death by the appellant. This is much more so in view of the fact that in a charge of murder, the prosecution has a duty to prove that:

1. the deceased had died
2. the death of the deceased was caused by the accused
3. the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence. See Inyang Etim Akpan V. The State (1994) LPELR - 382 (SC), (1994) 9 NWLR

(Pt.363) 347, Akinfe V. The State (1988) 3 NWLR (Pt.85) 729, Ogha V. The State (1992) 2 NWLR (Pt.222) 164, Oludamilola V. State (2010) 8 NWLR (Pt.1197) 565.

On the evidence relied upon to convict the appellant, the Lower Court stated on page 175 of the record as follows:-

*“The case of the prosecution was built on circumstantial evidence since there was no eye witness account as to the person who inflicted the injuries on the deceased.”*

The facts of this case as can be deduced from the record clearly support the above finding and conclusion. The appellant was charged along with one Kingsley Omoregie, a former employee of the deceased, one Engr. Samuel Fakoya. They were seen entering the house of the deceased by PW1. But because the said Kingsley Omoregie had previously stolen the bus of the deceased a few weeks earlier, PW1 alerted the vigilante group in the area as to the presence of the appellant and his co-accused.

On arrival of the PW1 and the vigilante group, it was noticed that the front door used by the appellant and his co-accused to enter the house was locked from inside and they were unable to gain entry into the house of the deceased. They resorted to using a ladder to climb to the balcony on the top floor. On peeping into the house, PW1 saw the 1st accused face to face in the house though he (the 1st accused) tried to escape. Eventually, the deceased was found in the house bound, and with stab wounds to his chest area and abdomen with blood all over the floor. Two knives were also recovered from the scene. Both the appellant and the co-accused were pursued and arrested by the vigilante group. A conviction of murder by the High Court was substituted for attempted murder by the Court of Appeal.

Clearly, the evidence against the appellant is circumstantial. Now, come to think of it, the door was open when the accused persons arrived and they walked through it into the house of the deceased. Immediately after they entered, the door was locked and the deceased was later found tied to the staircase with stabbed wounds. The appellant never raised any alarm but merely tried to escape when the vigilante arrived. There is no evidence that any other person was found in the house. The whole gamut of evidence irresistibly points to the fact that it was the appellant and his co-accused who stabbed the deceased as there is no other person that can be linked to the

dastardly act.

It is trite law that circumstantial evidence to be relied upon to convict an accused person should point unequivocally, positively, unmistakably and irresistibly to the fact that the offence was committed and that the accused person committed the offence. See *Yongo B & Anor. V. Commission of Police* (1992) LPELR -3528 (SC), (1992) 4 SCNJ 113, *Abieke V. The State* (1975) 9 - 11 SC 97.

This court had warned in *Adepetu V. The State* (1990) LPELR - 135 (SC) at p.21 paras B - E (see also (1998) 9 NWLR (Pt.565) 185) that -

*“In drawing an inference of guilt of an accused person from circumstantial evidence, however, great care must be taken not to fall into serious error. It follows, therefore, that circumstantial evidence must always be narrowly examined, as this type of evidence may be fabricated to cast suspicion on innocent persons. Before circumstantial evidence can form the basis for conviction, the circumstances must clearly and forcibly suggest that the accused was the person who committed the offence and that no one else could have been the offender. See *Fatoyinbo V. A. G. of W.N.* (1966) NNLR 4, 7; *Udedibia E V. The State* (1976) 1-1 SC 133, *Adie V. The State* (1980) 1-2 SC 116, *Omogodo V. The State* (1981) 5 SC. 5.”*

It is beyond argument that in all cases where a charge of murder is in issue, it is very essential that evidence must be led to prove the guilt of the accused beyond reasonable doubt. It must be shown in clear and unmistakable terms that the deceased died as a result of the act of the accused person. Where the circumstances of the attack on the deceased are clear, the injuries inflicted upon him as a result of the attack are graphically described to lead to an irresistible conclusion that the deceased died as a result of the attack and the injuries, the court can convict even if there is no direct eye witness. See *Babaga V. The State* (1996) 7 NWLR (Pt.460) 279.

In the instant appeal, the evidence, as I said earlier, point conclusively and irresistibly to the fact that the deceased died as a result of the stab wounds inflicted by the appellant and his co-accused. The appellant was convicted for murder and sentenced to death by the trial High Court. However, that sentence was reduced to life imprisonment by the Lower Court giving as reason that it was hypertension and diabetes which killed the deceased having regard to the medical



report. There is no appeal against the decision of the Lower Court on this aspect. I shall deliberately keep silence on it. It is however my view that the appellant was lucky to have had his sentence reduced for him. The question may be asked, why did the deceased not die of high blood pressure and diabetes before he was stabbed on the chest and abdomen by the accused persons? The medical report, to my mind, ought to have been treated with caution. I need not say more on this. B

On the whole, based on the reasons I have stated above and the more elaborate ones given in the lead judgment, I hold a strong view that there is no merit in this appeal. I hereby dismiss it accordingly. Appeal Dismissed. C

### **NWEZE JSC**

My Lord, Galadima, JSC, obliged me with the draft of the leading judgment just delivered now. I endorse the conclusion that this appeal is unmeritorious and should be dismissed. D

In the leading judgment, my noble Lord painstakingly plumbed the records. He most, adroitly, unearthed sufficient evidence that confirmed the fact that the deceased person was last seen with the appellant herein and his friends. He must, therefore, remain thankful to his stars that the trial court, as affirmed by the Lower Court, given the peculiar circumstances of his case, returned a verdict of attempted murder and only awarded him a lenient term of life imprisonment. E

For this, and the elaborate, reasons in the leading judgment of my Lord, Galadima, JSC, I shall enter an order dismissing the appeal as lacking in merit. F

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