

SUPREME COURT OF NIGERIA
FRIDAY, 15TH JUNE, 2012. SC. 204/2010
CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
J. A. FABIYI, B. RHODES-VIVOUR, O. ARIWOOLA, JJSC

EKPO OBONGHA MBANG APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Ground - Formulation - In the absence of a ground and an issue raised therefrom - Appellant cannot be heard to raise a bare complaint in vacuo (H1)

CRIMINAL PROCEDURE - Proof - Standard of - Onus is on prosecution to prove guilt of accused beyond reasonable doubt - And there is no onus on accused to establish his innocence (H2)

CRIMINAL PROCEDURE - Proof - Burden on accused - Although no burden is on accused to prove his innocence - But where there is presumption of guilty intent - Burden on accused is discharged on balance of probabilities (H3)

MURDER - Ingredients - Proof - For prosecution to secure conviction - He must prove death of deceased - That the act of accused caused the death - And that the act was intentional (H4)

EVIDENCE - Confession - Relevancy - For confession to be relevant and admissible - It must be voluntarily made - As weight attached to confession is unquestionable - Where it is unequivocal and true (H5)

CRIMINAL PROCEDURE - Trial within trial - Purpose and time - Essence of conducting the mini trial is to test voluntariness of confession - And this is done at the tendering of the confession (H6)

CRIMINAL PROCEDURE - Confession - Validity of - Mere denial by appellant of having made Exhibits F4 & F5 - Did not challenge the voluntariness of his confession - Hence the confession is rightly admitted (H7)

MURDER - Proof - From graphic accounts of exhibits F4 & F5 - None other than appellant as a party in criminis - Could possibly have killed the deceased (H8)

CRIMINAL PROCEDURE - Proof - Number of witnesses - Prosecution's duty is to produce evidence to prove its case - And not production of witnesses not necessary to establish its case (H9)

FACTS

Before the High Court of Cross River State Ugeb, accused/appellant and one other were arraigned for the murder of one Mary Obongha Inah – the deceased. The charge was brought under section 319(1) of the Criminal Code Laws of Cross River State. At the trial, prosecution/respondent called 6 witnesses while appellant testified in his defence but declined to call any witness. Respondents equally tendered some exhibits in support of its case. Appellant's major contention among others is that there was no eye witness to the crime as to who killed the deceased. The case against appellant is that he, in concert with his co-accused, Joseph Ubi Igri, murdered the deceased at a nearby bush inside an uncompleted building. Thereafter, they dug a shallow grave and buried the deceased therein.

Few days later, the owner of the uncompleted building on inspection at the site discovered the shallow grave of the deceased and a report was made to the police. The deceased body was exhumed and post-mortem examination confirmed the identity of the deceased and cause of death. Appellant and his accomplice were arrested in connection with the crime. He made confessional statement. At the end of the trial, the learned trial Judge relying on circumstantial evidence and the confessional statement of appellant, convicted appellant and his co-accused as charged and sentenced them to death by hanging. Appellant's appeal to the Court of Appeal Calabar division was heard and dismissed. Appellant has therefore further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"i. Whether from the circumstances of this case, the alleged confessional statements of the appellant - exhibits F, F1-F5 and especially exhibits F4 and F5 upon which the appellant was convicted

and sentenced were voluntarily made and rightly admitted in evidence.

ii. Assuming (without conceding) that the alleged confessional statements of the appellants were voluntarily made and rightly admitted in evidence, whether the trial court was right to have convicted the appellants on the strength of the said confessional statements, especially exhibits F4 and F5 without putting into consideration the strength of exhibits F, F1, F3 which are other confessional statements allegedly made by the appellant and in the absence of any other independent corroborative evidence.”

HELD (Unanimously dismissing the appeal per

CHUKWUMA-ENEH JSC)

APPEALS - Ground - Formulation

1. To delve into this question it is necessary in the instant appeal to examine the notice of appeal filed in this matter to ascertain whether or not this complaint formed a ground of appeal therein and also whether or not any issue has been raised therefrom upon which to predicate the discussion otherwise it is a non-starter and this court in the absence of a ground of appeal on that specific issue will not deal with it. I have gone through the notice of appeal the basis of this appeal. There is no complaint talk less a ground of appeal challenging the lower court's decision on the alleged complaint for relying on the doctrine of similar facts to convict the appellant. I take it that the appellant is not complaining. And this court in the interest of fair hearing is not disposed to invoke its general powers under section 22 of the Supreme Court Act to review a decision of the lower court even where there is no appeal. It is significant that none of the two issues raised for determination here has remotely encompassed or even alluded to that issue. In the absence of a ground of appeal and an issue raised therefrom the appellant cannot be heard to raise a bare complaint *in vacuo* as here. The appellant's complaint in this regard having been raised *in vacuo* and otherwise being totally misconceived is hereby refused.

What I have tried to say here is that it is settled law that a complaint against a specific finding of a lower court on a matter on appeal to this court need to be raised in this court by a specific ground of appeal from which an issue would have been raised for determination. (p. 3127 A)

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CRIMINAL PROCEDURE - Proof - Standard of

2. There can be no doubt that in criminal cases such as in the instant case, the onus is on the prosecution to establish the guilt of the accused beyond reasonable doubt as settled law implying that unless the prosecution has discharged that onus it is not entitled to succeed. This settled principle of law agrees with the proposition of the law that one who asserts a disputed fact must prove it. It is also settled that there is no onus on the accused in criminal cases to establish his innocence.

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(p. 3128 G)

CRIMINAL PROCEDURE - Proof - Burden on accused

3. This burden on the prosecution does not shift as it rests squarely on the prosecution throughout. There is no onus on the accused but where the charge imports a presumption of guilty intent as exemplified in cases of being in recent possession of presently stolen property, the burden on the accused is discharged on the balance of probabilities; that is to say, such proof rests upon facts peculiarly within the accused's own knowledge. (p. 3129 A)

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MURDER - Ingredients - Proof

4. In this case, it is settled law that for the prosecution to secure a conviction in a murder charge as per the decision in *Kada v. The State* (1991) 11/12 SC 1; (1991) 8 NWLR (Pt. 208) 134 it must prove the following ingredients of the crime thus:

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1. The death of the deceased.

2. That the voluntary act or omission of the accused caused the death of the deceased.

3. That the accused's act resulted in the death of the deceased having been done with the intention of causing death

or grievous bodily harm to the deceased. That the accused knew that death is the probable and natural consequences of his act or omission.

By Kada's case the onus is on the prosecution to prove its case in the instant matter beyond reasonable doubt based on the foregoing ingredients which must co-exist. (p. 3129 E) B

EVIDENCE - Confession - Relevancy

5. Thus, this abstract has underscored the law that for a confession to be relevant and so admissible in evidence it must be voluntarily made as the weight to be attached to a confession is unquestionable where the confession is voluntary in order words unequivocal, free and true. In the instant case, the appellant has made exhibits F4 and F5 although he has claimed he signed them by force. The two lower courts have specifically found against the appellant on this point and there are no grounds to support the contrary. The point must be made that it is as late as at the defence stage i.e. while testifying in evidence-in-chief in his defence that the appellant has for the first time raised the fact of denying and retracting the confession as per exhibits F4 and F5. The two lower courts having given these questions exhaustive consideration and rightly so have in the end found the questions as having been raised without any bases and I agree. (p. 3130 E) C D E F

CRIMINAL PROCEDURE - Trial within trial - Purpose and time

6. It is clear as conceded by the appellant also as found by the lower courts that the process of trial-within-trial is contingent on challenging the voluntariness of a confession otherwise it is of no moment. As a matter of fact the tendering of exhibits F4 and F5 has not been challenged at the trial court in the proper manner and time so as to ignite the process of trial-within-trial and besides the appropriate time to conduct a trial-within-trial as I have said earlier on is at the tendering of the confessional statements. This is so as the whole essence of resorting to the said process is to test the admissibility in evidence of a confession. So as can be seen here it is belated to have recourse to the process of trial-within-trial at G H

the defence stage of the proceedings i.e. after the prosecution has closed its case at which stage the prosecution cannot reopen its case. Therefore the proper time to do so is at the point of tendering the statements as exhibits F4 and F5 invariably doing so during the prosecution's case and not when
B *the defence has opened or as in this case to be precise at the stage the appellant has commenced to testify-in-chief in his defence. At that stage it is belated to raise the issue.*
(p. 3131 F)

C *CRIMINAL PROCEDURE - Confession - Validity of*

7. I therefore hold that a trial-within-trial as borne out in the case of Nsofor v. The State (supra) is only resorted to in order to test the voluntariness of an accused's confession where
D *that has become an issue in the case. So also where as here the appellant has challenged exhibits F4 and F5 his confessional statements as not having been voluntarily made as he has otherwise been forced to sign them. If I may, with respect*
E *repeat, these issues are not properly raised during evidence-in-chief or cross-examination during the defence case for the first time as it cannot be said that the parties have, as it were, joined issues on the matter. What I am trying to say here is that a trial-within-trial is simply the only process of determining the voluntariness or not and the same principle is applica-*
F *ble to testing the admissibility of a confession where challenged on the grounds of threats, undue influence, duress etc but not essentially as to where as here the appellant is simply denying making exhibits F4 and F5. Such objections do not go to*
G *the admissibility of a confessional statement but really as to the weight to be attached to it.*

Having, as it were, cleared these minor objections to admitting exhibits F4 – F5 in evidence, I find as well taken the point by the respondent to the effect that no proper objection has
H *been taken to these exhibits F4 and F5 vis-à-vis their respective voluntariness at the appropriate time of tendering the exhibits. And so, there can be no cause for conducting of the process of trial-within-trial to determine their voluntariness or otherwise before being admitted in evidence and acted upon*

by the court. In the circumstances of this case I uphold the submission. I therefore find exhibits F4 and F5 as properly admitted in evidence meaning that the trial court rightly relied on them in convicting the appellant. The trial court's decision as affirmed by the lower court rightly therefore admitted the confession in evidence as the essence of the process of trial-within-trial, if I may repeat is to determine admissibility of a confession where the confession is effectively challenged and not where the accused person as the appellant here has not taken the advantage to do so at the trial stage particularly before the defence has opened. (pp. 3133 A/3134 A)

MURDER - Proof

8. Having perused the foregoing abstract of exhibits F4 and F5, I find further that the essence of their admissibility as confessional statements lies in their voluntariness and on the relevancy of the confession to this case that is to say, as to the appellant having confessed to committing the crime. See sections 27 and 28 of the Evidence Act 2004. Even then it is quite evident from the detailed, vivid and graphic account of the facts of the gruesome murder that none other than the appellant as a party in criminis can possibly do so vis-à-vis the gory detail contained in exhibits F4 and F5 as to the pre-events and post-events of the crime. For all this, I have no doubt in my mind that the appellant and his co-accused killed the deceased and that death is the probable consequence of their unlawful acts as owned up in exhibits F4 and F5. (p. 3135 G)

CRIMINAL PROCEDURE - Proof - Number of witnesses

9. I have examined the hotly contested question of not having called the cyclist who it has been alleged ferried the appellant, his co-accused and the deceased to the locus in quo at Ekori Beach where the appellant and his co-accused killed the deceased. I hold that the prosecution's duty in this regard as a prosecutor is to produce evidence to prove its case and not accountable for failure to produce witnesses not necessary to establish its case. (p. 3138 E)

NOTABLE POINTS OF INTEREST

CHUKWUMA-ENEH JSC

1. Confession – Meaning of

I think firstly I should advert to what is a confession and it is as defined by section 27 of the Evidence Act, 2004 which reads as follows:

“27(1) A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime.

(2) Confessions, if voluntary, are deemed to be relevant facts against the persons who make them only.”

The foregoing provisions of section 27 (supra) have been construed and applied in too many decisions of this court that they do not need being freshly construed as such here. (p. 3129 H)

2. Confession – Test of

Having taken an overview of the above reasoning and findings in this matter, it is my conclusion that the two lower courts have also applied the tests so eloquently discussed in *Dawa v. The State* (supra) and that in considering the voluntariness of exhibits F4 and F5 and the subsequent retraction and so to determine whether the confession is unequivocal, free and true they have raised and addressed the following questions:

“(1) Is there anything outside the confession to show that it is true?

(2) Is it corroborated?

(3) Are the relevant statements made in it of facts, true as far as they can be tested?

(4) Was the prisoner one who had the opportunity of committing the murder.

(5) Is his confession possible?

(6) Is it consistent with other facts which have been ascertained and hence been proved? (p. 3136 G)

REPRESENTATION

Chief Wale Taiwo with Jide Olakanmi,

E. M. Dodo and Deji Jayioba, for the Appellant

P. S. Bisong, Deputy Director, Public Prosecutions, Ministry of Justice,

Cross River State, Calabar, for the Respondent

CASES REFERRED TO

Uluebeka v. State (2000) 7 NWLR (pt. 665) 404

Dawa v. State (1980) 8-11 SC 236

Shande v. State (2005) 1 NWLR (pt. 907) 218

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Ikpo v. State (1995) 9 NWLR (pt. 421) 540

Mbele v. State (1990) 4 NWLR (pt. 145) 484

Amadi v. State (1993) 8 NWLR (pt. 314) 644

Yesufu v. State (1976) 6 SC 167

C

Ekpe v. State (1994) 9 NWLR (pt. 368) 263

Nwachukwu v. State (2002) 2 NWLR (pt. 551) 366

Hassan v. State (2001) 15 NWLR (pt. 735) 184

Oche v. State (2007) 5 NWLR (pt. 1027) 214

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STATUTES REFERRED TO

Evidence Act 2004, ss. 27, 28

Criminal Code Laws of Cross River State, s. 319(1)

LEAD JUDGMENT BY CHUKWUMA-ENEH, JSC

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The accused person/appellant in this matter has by a notice of appeal filed on 13/6/2007 appealed to this court against the judgment of the Court of Appeal, Calabar judicial division that has affirmed the conviction and sentence of the appellant and his co-accused to death by hanging as passed on them by the High Court of the Ugep Judicial Division (trial court).

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The said notice of appeal filed on 16/4/2009 by the appellant has raised two grounds of appeal. Both parties to this appeal have filed and exchanged their respective briefs of argument. The appellant in his brief of argument has formulated 2 (two) issues for determination to wit:

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“i. Whether from the circumstances of this case, the alleged confessional statements of the appellant - exhibits F, F1-F5 and especially exhibits F4 and F5 upon which the appellant was convicted and sentenced were voluntarily made and rightly admitted in evidence.

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ii. Assuming (without conceding) that the alleged confessional statements of the appellants were voluntarily made and rightly ad-

mitted in evidence, whether the trial court was right to have convicted the appellants on the strength of the said confessional statements, especially exhibits F4 and F5 without putting into consideration the strength of exhibits F, F1, F3 which are other confessional statements allegedly made by the appellant and in the absence of
 B *any other independent corroborative evidence."*

The respondent on its part has filed its respondent's brief of argument although it has therein distilled two issues for determination otherwise similar in content with the appellant's issues for determination as stated above, even then the respondent has opted to
 C argue the appeal on the appellant's issues for determination as raised above. I do not therefore intend to replicate the said issues raised by the respondent's here.

I must however remark that SC.203/2010 and 204/2010 are
 D of the same pedigree having emanated from a joint trial of the appellant here and one Joseph Ubi Igri - his co-accused in SC.203/2010, hence the identical issues for determination, as well as briefs of argument etc. And thus this has made the treatment of both appeals similar in every respect.

The appellant's case has revolved firstly, on the absence of an
 E eye witness to the crime as to who killed Mary Obongha Inah and secondly, on the undue reliance solely on the appellant's confession alone to convict and sentence him for committing the crime despite
 F as he has opined the dangers inherent in doing so on the peculiar facts of the instant case without more. And thirdly, on the lack of outside facts and circumstances corroborating the confession. The pertinent statements in the confession are especially as contained in exhibits F4 and F5 out of the six (6) statements made by the appellant i.e. F, F I - F5. He relies on *Uluebeka v. The State (2000) 7*
 G *NWLR (Pt. 665) 404 at 436 H* to submit that a confession to a crime of this nature is admissible only if it is unequivocal, free and true, in short voluntary. He has referred to his 6 (six) statements to submit that exhibits F, FI- F3 are not admission as such and that exhibits F4
 H and F5 are the pedestals upon which he has been convicted and sentenced based on a confession of having committed the murder of one Mary Obongha Inah and also for being involved in killing of one Grace Ibiang Usang earlier in time as evidence of similar circumstances as in the instant case and wrongly relied on by the lower court to

affirm his guilt of the murder of Mary Obongha Inah. That the doctrine of similar facts has no application to this case. The appellant has referred to exhibits F4 and F5 as well as on sections 27 and 28 of the Evidence Act 2004 to posit that the prosecution has not discharged the onus required by the law for admitting in evidence both confessional statements. It is conceded that the issue of voluntariness or otherwise of a confession ought to be taken at the tendering of confessional statements. In this instance the non-voluntariness of exhibits F4 and F5 has been raised only at the evidence-in-chief of the appellant at the trial court. Even then the appellant has submitted that the failure to conduct the process of trial-within-trial in regard to the admissibility of exhibits F4 and F5 even at that stage is still fatal to relying on the confession. Equally so, he has submitted that the lower courts have not given due consideration to the effect of the appellant's retraction of the confession and so resulting in it having been acted upon in error. In the circumstances the court is urged to reject exhibits F4 and F5 as inadmissible evidence. The appellant has also adverted to the onus on the respondent to prove the charge of murder against him beyond reasonable doubt as this is so in spite of the fact that the death of one Mary Obongha Inah has been established by exhibit A, that is, the death certificate. The prosecution still has the onus to prove the other remaining two ingredients to establish the charge of murder against the appellant and has not done so beyond reasonable doubt. The court is urged to resolve this issue against the respondent.

One Issue 2:

The appellant although has conceded that a conviction can be sustained on a confession alone once the court is satisfied as to the truth of the confession. He has all the same submitted that for the court to be so satisfied the confession must have been voluntary, true and properly admitted in evidence and it must have also satisfied the crucial tests as laid down in *Dawa v. The State* (1980) 8-11 SC 236 to the effect also that the confession must be supported by admissible evidence outside the confession. The appellant has relied for so submitting on *Shande v. The State* (2005) 1 NWLR (Pt. 907) 218 and *Ikpo v. The State* (1995) 9 NWLR (Pt.421) 540. In this regard the appellant has again submitted that there is no evidence outside exhibits F4 and F5 to corroborate the truthfulness of the confession

and having railroaded into the alleged pieces of corroborative evidence outside the confession as found by the trial court and affirmed by the lower court he has characterized them as unreliable and so wrongly relied on to convict him by the lower courts. The appellant has also castigated as inadmissible evidence the alleged evidence of
B having taken the IPO to the *locus in quo* so also the hearsay evidence of the two cyclists over the contention of having conveyed the trio i.e. the appellant, the co-accused and the deceased to the *locus in quo* at Ekori beach at Ugep. He has described the prosecution's story
C in that regard as apart from being unreliable and also being hearsay evidence it is therefore inadmissible evidence to corroborate exhibits F4 and F5. See *Mbele v. The State* (1990) 4 NWLR (Pt. 145) 484 at 490 and *Amadi v. The State* (1993) 8 NWLR (Pt. 314) 644 at 647. The appellant finally has also relied on *Yesufu v. The State* (1976) 6
D SC 167 to contend that the necessary tests to determine the truth of the instant confession in the said confessional statements as per exhibits F4 and F5 have not been carried out. He then has relied on the cases of *Shande v. The State* (2005) 1 NWLR (Pt. 907) 218 and *Ekpe v. The State* (1994) 9 NWLR (Pt. 368) 263. The cases of
E *Nwachukwu v. The State* (2002) 2 NWLR (Pt. 551) 366; *Hassan v. The State* (2001) 15 NWLR (Pt. 735) 184, and *Oche v. The State* (2007) 5 NWLR (Pt. 1027) 214 at 231 E-C to show that the lower court has not satisfactorily considered the questions of corroborative
F evidence vis-à-vis the truth of the confession that is to say, with other outside admissible evidence to enable both lower courts decide whether or not the appellant really made the confession as per exhibits F4 and F5. The court is urged to resolve this issue in favour of the appellant and to allow the appeal and set aside the judgments of
G the lower courts. The respondent's brief of argument in SC.203/2010 I must remark is identical in content to the instant respondent's brief in this matter. It simply lifted and transplanted its argument in toto in SC.203/2010 without even adverting to the marking of the exhibits in SC.204/2010. I have treated the respondent's case as per its brief
H in spite of avoidable mistakes in marking the crucial exhibits G4 and G5 instead of exhibits F4 and F5 in the interest of justice. The respondent having referred to *Igabelo v. The State* (2006) 5 MJSC 96 at p.100; (2006) 6 NWLR (Pt. 975) 100 has in that wise adverted to the three ingredients required to be proved in order to sustain charge

of murder along side the definition and application of a confessional statement as provided in Sections 27 and 28 of the Evidence Act, 2004 and has referred to on *Uluebeka v. The State* (2000) 7 NWLR (Pt. 665) 404 at 436 H. On the objections as raised against the instant confession as not having been voluntary and free, the respondent has submitted that any objection to admitting in evidence the confession must be made at the tendering of confessional statements in this case in regard to exhibits F, F1-F5 and relied on *Odeh v. Federal Republic of Nigeria* (2008) All FWLR (Pt. 424) 1590 at 1595; (2008) 13 NWLR (Pt. 1103) 1 for so submitting. The respondent has observed that the only meaningful objection to admitting the confession has been as to the minor differences in the dates of the exhibits and not as to their contents thereof and that these have been adverted to and cleared by the trial court's pronouncement at pp.71-72 of record thus:

"It is clear from the evidence before me that when the prosecution witnesses were testifying and the statements of the accused persons were being tendered, the only issue raised by the accused persons through their counsel was the difference in dates appearing in the statements of the accused persons which were made at the Ekorì Police Station. The accused persons did not dispute the contents of any to their statements neither did they raise any question concerning the voluntariness or otherwise of any of their statements. If the issue of lack of voluntariness in making their statements was raised at the period, the issue would have been determined through a trial within trial, at the end of which the statements would not have been admitted as exhibits if found to have been made under conditions the law regards as involuntary. It was when the accused persons were testifying and being cross-examined that they raised the issue that they never made statements in Calabar and asked the court to disregard the statements if it finds that they ever made statements in Calabar as those statements were made after threats had been issued to them by the police."

This pronouncement has been affirmed by the lower court. On the appellant alleged retraction of the confession; the respondent has taken the point that there is nothing sacrosanct about retracting a confession. And that once the court is satisfied as to the truth of a confession properly admitted, the court is bound to act on it and I

agree entirely. See *Dibie v. The State* (2007) 9 NWLR (Pt. 1038) 30. The respondent has submitted relying on *Nemi v. A-G Lagos State* (1994) 23/24 LRCN 111 at 119; (1996) 6 NWLR (Pt. 452) 42 that notwithstanding the retraction of a confession the court may rightly convict solely on the retracted confession. The court is urged to do so
 B and to resolve issue one against the appellant.

On Issue Two:

The respondent like in the sister case SC.203/2010 has replicated in this appeal the same argument as in SC.203/2010. Having
 C acknowledged appellant's concession that a confession alone is sufficient evidence to sustain a conviction respondent has submitted that the court all the same is expected to look outside the confession for corroborative evidence however slight and remote connecting an accused as the appellant here to the crime. The respondent has referred to Pp. 174 - 176 of the record for such corroborative evidence outside exhibits F4 and F5 on which both lower courts have relied to convict and sentence appellant. The court is urged to find this issue against appellant and on the whole to dismiss the appeal.

Before going into a full discussion of this matter, I think I should
 E advert to a pertinent question as raised by the appellant at paragraphs 5.18 - 5.21 of the appellant's brief of argument on the issue dealing on whether or not similar fact evidence has been established against the appellant. This has arisen from the testimonies of PW5 and PW6 on the alleged murder of one Miss Grace Ibiang Usang by
 F the appellant in similar circumstances as in the instant matter. The appellant in his defence at the trial court has vehemently denied that he had earlier killed one Grace Ibiang Usanga in similar circumstances as here and threw her remains into the Cross River at Ekor.

G The appellant has decried the non-resolution of this issue throughout the lower court's judgment even though at p. 168 of the record the lower court clearly has stated thus:

"Now, regarding the similar fact evidence proffered by PW5, the learned trial Judge after analyzing the same held that it was relevant in showing the particular way the 1st accused does eliminate young girls. Having stated the above, it seems clear therefore; from the prevailing circumstance that issue No. 1 cannot effectually be resolved until issue No. 2 is determined since the two are interwoven."
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The appellant rightly has observed that the lower court never

resolved this issue nor adverted to it again throughout its judgment, which is very unfortunate for that matter. The appellant therefore has asked this court to do so now and in the same vein to hold that the doctrine of similar facts is not applicable to the instant case.

To delve into this question it is necessary in the instant appeal to examine the notice of appeal filed in this matter to ascertain whether or not this complaint formed a ground of appeal therein and also whether or not any issue has been raised therefrom upon which to predicate the discussion otherwise it is a non-starter and this court in the absence of a ground of appeal on that specific issue will not deal with it. I have gone through the notice of appeal the basis of this appeal. There is no complaint talk less a ground of appeal challenging the lower court's decision on the alleged complaint for relying on the doctrine of similar facts to convict the appellant. I take it that the appellant is not complaining. And this court in the interest of fair hearing is not disposed to invoke its general powers under section 22 of the Supreme Court Act to review a decision of the lower court even where there is no appeal as in Amobi v. Amobi (1996) 8 NWLR (Pt. 469) 638 at 654. It is significant that none of the two issues raised for determination here has remotely encompassed or even alluded to that issue. In the absence of a ground of appeal and an issue raised therefrom the appellant cannot be heard to raise a bare complaint in vacuo as here. The appellant's complaint in this regard having been raised in vacuo and otherwise being totally misconceived is hereby refused.

What I have tried to say here is that it is settled law that a complaint against a specific finding of a lower court on a matter on appeal to this court need to be raised in this court by a specific ground of appeal from which an issue would have been raised for determination. See *Opera v. Dowel Schlumberger Nig. Ltd.* (2006) 7 SC (Pt.111) 56; (2006) 15 NWLR (Pt.1002) 342.

The respondent has adopted the two issues raised by the appellant in this case. I therefore, proceed to consider the appeal on those bases. The appellant and respondent before this court as in the lower court have fought this appeal on the same and/or identical grounds, issues for determination and thus have replicated their re-

spective arguments in the lower court. The appellant's confession especially as per exhibits F4 and F5 is the fulcrum of the case upon which the prosecution and defence have as it were joined issues in the two lower courts and here. And the appellant and respondent appear in their respective cases here to have rehashed and rehearsed the same arguments in their respective briefs at every stage/level of the appellate courts. It is important to remark in this judgment indeed to emphasise the crucial point that there is no eye witness to the crime and so the prosecution in order to prove its case has relied heavily, albeit solely on the appellant's confession to have committed the crime. That is to say on exhibits F4 and F5 and on circumstantial facts and evidence outside exhibits F4 and F5 as corroborative evidence to prove its case. See *Dawa v. The State* (supra).

It is the case of the appellant that the prosecution i.e. the respondent here has failed to prove its case beyond reasonable doubt in that firstly, as argued by the appellant the confession as per exhibits F4 and F5 (particularly on which the appellant and respondent have pitched their respective cases) has not been made voluntarily as the appellant has alleged use of force on him to sign the exhibits. Secondly, even more so the absence of corroborative evidence outside the said exhibits F4 and F5 in support of the confession as required as a matter of practice and procedure; and thirdly, that even though the appellant has not made the confessional statements voluntarily he has even then retracted the entire confession in consequence thereof the confession is no longer relevant nor of any material weight or evidential value any longer upon which a court of law can solely rely to convict him and so it is wrongful for the trial court and as affirmed by the lower court as having established conclusively the appellant's guilt of the crime of murder. ***There can be no doubt that in criminal cases such as in the instant case, the onus is on the prosecution to establish the guilt of the accused beyond reasonable doubt as settled law implying that unless the prosecution has discharged that onus it is not entitled to succeed.*** See *Mandilas & Karaberis Ltd. v. Inspector-General of Police* (1958) 3 FSC 20; (1958) SCNLR 335. ***This settled principle of law agrees with the proposition of the law that one who asserts a disputed fact must prove it. It is also settled that there is no onus on the accused in criminal cases to establish his***

innocence. See *Ogbewe v. Inspector-General of Police* (1958) WANLR 17; (1958) SCNLR 341. ***This burden on the prosecution does not shift as it rests squarely on the prosecution throughout. There is no onus on the accused but where the charge imports a presumption of guilty intent as exemplified in cases of being in recent possession of presently stolen property, the burden on the accused is discharged on the balance of probabilities; that is to say, such proof rests upon facts peculiarly within the accused's own knowledge.*** See *Woolmington v. D.P.P.* (1935) AC 462, 25 CR. App. R. 72 per Lord Sankey and *R. v. Adamu* (1944) 10 WACA 161. B
C

What seems to have emerged from the foregoing scenarios is that given the absence of any eye-witnesses to the crime in this case to testify as to what happened, that is, being one of the settled three ways of proving of a crime, the respondent has fallen back on the appellant's confession alone and other facts and circumstantial evidence outside the confession to establish the guilt of the appellant and rightly so on the decided authorities. See *Emeka v. The State* (2001) 14 NWLR (Pt. 734) 666 at 683 G-H and *Oka v. The State* (1975) 9111 SC 17. D
E

In this case, it is settled law that for the prosecution to secure a conviction in a murder charge as per the decision in Kada v. The State (1991) 11/12 SC 1; (1991) 8 NWLR (Pt. 208) 134 it must prove the following ingredients of the crime thus: F

- 1. The death of the deceased.***
- 2. That the voluntary act or omission of the accused caused the death of the deceased.***
- 3. That the accused's act resulted in the death of the deceased having been done with the intention of causing death or grievous bodily harm to the deceased. That the accused knew that death is the probable and natural consequences of his act or omission.*** G

By Kada's case the onus is on the prosecution to prove its case in the instant matter beyond reasonable doubt based on the foregoing ingredients which must co-exist. I think firstly I should advert to what is a confession and it is as defined by section 27 of the Evidence Act, 2004 which reads as follows: H

“27(1) A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime.

(2) Confessions, if voluntary, are deemed to be relevant facts against the persons who make them only.”

B The foregoing provisions of section 27 (supra) have been construed and applied in too many decisions of this court that they do not need being freshly construed as such here and they include these few to wit: Yesufu v. The State (1976) 6 SC 167; Nsofor v. The State (2004) 18 NWLR (Pt. 905) 292; Dawa v. The State (1980) 8-11 SC 236 and State v. Enabosi (1966) ZANL 116 and Mbang v. The State (2010) All FWLR (Pt. 508) 395; (2010) 7 NWLR (Pt. 1194) 431. Furthermore from the above mentioned decisions the law is settled that for a confession to be admissible in evidence it is required to be D voluntary. See R. v. Itule (1961) All NLR 462 at 465, reported as Itule v. Queen (1961) 2 SCNLR 183 per Brett Ag. C.J.F. in this regard he said:

E *“A confession does not become inadmissible merely because the accused person denies having made it and in this respect a confession contained in a statement made to police by a person under arrest is not treated differently from any other confession.”*

Thus, this abstract has underscored the law that for a confession to be relevant and so admissible in evidence it must be voluntarily made as the weight to be attached to a confession is unquestionable where the confession is voluntary in order words unequivocal, free and true. In the instant case, the appellant has made exhibits F4 and F5 although he has claimed he signed them by force. The two lower courts have specifically found against the appellant on this point and there are no grounds to support the contrary. The point must be made that it is as late as at the defence stage i.e. while testifying in evidence-in-chief in his defence that the appellant has for the first time raised the fact of denying and retracting the confession as per exhibits F4 and F5. The two lower courts having given these questions exhaustive consideration and rightly so have in the end found the questions as having been raised without any bases and I agree.

I must however go on to consider the foregoing side by side

the other vitiating factors the appellant has also alleged against exhibits F4 and F5. Firstly, on the backdrop of whether exhibits F4 and F5 have been voluntarily made vis-à-vis its retraction later on; the question that immediately springs to the mind is whether or not the appellant's confession as per exhibits F4 and F5 has been tested against the laid down principles as enunciated in *Dawa v. The State* (1980) 8/11 SC 236 at 267 - 268 (infra).

I see it fit as per the records to say I am satisfied that this process has been complied with. This means the lower court has been complied with. This means the lower court has rightly found exhibits F4 and F5 as having been voluntarily made by the appellant and so are admissible evidence against the appellant and I agree. Next is the question that the respondent failed to test the voluntariness and admissibility of the confession in a trial-within-trial. However, in the circumstances it is clear that at the time the appellant has challenged the voluntariness of exhibits F4 and F5 and the retraction of the confession later on the challenge has become belated for a trial-within-trial to be conducted to determine the admissibility of the confession as evidence against the appellant. I say so as it is the appellant's case that having challenged the voluntariness of the confession and having signed exhibits F4 and F5 by force, that a trial-within-trial however late ought to have been conducted to determine the admissibility of exhibits F4 and F5; and that having failed to do so has made exhibits F4 and F5 inadmissible evidence against him and fatal to rely on them to convict him of murder. To approve these submissions in favour of the appellant in the circumstances of this case I dare say will amount to standing the truth of this case on its head.

It is clear as conceded by the appellant also as found by the lower courts that the process of trial-within-trial is contingent on challenging the voluntariness of a confession otherwise it is of no moment. As a matter of fact the tendering of exhibits F4 and F5 has not been challenged at the trial court in the proper manner and time so as to ignite the process of trial-within-trial and besides the appropriate time to conduct a trial-with in-trial as I have said earlier on is at the tendering of the confessional statements. This is so as the whole essence of resorting to the said process is to test the admissibility in evidence of a confession. So as can be seen here it is

belated to have recourse to the process of trial-within-trial at the defence stage of the proceedings i.e. after the prosecution has closed its case at which stage the prosecution cannot reopen its case. Therefore the proper time to do so is at the point of tendering the statements as exhibits F4 and F5 invariably doing so during the prosecution's case and not when the defence has opened or as in this case to be precise at the stage the appellant has commenced to testify-in-chief in his defence. At that stage it is belated to raise the issue. See Nwachukwu v. The State (supra); Okaroh v. The State (1988) 3 NWLR (Pt. 81) 214; Eguabor v. Queen (1962) 1 SCNLR 409 and Akpa v. The State (2008) 14 NWLR (Pt. 1106) 72.

I think at this point it is most apt and pertinent to state the lower court's attitude to those questions and I quote its reaction as follows: *"At the time he raised the issue of voluntariness of the statements during his testimony in chief, the stage at which a trial-within-trial could have been held had passed. The issue should have been raised at the time those statements were being admitted in evidence as exhibits. The issue that arose at the time of admissibility of those statements was whether or not the statements tendered were made by the appellant, and that issue became a matter for the trial Judge to decide at the end of the trial. In any case, it was only one statement the appellant alleged, during his testimony that he was forced to sign and not two as learned counsel, with due respect, had argued in the appellant's brief of argument. Since the appellant had the opportunity of challenging exhibits F, F1 - F5 at the time they were being tendered on the ground that they, particularly, exhibits F4 and F5, were involuntarily made, and, failed to do so until the statements were admitted in evidence, it is my profound view that it is too late in the day to allege the involuntariness of exhibits F4 and F5 or any of the said statements at the time of the appellant's evidence in chief. It was too late to hold a trial-within-trial because the same had already been admitted in evidence. See Nwachukwu v. The State (2002) 2 NWLR (Pt. 751) p. 366 and Nwachukwu v. The State (2004) 17 NWLR (Pt. 902) p. 262. In Akpa v. The State (2008) 14 NWLR (Pt. 1106) p. 72, it was held that a trial-within-trial should not have been conducted since the appellant only denied making the statement and not that he was forced to make it under duress."*

From the record the trial court also has arrived at the same conclusion as the lower court by the same route of reasoning. The foregoing findings by the lower court which I uphold having resolved the questions beyond peradventure. ***I therefore hold that a trial-within-trial as borne out in the case of Nsofor v. The State (supra) is only resorted to in order to test the voluntariness of an accused's confession where that has become an issue in the case. So also where as here the appellant has challenged exhibits F4 and F5 his confessional statements as not having been voluntarily made as he has otherwise been forced to sign them. If I may, with respect repeat, these issues are not properly raised during evidence-in-chief or cross-examination during the defence case for the first time as it cannot be said that the parties have, as it were, joined issues on the matter. What I am trying to say here is that a trial-within-trial as per Auta v. The State (197S) 4 SC 125 and Gbadamosi v. The State (1991) 6 NWLR (Pt. 196) 182 is simply the only process of determining the voluntariness or not and the same principle is applicable to testing the admissibility of a confession where challenged on the grounds of threats, undue influence, duress etc but not essentially as to where as here the appellant is simply denying making exhibits F4 and F5. Such objections do not go to the admissibility of a confessional statement but really as to the weight to be attached to it.*** The case of Akpa v. The State (supra) has laid to rest the question that an objection is required to be raised at the tendering of the confessional statement. This is ordinarily so during presenting of the prosecution's case at the main trial.

As per the record, I agree with the lower court that the other objections to exhibits F4 - F5 relate to very minor discrepancies as to the differences as to the dates of making the exhibits like the challenge posed against the evidence of PW5 and PW6 that the said exhibits F4 – F5 have been made on 13/4/01 which cannot be correct when the appellant, it is alleged has been arrested only on 14/4/01. Obviously, the challenge as to the said differences in the dates of the Exhibits in these instances is baseless. I will come anon to the hotly contested question of not having called the cyclist that conveyed the appellant, his co-accused and the deceased to the locus in quo at Ekori beach Ugep where they killed the deceased.

Having, as it were, cleared these minor objections to admitting exhibits F4 – F5 in evidence, I find as well taken the point by the respondent to the effect that no proper objection has been taken to these exhibits F4 and F5 vis-à-vis their respective voluntariness at the appropriate time of tendering the exhibits. And so, there can be no cause for conducting of the process of trial-within-trial to determine their voluntariness or otherwise before being admitted in evidence and acted upon by the court. In the circumstances of this case I uphold the submission. I therefore find exhibits F4 and F5 as properly admitted in evidence meaning that the trial court rightly relied on them in convicting the appellant. The trial court’s decision as affirmed by the lower court rightly therefore admitted the confession in evidence as the essence of the process of trial-within-trial, if I may repeat is to determine admissibility of a confession where the confession is effectively challenged and not where the accused person as the appellant here has not taken the advantage to do so at the trial stage particularly before the defence has opened.

He cannot be heard to complain afterwards as it is belated. See *Nwachukwu v. The State* (supra); *Okaroh v. State* (1988) 3 NWLR (Pt.81) 214, *Eguabor v. Queen* (1962) 1 SCNLR 409 & *Akpa v. State* (supra). There is no way the process of trial-within-trial could have been activated at the time the appellant in this case has raised the issue of the involuntariness of exhibits F4 - F5. See *Okaroh v. State* (supra) and *Akpa v. State* (supra). In my view, there is no legitimate grounds for attacking the decisions of the lower courts on these grounds. I find these attacks as baseless and a matter of after-thoughts and so unacceptable.

The appellant’s case in this regard bears all the trappings of a drowning man catching at every straw to avoid being drowned.

Notwithstanding having come to the foregoing findings I must also examine exhibits F4 - F5 closely vis-à-vis the prosecution’s case to the effect of whether or not the confession by the appellant in the circumstances is unequivocal, free and true and is sufficient even then all alone to ground the conviction and sentence of the appellant for the murder of Mary Obongha Inah. In that regard firstly, I set forth the graphic and chilling account in exhibit F4 as depicting how the appellant and his co-accused callously murdered the deceased. Ex-

hibits F4 states:

“She told us that she took the money from her Auntie house. It was because of that money we collected from her that make me and friend Joseph Ubi Igri to kill her. After we collected the money from her we kept her in Joseph Ubi’s house till night time. In the night of 12/4/2001 breaking 13/4/2001 at about 1.30 am and Joseph Ubi told her to escort us for toilet along Ekomati road where we took her to one uncompleted building build by one pele who works at Lagos. The ground was sand filled, there we held her on the ground, she was weak, there I used the sword and stabbed on her throat. While Joseph Ubi used plank to hit her on her head until she finally die. We were unable to remove the long sword on her neck and left her with sword. Nobody saw us that killed Mary Obongha Inah. I did not disclose this fact to the father of the girl when he asked me about her daughter. That time she was not killed. Why I earlier said Solomon Ntuongha is her boyfriend and truly he was a boyfriend. I thought I would get a help from there.”

Let me recall here that this is the appellant’s statement containing his confession which the appellant in desperation to save himself has attempted to retract. I will come to that question anon. The above abstract has painted a graphic dastardly saga of the gruesome murder of the deceased. I have no doubt in my mind and in that regard I agree with the two lower courts that clearly the confession as per exhibits F4 and F5 is intended to be believed as true as it has stated and admitted in vivid words of all the legal ingredients of the crime of murder in a forthright manner in exhibits F4 and F5. There can be no doubt that the confession is unequivocal, free and true and has been rightly so found by the lower courts also rightly relied upon by the lower courts to convict the appellant even as the retraction of the confession has been rightly found to be of no moment here. I therefore hold that exhibits F4 and F5 have rightly been found to be unequivocal free and true and I also so hold.

Having perused the foregoing abstract of exhibits F4 and F5, I find further that the essence of their admissibility as confessional statements lies in their voluntariness and on the relevancy of the confession to this case that is to say, as to the appellant having confessed to committing the crime. See sections 27 and 28 of the Evidence Act 2004. Even then it is quite

evident from the detailed, vivid and graphic account of the facts of the gruesome murder that none other than the appellant as a party in criminis can possibly do so vis-à-vis the gory detail contained in exhibits F4 and F5 as to the pre-events and post-events of the crime. For all this, I have no doubt in my mind
that the appellant and his co-accused killed the deceased and that death is the probable consequence of their unlawful acts as owned up in exhibits F4 and F5.

At this stage of this judgment I examine of other collateral evidence to these exhibits thus making the confession very probable particularly so as the appellant has tried to retract the confession in his defence. I think that in a case as the instant one in which the lower courts have made concurrent findings upon which an accused person has been rightly convicted and sentenced and has ultimately appealed the case to this court on the same grounds upon which the case has been contested in the two lower courts that is excepting where any questions with grave consequences to the conviction have been raised, this court ought not to re-open the issue of the findings upon which the decision is founded unless and until the appellant has showed the grounds of convicting him as perverse, or unsupported by evidence or even then has occasioned a miscarriage of justice. This court at this stage of the case cannot be expected to recommence the act of reviewing all over again questions of facts particularly as most of the issues raised in this case hinge on issues of facts or at 'best' of mixed law and facts which a concurrent findings of both lower courts have clearly settled. I pause here to say that this case falls squarely within the pigeon hole of a concurrent finding of facts and I so uphold.

Having taken an overview of the above reasoning and findings in this matter, it is my conclusion that the two lower courts have also applied the tests so eloquently discussed in *Dawa v. The State* (supra) and that in considering the voluntariness of exhibits F4 and F5 and the subsequent retraction and so to determine whether the confession is unequivocal, free and true they have raised and addressed the following questions:

"(1) Is there anything outside the confession to show that it is true?

(2) Is it corroborated?

(3) *Are the relevant statements made in it of facts, true as far as they can be tested?*

(4) *Was the prisoner one who had the opportunity of committing the murder.*

(5) *Is his confession possible?*

(6) *Is it consistent with other facts which have been ascertained and hence been proved? See: R. v. Sykes (1913) 8 CAR Appeal Report 233 and approved by WACA in Kanu v. The King (1952/55) 14 WACA 30."*

I have gone through the judgments of the two lower courts against the background of the record of appeal in this matter and I am satisfied that the two lower courts have consummated the tests set forth above. I am further satisfied that exhibits F4 and F5 are unequivocal, free and true and encompass a voluntary confession upon which the two lower courts have rightly acted to find the appellant completely connected with the instant crime.

And again, I have found the confession unequivocal, free and true rightly relied on to convict and sentence the appellant to death by hanging.

Even then there are abundant materials though circumstantial evidence outside the confession as per these exhibits to support the conviction of the appellant of the crime and I have herein elucidated on that question.

Firstly, the appellant and his co-accused it must be recalled acknowledged having shared with the deceased the sum of N10,000 stolen by the deceased from the mother's home as the mother clearly has stated in her statement to the court. Secondly, the manner of using a machete to pierce the neck of the deceased has been authenticated and corroborated by exhibit A - the medical report (after exhumation of the deceased body with the machete still stuck to the neck) thus confirming the appellants account on the issue; thirdly, also it is evident that the appellant has taken the PW6 to the locus in quo i.e. an uncompleted building at Ekorì - and thereat the remains of the deceased have been buried and later exhumed - there again in that regard corroborating that story as per exhibits F4 and F5. Fourthly, it must be mentioned that the graphic and vivid account of how the gruesome murder has been committed as well as the burial of deceased's remains as per exhibit F4 can only be told by a party in

criminis. There can be no doubt, therefore, that these facts and circumstances of this case outside exhibits F4 and F5 have corroborated the facts therein beyond reasonable doubt pointing conclusively to the appellant and his co-accused as having committed the crime intending the death of the deceased. These circumstantial facts and evidence as can be seen are direct, positive, compelling and irresistibly pointing to no other conclusion than the conclusion of the appellant's involvement in this crime and as having intended the probable consequences of their acts. To my mind therefore the confession being unequivocal and true as to every detail of the crime is voluntary as well as true and admissible in evidence and rightly acted and relied on by the lower courts to convict the appellant as its retraction by the appellant on the peculiar facts of this case is of no moment. Besides, the confession is consistent with other facts outside the confessional statements exhibits of F4 and F5 and above all with the opportunity to commit the crime as I have tried to show above. I have no doubt in my mind that exhibits F4 and F5 have squarely nailed the appellant to the crime, meaning that the prosecution has proved the case beyond reasonable doubt. The fact that the confession has been retracted I repeat respectfully is immaterial in the face of the overwhelming evidence that has showed the confession as voluntary, free and true and properly admitted. See *Uluebeka v. The State* (2000) 4 SC (Pt. 1) 203; (2003) 71 NWLR (Pt. 665) 404.

I have examined the hotly contested question of not having called the cyclist who it has been alleged ferried the appellant, his co-accused and the deceased to the locus in quo at Ekori Beach where the appellant and his co-accused killed the deceased. I hold that the prosecution's duty in this regard as a prosecutor is to produce evidence to prove its case and not accountable for failure to produce witnesses not necessary to establish its case. See *Musa Sadau & Anor. v. The State* (1968) NMLR 208; (1968) SCNLR 170. I find that section 149(d) of the Evidence Act, 2004 does not apply here; and my findings as regards to his evidence (i.e. the cyclist) even then would not have advanced the prosecution's case any further or better, although I must state it is no reason for not calling his evidence. In the face of exhibits F4 and F5 having been found to be voluntary and admissible in establishing the prosecution's case the failure to call the cyclist

for whatever he would otherwise have said cannot be superior to the appellant's wholehearted confession to the crime as per exhibits F4 and F5 in which he admitted forthrightly against his interest to have killed the deceased with his co-accused in the crime and the lower courts have rightly believed it as unequivocal, free and true.

I have given due attention to why the process of trial-within-trial for the admissibility of these exhibits vis-à-vis the confessional statements as per exhibits F4 and F5 and if I may repeat, I am satisfied that the time to object to tendering the confessional statements as exhibits F4 and F5 here, indeed, any material object for that matter is at the time of tendering it. In this case, these exhibits have been found therefore as admissible evidence. And I may recap that to raise any challenge against them at the defence stage particularly as when the appellant is testifying in-chief is belated as the prosecution has closed its case and it may not to be reopened. See *Okaroh v. State* (supra) and *Akpa v. State* (supra).

I find also that each of the two lower courts in their respective decisions has dispassionately examined the two crucial issues for determination as raised by the parties in this matter and each of the courts has rightly found the prosecution's case as proved beyond reasonable doubt and their respective conclusions in this regard cannot be faulted.

There is therefore a concurrent finding and I can find no perversity or that the conclusions so reached are not supported by admissible evidence or that the decisions have occasioned a miscarriage of justice. I have also considered exhibits F4 and F5 containing the confession of the appellant to the crime on the backdrop of the challenges and attacks of the appellant vis-à-vis the making of these exhibits and I am satisfied as the two lower courts before now that the confession as per these exhibits is admissible evidence and properly admitted in evidence being unequivocal, free and true, which has established as rightly found by the lower courts that the appellant and his co-accused killed Mary Obongha Inah and I find the retraction baseless in the circumstances.

Without any doubt whatsoever I find no merit whatsoever in this appeal as the guilt of the appellant has been resoundingly proved beyond reasonable doubt. It is a sheer waste of the time of this court so expended on a bad case. I must remark that counsel must in the

circumstances of this case and on the backdrop of the way the two lower courts have exhaustively treated the issues raised for determination here and their respective conclusions thereupon, know when to submit to court that he has nothing to urge in a matter as hopeless as here and to rest his case thereat. This is one case counsel should have known as to whether or not to do so here timely enough. I say no more.

The appeal being most unmeritorious is accordingly dismissed. The decisions of the two lower courts are hereby respectively affirmed.

C _____

MOHAMMED JSC

At the trial High Court of Justice of Cross River State sitting at Ugeb, the appellant together with one Joseph Ubi Igri were jointly charged with the murder of Mary Obongha Inah under section 319(1) of the Criminal Code, Laws of Cross River State, the prosecution called 6 witnesses while the appellant testified in his defence but declined to call any witness, a number of exhibits were tendered and received in course of the prosecution of the case.

The case against the appellant at the trial court was that on 12th April 2001, the appellant in concert with the co-accused Joseph Ubi Igri, murdered the deceased at a nearby bush inside an uncompleted building. Thereafter, the appellant and his co-accused dug a shallow grave and buried the deceased. Few days later, the owner of the uncompleted building on inspection at the site, discovered the shallow grave of the deceased and a report was made to the police, The deceased body was exhumed and post-mortem examination confirmed the identity of the deceased and cause of death. At the end of the trial, the trial court relying on circumstantial evidence and the confessional statement of the appellant, convicted the appellant and his co-accused as charged and sentenced them to death by hanging. Appellant's appeal to the Court of Appeal Calabar division was heard and dismissed, hence appellant's further appeal to this court.

From the brief of argument filed on behalf of the appellant by his learned counsel, two issues were distilled from the grounds of appeal filed by the appellant and upon which it was sought to determine the appeal. These issues were thoroughly examined by my learned brother Chukwuma-Eneh, JSC in his leading judgment which

I have had the opportunity of reading in draft before today and with which I entirely agree that this appeal is bound to fail as the circumstantial evidence on record pointed to no other person other than the appellant and his co-accused as those who committed the offence, I see no merit at all in the appeal which is hereby dismissed, The conviction and sentence of the appellant by the trial High Court and affirmed by the court below is hereby further affirmed. B

FABIYI JSC

I have read in advance the judgment just delivered by my learned brother, Chukwuma-Eneh, JSC. I completely agree with the reasons therein advanced to arrive at the conclusion that the appeal has no merit and should be dismissed. C

At the trial High Court, the appellant was charged along with one Joseph Ubi Igri with the offence of murder of Mary Obongha Inah contrary to section 319(1) Criminal Code, Laws of Cross River State. D

The learned trial Judge garnered evidence and was duly addressed by counsel. In a reserved judgment the appellant was convicted and sentenced to death. He appealed to the Court of Appeal, Calabar division. E

Thereat, the appeal was heard and dismissed on 23rd March, 2009. This is a further appeal to this court. F

I wish to chip in a few words of my own in respect of this sordid matter. In exhibit F4, the appellant gave graphic details on how himself and his cohort snuffed life out of the deceased. It was a gory story. The appellant in company of his cohort took PW6 to the spot where they buried the deceased in an uncompleted building. G

The appellant tried to impugn the propriety of exhibit F4, inter alia, to no avail. The appellant tried to make a retraction of his confessional statement. There is nothing sacrosanct about such a retraction of the confessional statement as the courts below were satisfied of its truthfulness. See: *Dobie v. The State* (2007) 9 NWLR (Pt. 1038) 30. The appellant gave clear, positive and vivid evidence that nailed him and his cohort. All accusing fingers point at them and they failed to wriggle themselves out of the web created by them. H

On behalf of the appellant, it was insinuated that the case was

not proved beyond reasonable doubt. With the gory story related by the appellant, I feel tempted to say that he should go and tell the Marines same. The case was proved beyond reasonable doubt as all the vital ingredients of the offence charged have been established. See: Alabi v. The State (1993) 7 NWLR (Pt. 307) 511 at 523. Finally, let me state it in passing that the two lower courts made concurrent findings of fact in most material respects, I have no cause to disturb same since they have not been shown to be perverse. See Kale v. Coker (1982) 12 SC 252.

For the above reasons and the detailed ones contained in the lead judgment, I too feel that the appeal has no chance for success. It is completely devoid of merit and is hereby dismissed. I hereby affirm the decisions of the two lower courts.

D

RHODES-VIVOUR JSC

I read in draft the leading judgment delivered by my learned brother, Chukwuma-Eneh, JSC and I agree with his Lordships reasoning and conclusion.

This appeal and SC.203/2010 emanated from a joint trial of the appellant and one Joseph Ubi Igri his co-accused in SC.203/2010. Both appeals are similar with identical issues.

In SC. 203/2010, I observed that the deceased had a very painful and gruesome death at the hands of the appellant and his co-accused (the appellant in this appeal). I described their act as naked aggression, sheer wickedness and callousness, and I agreed with my learned brother Chukwumah-Eneh, JSC that there was no merit in the appeal. This appeal is on the same facts and circumstances. Clearly there are no redeeming features. The appeal lacks merit and it is hereby dismissed.

ARIWOOLA JSC

The contribution of Hon. Justice Ariwoola, J.S.C. who was a member of the Panel of Justices of the Supreme Court that decided this case could not be obtained.