

**SUPREME COURT OF NIGERIA**  
FRIDAY 29TH JANUARY, 2016. SC. 706/2013  
**CORAM:- S. GALADIMA, M. D. MUHAMMAD,**  
**K. M. O. KEKERE-EKUN, J. I. OKORO, A. SANUSI, JJSC**

ANTHONY ITU ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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WORDS & PHRASES - Miscarriage of justice - Meaning - It means failure on the part of court to do justice - And it arises in a decision that is prejudicial - Or inconsistent with substantial right of party (H1)

CRIMINAL PROCEDURE - Mini trial - Failure to rule in - Procedure adopted by trial Judge did not occasion miscarriage of justice - It is a mere irregularity that did not infringe on right to fair hearing (H2)

JUDGMENTS - Reversal - Wrongful admission of evidence - Would not by itself be a ground for reversing a decision - Where appellate court finds that the evidence did not affect the decision (H3)

MURDER - Ingredients - Proof - To obtain conviction prosecution must prove that deceased died - That accused caused the death - And that the act of accused causing the death was intentional (H4)

MURDER - Proof - Number of witness - Murder can be proved through one credible witness - And not necessarily by calling many witnesses who are not credible (H5)

CRIMINAL PROCEDURE - Proof - Means of - Guilt of an accused can be proved through his confessional statement - Circumstantial evidence - And testimony of eye witness (H6)

MURDER - Proof - As testimonies of prosecution witnesses were never contradicted - Findings of trial court that the offence was proved beyond reasonable doubt - Cannot be faulted (H7)

EVIDENCE - Tainted witness - The fact that PW1 is related to the deceased is not enough to tag her as tainted witness - As she had no interest to serve besides giving true account of what transpired (H8)

### **FACTS**

The trial and conviction of accused/appellant was commenced at the High Court of Delta State before Oritsejafor J. Appellant was arraigned on a count charge of murder of the deceased. The case as presented by prosecution/respondent is that appellant shot and killed one Godswill Itu (the deceased). Appellant was arrested in connection with the crime and brought to the Court. At the trial, appellant pleaded not guilty. Respondent called six witnesses in support of its case and tendered four exhibits namely Exhibits A and B (confessional statements of appellant to the police), while Exhibits C and D (one single barrel gun and cartridge respectively allegedly recovered from appellant at the scene of the crime). Appellant testified in his defence and called one witness in support.

During the course of the trial, when respondent sought to tender the confessional statements of appellant, the latter objected on the ground that the statements sought to be tendered were not made voluntarily by him. Sequel to that, the learned trial Judge conducted a trial within trial. At the end of the mini trial, the learned trial judge did not deliver his ruling in order to determine the admissibility or otherwise of the confessional statements, rather he admitted the two statements as Exhibits A and B. The learned trial Judge however evaluated and decided on the confessional statements when delivering his final judgment in the matter. In a considered judgment, the Court convicted and sentenced appellant to death by hanging for murder. Aggrieved, appellant approached the Court of Appeal Benin Division on an appeal. Appellant challenged the procedure adopted by the trial Court after the trial within trial. The Court considered the appeal and in a majority decision found no merit in the complaint of appellant. The appeal was dismissed and judgment of the trial Court upheld. Aggrieved further, appellant appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*1. Whether the lower court was right in holding that the learned trial judge properly conducted trials within trial before he admitted and relied on exhibits A and B in his judgment against the appellant.*

*2. Whether having regard to the circumstances of this case and the totality of the evidence on record, the lower court was right when it affirmed the decision of the learned trial judge who convicted the appellant for murder.*

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

*WORDS & PHRASES - Miscarriage of justice - Meaning*

**1. Having read these cases cited above which defined the phrase “miscarriage of justice” I hold the view that the cumulative meaning of the phrase that could be gathered from the decided authorities cited supra, is that the Phrase ‘miscarriage of justice simply means justice miscarried. Miscarriage of justice in short means failure on the part of the court to do justice. It is justice misapplied, misappreciated or misappropriated. It was also an ill conduct on the part of the court, which amounts to injustice. Miscarriage of justice arises in a decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial right of a party.**  
(p. 113 E)

*CRIMINAL PROCEDURE - Mini trial - Failure to rule in*

**2. There is no gainsaying that the procedure adopted (supra) by the learned trial judge is alien or foreign to our jurisprudence and is certainly wrong. However, one consolation is, as I said above, the trial judge in his judgment had actually evaluated the evidence led at the trial within trial before finding the statements (Exhibits A and B) to have been voluntarily made before acting on it. He, as such, found no reason to expunge it from the record and he had thus proceeded to accept the confessional statements and acted on them. It is therefore my view that the failure on the part of the trial court to deliver its ruling immediately though un-procedural, did not occasion a miscarriage of justice on the appellant and had not occasioned injustice on him. To me, it is a mere irregularity and his right to fair hearing was not**

**infringed at all by such irregularity. It would have been otherwise, if the trial judge had totally failed to evaluate the evidence led at the trial within trial but just proceeded to accept it and acted on it willingly without ascertaining its voluntariness or otherwise. In this instant case, the trial court**  
**B believed and found that the two statements were voluntarily made by the appellant or if the trial judge, as I stated above, had totally refused or failed to conduct the trial within trial which is never the case here. (p. 114 E)**

**C** *JUDGMENTS - Reversal*

**3. With due deference to the learned counsel for the appellant, wrongful admission of evidence would not by itself be a ground for reversing a decision where an appellate court finds that**  
**D the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same even if such evidence had not been so admitted. (p. 115 D)**

**E** *MURDER - Ingredients - Proof*

**4. As rightly conceded by the two learned counsel for the parties in this case the ingredients of the offence of murder are as listed hereunder even at the risk of being repetitive the ingredients are:-**

- F**
- (a) That the death of the deceased occurred.**
  - (b) That the death of the deceased was caused by the accused or accused person on trial, and**
  - (c) That it was the act or omission of the accused that**  
**G caused the death of the deceased victim and such act or omission was intentional or with knowledge that death or grievous bodily harm was the probable result or consequence.**

**These ingredients I must emphasise here must coexist because if any of them is missing then the offence of murder**  
**H can be said not to have been proved hence, the prosecution cannot obtain conviction of murder against the accused person and the court must exonerate him and acquit him of the offence of murder. (p. 117 G)**

*MURDER - Proof - Number of witness*

**5. It must however be noted that proof beyond reasonable doubt cannot only be obtained by the prosecution fielding or calling multiplicity of witnesses to prove its case. The requirement in effecting such proof is not in the number, but in the credibility of a witness or witnesses. An offence of murder or any offence, for that matter can be proved beyond reasonable doubt (standard) even through only one credible, honest and untainted witness and not necessarily by calling myriad of witnesses who are not credible or who have interest to serve or who are merely called to tell half-truth.**

**The learned appellant's counsel frowned at the way the trial court convicted and sentenced the accused/appellant on the testimony of only eye witness alone. With profound respect to the learned counsel, the general law in calling of witnesses to testify for party in a criminal trial especially the prosecution, is that it is not the requirement of the law that the prosecution must call all conceivable witnesses. The duty of the prosecution pursuant to the provisions of Section 131 (1) of the Evidence Act 2011 as amended is to call witness or witnesses to prove their case beyond reasonable doubt. I must repeat here, that it is not the number of witnesses the prosecution calls that matters, or that entitles it to prove its case. Rather, it is the quality of the evidence that is given by the witness or witnesses that matter. In fact, one witness alone may be enough to prove a case or even a murder case, like the instant case. (pp. 118 E/120 E)**

*CRIMINAL PROCEDURE - Proof - Means of*

**6. The law is trite, that guilt of an accused person can be proved through any of the following methods:-**

- (1) Through confessional statement of the accused, or**
- (2) Through circumstantial evidence**
- (3) Through the testimony of eye witness or eye witnesses. (p. 118 H)**

*MURDER - Proof*

**7. From the pieces of evidence which I highlighted above it will not be out of place to conclude that the deceased died from the gun shot he received from the appellant. Since PW1 confirmed that the accused/appellant her attacker shot the deceased her younger brother when the latter came to her rescue. Other witnesses called by the prosecution, also confirmed that the accused appellant was the owner of the gun which he used in shooting Godwill Itu the deceased. These pieces of evidence were never controverted or contradicted by the defence in any material particular. From the surrounding circumstances of this instant case, I do not see any reason to fault the finding of the trial court when it held the offence was proved by the respondent against the accused/appellant beyond reasonable doubt which said finding was also affirmed by the lower court. (p. 119 H)**

*EVIDENCE - Tainted witness*

**8. Another submission of appellant’s counsel worth being considered here is that the PW1 being the only eye witness in the case is a “tainted witness’. Admittedly, the PW1 is the elder sister of the deceased victim. She was also the first person attacked by the appellant. I don’t think the PW1 is a tainted witness. My understanding of a “tainted witness” is that he is one witness who is either an accomplice or by the evidence he gives whether for the prosecution or for the defence may and could be regarded as having some purpose of his own to serve. The appellant did not show that PW1 had any interest to serve besides giving the true account and real picture of what transpired between herself and the accused/appellant which led to the latter’s death.**

**Therefore, the fact that the PW1 is related to the deceased is not enough to tag her as a tainted witness, contrary to what the appellant’s counsel wanted us to believe. Her evidence was regarded as credible and cogent, hence the trial court could and indeed had the right to accept and act on it as it had done here. I am fully convinced that the trial court had considered the defence posed by the appellant before arriving**

***at its conclusion that the prosecution had proved its case against the accused/appellant beyond reasonable doubt.***

(pp. 120 H/121 E)

## NOTABLE POINT OF INTEREST

### **SANUSI JSC**

#### ***1. Criminal procedure – Standard of proof***

I must stress here, that the prosecution always has the heavy task of proving its case or these aforementioned ingredients, beyond reasonable doubt. That is the standard of proof short of which the prosecution shall fail. See Section 135 of the Evidence Act 2011 as amended. The phrase “proof beyond reasonable doubt” does not however mean beyond the shadow of doubt. It is trite to say, that the law will not serve its purpose of protecting the community if it admits fanciful possibilities to deflect the course of justice. Where the evidence is so strong against an accused person as to leave only a remote possibility in his favour which can be dismissed with the sentence, “Of course it is possible but not in the least probable” but nothing short of that will suffice. (p. 118 C)

### **REPRESENTATION**

AYO ASALA ESQ. with John Smart for the Appellant

O. F. ENENMO ESQ., Deputy Director, Ministry of Justice, Delta State

E. S. Biwei, Assistant Chief Legal Officer for the Respondent

### **CASES REFERRED TO**

State v. Ajie (2000) FWLR (pt. 16) 2831

Oguntayo v. Adelaja (2009) All FWLR (pt. 495) 16206

Adeyemi v. State (2012) All FWLR (pt. 606) 492

Ogudu v. State (2012) All FWLR (pt. 629) 1111

Ogunye v. State (1999) 10 NWLR (pt. 604) 570

Pam v. Mohammed (2008) 5-6 SC (pt. 1) 83

Achibong v. State (2006) 14 NWLR (pt. 1000) 349

Bello v. State (2012) 8 NWLR (pt. 1302) 207

Moses v. State (2003) FWLR (pt. 141) 1969

Omotola v. State (2009) ACLR 129

State v. Ikoko (1974) 2 SC 73

Ishola v. State (1978) 9-10 SC

Isibor v. State (2002) 4 NWLR (pt. 759) 741

Ogba v. State (1999) 2 NWLR (pt. 222) 164

Nwosu v. State (1986) 4 NWLR (pt. 35) 384

B

### **STATUTES REFERRED TO**

Criminal Code Cap 48 Vol. 11 of Laws of Bendel State 1976, s. 319(1)

C Evidence Act 2011 (as amended), ss. 135, 231, 251(1)

### **LEAD JUDGMENT BY SANUSI JSC**

This appeal is against the judgment of the Court of Appeal, Benin Division (hereinafter referred to as “the lower court”) delivered on 7/11/2013 in which it affirmed the decision of Oritsejafor J of Delta State High Court (the trial court) which on 13<sup>th</sup> February 2012 convicted the present appellant of murder, contrary to Section 319(1) of Criminal Code, Cap 48, Vol. 11 of Laws of Bendel State, 1976 (then applicable to Delta State). The trial court having found the accused now appellant, guilty of the offence of murder, it sentenced him to death by hanging.

The facts of the case as presented before the trial court are that on 9<sup>th</sup> January 2008, the appellant shot and killed one Godswill Itu, who was his nephew. He was thereupon, arraigned before the trial court for trial on a charge of murder. At the trial, the appellant pleaded not guilty to the charge of murder, framed against him by the prosecution. Trial thereupon commenced in earnest and the prosecution, now respondent, called six witnesses to prove its case and tendered four exhibits namely Exhibits A and B which were confessional statements made by the accused/appellant to the police after his arrest, while Exhibits C and D are one single barrel gun and cartridge respectively, allegedly recovered from the appellant at the scene of the crime. At the end of the prosecution’s case, the appellant entered his defence by giving evidence and later he called one witness to testify for his defence.

It is however pertinent to state here that in the course of the trial, when the prosecution sought to tender the confessional statements of the accused person (appellant), the latter objected on



the ground that the statements sought to be tendered were not made voluntarily by him. Sequel to that, the trial court conducted a trial within trial. After conducting the trial within trial, the learned trial judge did not deliver his ruling on the trial within trial he conducted in order to determine the admissibility or otherwise of the confessional statements, but he instead, admitted the two statements as Exhibits B A and B, without evaluating the evidence led at the mini-trial by delivering a ruling thereon. He instead decided to do the evaluation when delivering his final judgment in the case. The appellant challenged that procedure on appeal at the lower court when he complained that ‘miscarriage of justice’ was occasioned on him and he made it a ground of appeal before the lower court, albeit, unsuccessfully. It is apt to state here, that the procedure adopted by the trial court led to division of opinion of the lower court learned Justices, wherein, one of the justices Lokulo-Sodiye JCA faulted it and departed with the majority Justices regarding the admissibility of Exhibits A and B. C D

Aggrieved with the judgment of the trial court, the appellant appealed to the court below. On 7/11/2013 the lower court delivered its considered judgment dismissing the appellant’s appeal and affirmed the judgment of the trial court. The appellant obviously became dissatisfied with the judgment of the lower court, hence he further appealed to this court. Sequel to that, he filed a notice of appeal containing two grounds of appeal out of which he also decoded two issues for the determination of the appeal. In his brief of argument settled by one Ayo Asala Esq., the following two issues for determination were proposed, namely:- E F

1. *Whether the lower court was right in holding that the learned trial judge properly conducted trials within trial before he admitted and relied on exhibits A and B in his judgment against the appellant.* G
2. *Whether having regard to the circumstances of this case and the totality of the evidence on record, the lower court was right when it affirmed the decision of the learned trial judge who convicted the appellant for murder.* H

The respondent’s brief of argument on the other hand, was settled by one O. F. Enenmo, a Deputy Director, Delta State Ministry of Justice on behalf of the respondent. Therein, only one issue was

formulated for the determination of this appeal, which is set out hereunder:-

*“Whether having regard to the evidence before the court, the Court of Appeal was right in law when it affirmed the conviction of the appellant?”*

B       In approaching this appeal, I choose to be guided by two issues raised in the appellant’s brief of argument which, I consider to be apt and are all encompassing and had also adequately captured the two issues raised by learned counsel of the respondent in this appeal. The issues will be considered hereunder separately.

C       On the first issue for determination, the learned counsel for the appellant kick-started his submission by referring to the finding of the court below on page 147 of the Record of appeal on the propriety or otherwise of the procedure adopted by the learned trial judge by not delivering its ruling on the trial within trial on the two extra-judicial statements allegedly made by the accused person (now appellant) after the close of the trial in order to determine whether they were voluntarily made or not before admitting them and making them as Exhibits A and B, on condition that it would later expunge them when delivering its judgment if they were found not to have been made voluntarily. The relevant finding of the lower court on the complaint on the procedure adopted by the trial court is shown at page 14 of the Record of Appeal where it was stated at page 74 of the record, thus:-

F       *“For these reasons I believe that the confessional statement Exhibit A was voluntarily made by the accused person. The failure to comply with the Judges rule cannot be a ground for the exclusion of a confessional statement voluntarily made.”*

G       *Of course, it’s so obvious from the above excerpts that the lower court did not specifically rule on the voluntariness or otherwise of the alleged confessional statements of the appellant at the conclusion of the two distinct trials within trial in question. The trial court merely proceeded to admit the two statements as exhibits A & H B, albeit, with a caveat that it would expunge the said exhibits if it discovered in the course of the judgment that they were not voluntarily made by the accused person ..*

*However, contrary to the contention of the appellant’s learned counsel, considering the circumstances surrounding the case, there*

*is every reason for me to believe that the lower court's failure to categorically rule on the voluntariness or otherwise of the alleged confession of the appellant before admitting exhibits 'A' & 'B' could not rightly be said to have amounted to a miscarriage of justice. And my reason for holding that view is not far-fetched! It is evident at page 75, lines 4-18 of the record, that the lower court has found, B rightly in my view, that:*

*The accused person retracted his confessional statements exhibits 'A' & 'B' and denied murdering the accused. The law is now certain that the inconsistency rule would not be applied to exclude a C confessional statement properly proved. Our own apex court laid down this principle of law in Egboghonome vs. State (2001) 2 ACLR 262...*

*In the circumstances, it is incumbent on this court to assess the quality of the alleged confessional statements Exhibits 'A' and 'B' D notwithstanding their retraction by the accused person in his oral testimony before this court."*

It is also the submission of the learned counsel for the appellant, that the lower court by its finding above, had conceded that the procedure adopted by the trial court was unknown to law, adding E that such procedure had occasioned miscarriage of justice to the appellant. Learned counsel referred to the meaning of "miscarriage of justice" as given in the cases of *The State vs Ajie* (2000) FWLR (pt 16) 2831 at 2842; *Oguntayo vs Adelaja* (2009) All FWLR (pt 495) 16206 at 1661. Further submission of the learned counsel for the F appellant, is that trial within trial or trial, as it is usually referred to, also as mini trial, in which witnesses are called to give evidence and are subjected to cross examination by the other side, after which the court would deliver its ruling either admitting or rejecting the G statement. See *Adeyemi v State* (2012) All FWLR(pt 606) 492 at 504 Para C - E; *Ogudu v State* (2012) All FWLR (pt 629) 1111 at 1142/1143 Para A.

The learned counsel for the appellant proceeded to high-light H the antecedents that led to what he referred to as "procedure unknown to law" adopted by the trial court with regard to the trial within trial on pages 9 to 11 of the Appellant's Brief of Argument. I will copiously reproduce below all that had transpired as contained

in the said pages in the Appellant’s brief below for ease of reference and purpose of clarity.

The followings are what transpired in the course of the proceedings at page 36 of the record from lines 5 to 15:

B *“M.N. Akpan for the accused person objects to the admissibility of statement of accused in person on ground that it was not made voluntarily, contrary to section 28 of the Evidence Act. Attorney General states that the statement sought to be tendered was made voluntarily.*

C *Court: since the accused person has alleged that the statement sought to be tendered was not made voluntarily by him, it is necessary for this court to conduct trial within trial to test the voluntary (sic) for this court to conduct trial within trial of the statement accordingly (sic).I hereby order that a trial within trial be conducted to test the*  
D *voluntary nature of the statement sought to be tendered by the prosecution.”*

4.07 After the trial within trial as ordered by the trial judge and instead of evaluating the evidence led within the mini trial and delivered a ruling on the voluntariness of the statement and either  
E admit or reject instantly the statement of the accused person, the trial judge at page 40 of the record from line 20 to 29 said:

*“I will for now admit the statement sought to be tendered subject to this court giving a proper consideration to the evidence and address of counsel in this trial within trial proceedings in the final*  
F *judgment of this court during which if the statement is found not to have been voluntarily made it would be expunged from the record. Accordingly, the statement of the accused person made by the accused person on the 9/1/2008 to the police at Ozoro is hereby admitted in*  
G *evidence in these proceedings and marked ‘A’.”*

4.08 Again, at page 43 of the record, PW6 also attempted to tender another statement said to have been made by the appellant. From line 25 of pages 43 to 44, the following proceedings emerged:

*Later a statement was taken from the accused person after the*  
H *cautionary words which he signed. The document shown to me is the statement of the accused person. P.U. Akamaguna seeks to tender the statement of the accused person made at the state CID. M. N. Akpan opposed the application to tender the statement. He state(sic) that he is vehemently opposed to the admissibility(sic) of the statement*

*in that the accused person made the statement under compulsion after he was intimidated and under duress contrary to provisions of section 28 of the evidence Act.*

4.09 At page 44 of the record from lines 4 to 9, the learned trial judge observed:

*“I agree that a trial within trial is at the stage necessary and I agree and order a trial within trial to ascertain whether the accused person made the confessional statement voluntarily or not.”* <sup>B</sup>

4.10 But instead of immediately evaluating the evidence and delivered a ruling, the learned trial judge at page 46 of the record from lines 29 to 38 said: <sup>C</sup>

*I have duly considered the evidence led by the PW6 and the accused person in the trial within trial and I have also considered the submissions of learned counsel. The law enjoins(sic) this court to admit the statement of the accused person at this stage subject to a consideration of the evidence at the time when the judgment is to be delivered if at that time I find that the statement was not voluntarily made, I will expunge(sic) the statement from the record when I deliver the final judgment in this information in the circumstances, I will and hereby for now admit the statement of the accused person made on 14th of January, 2008 and marked(sic) Exhibit B..... “* <sup>D</sup> <sup>E</sup>

It is the further submission of the learned appellant’s that the trial court’s resolve to “conditionally admit” the statements of the accused is not only unknown to law but also prejudicial to the appellant especially when presenting his defence and also it tantamount to receiving additional evidence by the trial court against a party after close of the case without giving him the opportunity to cross examine his adverse party or giving a rebuttal evidence. He opined that the trial judge heavily relied on the two alleged confessional statements (Exhibits A and B) to convict the appellant. In urging this court to resolve this issue in his client’s favour, the learned counsel stated that if the two statements were discarded, the prosecution’s case would be left bare. <sup>F</sup> <sup>G</sup>

In his reaction to the submissions of the learned counsel for the appellant on this issue, the learned counsel for the respondent conceded that where an accused person objects to the admission of his extrajudicial statement on the ground that it was not voluntarily made by him, the trial court is bound to conduct a trial within trial to <sup>H</sup>

determine its voluntariness or otherwise. See *Ogunye vs State* (1999) 10 NWLR (pt 604) 570. He also conceded to the fact that the trial judge did conduct the trial within trial but only did not evaluate the evidence led by the parties at the trial within trial and give ruling on same. He however submitted that even at that, the trial judge in his judgment did evaluate the evidence and gave his verdict on it at page 73, lines 16 to 28 of the Record of Appeal. The learned counsel for the respondent admitted that the method adopted by the learned trial judge was really not in line with the usual practice by giving a distinct ruling admitting or rejecting the confessional statement of the appellant. He urged us to resolve this issue in the respondent's favour.

The grouse of the learned appellant's counsel is that failure of the trial court to give distinct ruling on the trial within trial but deferring the ruling until when it delivered judgment had occasional miscarriage of justice to him. Both learned counsel to the parties have agreed that the procedure adopted by the learned trial judge by not evaluating the evidence led by the parties during trial within trial and giving distinct ruling on it before proceeding with the main trial was wrong. The grey area or point of disagreement between the parties is whether the wrong procedure adopted by the trial court, had occasioned miscarriage of justice to the appellant or not. The lower court in its pronouncement on the vexed issue is where it stated in its majority judgment at page 148 of the Record of Appeal as follows:-

*"However contrary to the contention of the appellant's learned counsel, considering the circumstances surrounding the case there is every reason for me to believe that the lower court's failure to categorically rule on the voluntariness or otherwise of the alleged confession of the appellant before admitting exhibit A & B (sic) could not be rightly be said (sic) to have amounted to a miscarriage of justice.*

I have closely studied or considered the judgment of the lower court. It is noted by me from the judgment of the trial court that the trial court had actually evaluated the evidence led by the parties at the trial within trial when it held on page 73 of the Record with regard to Exhibit A as follows:-

*"For these reasons, I believe that the confessional statement Exhibit A was voluntarily made by the accused person the failure to*

*comply with the Judges Rule cannot be a ground for the exclusion of confessional statement voluntarily made”.*

Similarly, the trial court also evaluated the evidence led by the parties with regard to the Exhibit B the second confessional statement, on the same page 73 of the Record of Appeal where the trial court in its judgment also stated thus:-

*“Furthermore, the accused contended that his tooth was broken in the course of the torture on him on 14/1/2008 after making the same allegation that pw4 broke his tooth on 9/1/2008 in the course of forcing him to sign the statement Exhibit A. For these reasons, I do not believe the evidence of the accused person that he was forced to make confessional statement Exhibit B. I hold that the statement Exhibit B was voluntarily made by the accused person”*

The learned counsel for the appellant as I said above, holds the view that the failure on the trial court to evaluate the evidence led at the trial within trial and give its ruling distinctly, admitting or rejecting it, besides being wrong, it had also occasioned “miscarriage of justice’ to the appellant even though the lower court held that no ‘miscarriage of justice’ was occasioned to the appellant. Learned applicant’s counsel referred to several decided authorities where the phrase “miscarriage of justice” was defined. Notable among those decided authorities are: The State vs Ajie (2000) FWLR (pt 16) 2831 at 2842; Oguntayo vs Adelaja (2009) All FWLR (pt 4951) 1626 at 1661 Para 9-H. ***Having read these cases cited above which defined the phrase “miscarriage of justice” I hold the view that the cumulative meaning of the phrase that could be gathered from the decided authorities cited supra, is that the Phrase ‘miscarriage of justice simply means justice miscarried. Miscarriage of justice in short means failure on the part of the court to do justice. It is justice misapplied, misappreciated or misappropriated. It was also an ill conduct on the part of the court, which amounts to injustice. Miscarriage of justice arises in a decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial right of a party.*** See the cases of The State vs Ajie (supra) or (2000) 7 SC (pt I) 24, Pam and Anor vs Mohammed and Anor (2008) 5-6 SC (pt 1) 83.

Now, from the surrounding circumstances and the antecedents of this instant case, can it be said that the failure on the part of the trial court to give distinct ruling on the trial within trial had occasioned miscarriage of justice to the appellant? Before answering this question I think it will be apt to reproduce the stance of the trial court which informed it to defer its ruling in the trial within trial court till at the time it delivers its judgment and its resolve at that time to admit the statements conditionally. At page 46 of the Record lines 29 to 38, it stated thus:

*"I have duly considered the evidence led by PW6 and the Accused person in the trial within trial and I have also considered the submissions of learned counsel. The law enjoins (sic) this court to admit the statement of the accused person at this stage subject to a consideration of the evidence at the time when the judgment is to be delivered if at that time I found that the statement was not voluntarily made, I will expunge (sic) the statement from the record when I deliver the final judgment in this information in the circumstances, I will and hereby for now admit the statement of the accused person made."*

***There is no gainsaying that the procedure adopted (supra) by the learned trial judge is alien or foreign to our jurisprudence and is certainly wrong. However, one consolation is, as I said above, the trial judge in his judgment had actually evaluated the evidence led at the trial within trial before finding the statements (Exhibits A and B) to have been voluntarily made before acting on it. He, as such, found no reason to expunge it from the record and he had thus proceeded to accept the confessional statements and acted on them. It is therefore my view that the failure on the part of the trial court to deliver its ruling immediately though unprocedural, did not occasion a miscarriage of justice on the appellant and had not occasioned injustice on him. To me, it is a mere irregularity and his right to fair hearing was not infringed at all by such irregularity. It would have been otherwise, if the trial judge had totally failed to evaluate the evidence led at the trial within trial but just proceeded to accept it and acted on it willingly without ascertaining its voluntariness or otherwise. In this instant case, the trial court***



**believed and found that the two statements were voluntarily made by the appellant or if the trial judge, as I stated above, had totally refused or failed to conduct the trial within trial which is never the case here.** I therefore agree with the finding of the court below when on page 152 of the record it held as below:-

*“However, contrary to the contention of the appellant’s learned counsel, considering the circumstances surrounding the case, there is every reason for me to believe that the lower’s court’s failure to categorically rule in the voluntariness or otherwise of the alleged confession of the appellant before admitting Exhibit A and B (sic) could not be rightly be said (sic) to have amounted to a miscarriage of justice”.*

Another point worth being considered, is the appellant’s urge, that since Exhibits A and B were wrongfully admitted, this court should expunge the confessional statement and the evidence relied on by the trial court and discharge and acquit the appellant.

***With due deference to the learned counsel for the appellant, wrongful admission of evidence would not by itself be a ground for reversing a decision where an appellate court finds that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same even if such evidence had not been so admitted.*** See Section 251 (1) of the Evidence Act 2011 as amended. See also Achibong vs State (2006) 14 NWLR (pt 1000) 349 at 494. The first issue for determination is therefore hereby resolved against the appellant.

On the second issue for determination the appellant queries whether from the totality of the evidence on record, the lower court was correct in affirming the decision of the trial court convicting the appellant for the offence of murder. The learned counsel for the appellant in his brief of argument correctly listed the essential elements which the prosecution must prove in order to obtain conviction in a case of murder. These elements include the followings:-

- “(1) That a person died*
- (2) That it was the act of the accused that resulted in the death of his deceased victim.*
- (3) That the act of the accused leading to the death of deceased was intentional or with knowledge that death or grievous harm was*

*its probable consequence.*” See *Mbang vs The State* (2007) All FWLR (pt. 372) 1863; *Uwaogbe vs The State* (2008) All FWLR (pt. 419) 425; *Yaki vs State* (2008) All FWLR (pt. 440) 618.

Learned counsel for the appellant conceded that the death of the deceased was proved while the second and third elements listed  
B supra according to him were not proved by the prosecution now  
respondent. He argued that prosecution failed to prove that it was  
the act of the appellant that caused the death of the deceased or that  
this act was intentional or that he had knowledge that death or  
C grievous harm was the probable consequence. He submitted further  
that the respondent did not prove the offence of murder beyond  
reasonable doubt as required by law. See *Bello vs State* (2012) 8  
NWLR (pt 1302) 207 at 231 and Evidence Act 2011, as amended.  
Learned counsel for the appellant argued that, contrary to the finding  
D of the lower court, Exhibits C and D i.e. the single barrel gun and the  
cartridge respectively, were not recovered from the accused/appellant  
and they were also not linked to him, since the appellant even denied  
that he owned them or used them. The learned appellant’s counsel  
further argued that PW1 the only eye witness called by the prosecution  
E was a “TAINTED WITNESS”, in view of her blood relationship with  
her younger brother, the deceased victim and also in view of her  
earlier misunderstanding with the appellant who had suspected her  
and her mother to be witches. He stated that since she had grudge  
F against the appellant, she was not an independent witness and the  
trial judge ought to have warned himself before accepting and acting  
on her testimony which he failed to do. He referred to the cases of  
*Moses v. State* (2003) FWLR (pt 141) 1969 at 1988; *Omotola &  
Ors vs State* (2009) ACLR 129 at 163 to 164; *State v Ikoko* (1974)  
G 2 SC 73; *Ishola v State* (1978) 9-10 SC. Learned appellant’s counsel  
contended that the evidence of PW2 and PW3 were hearsay evidence  
they, being investigating police officers and their testimonies could  
not be said to have corroborated the evidence of PW1 at all. It is  
further submission of the learned appellant’s counsel, that the  
H prosecution failed to prove its case against the appellant beyond  
reasonable doubt, because the trial judge did not consider the  
accused/appellant’s defence especially his defence of insanity and  
the lower court was therefore in error when it held that the prosecution  
had proved its case beyond reasonable doubt against the appellant.

On his part, the learned counsel for the respondent submitted that the lower court was right in affirming the conviction of the appellant by the learned trial judge because the prosecution proved the case of murder against the appellant beyond reasonable doubt as required by Section 135 of the Evidence of Act, as amended. He argued that proof beyond reasonable doubt connotes that the prosecution must lead credible evidence to prove the ingredients of the offence the accused person is facing at the trial. See *Isibor vs State* (2002) 4 NWLR (pt 759) 741. He added that the prosecution is not expected to prove the offence beyond shadow of doubt or with absolute certainty which is impossible in any human adventure including the administration of justice. He cited and relied on the case of *Onatauokan v the State* (1987) 3 NWLR (pt 61) 538 @ 557. Learned respondent's counsel listed the ingredients of the offence of murder which the prosecution must prove in order to obtain conviction as highlighted above in the appellant's counsel's submission and he cited the authorities of *Ogba vs The State* (1999) 2 NWLR (pt 222) 164 and *Nwosu vs The State* (1986) 4 NWLR (pt 35) 384.

In further submission, the learned respondent's counsel argued that the death of the deceased was established through the testimony of PW1 the only eye witness in the case, PW2 the doctor who performed the post mortem examination and the two confessional statements of the accused/appellant i.e. Exhibits A and B.

Learned counsel went further to submit that PW1, was not a "tainted witness" as the appellant's counsel wanted this court to believe, because a tainted witness, is one who has purpose of his own to serve. See *Onuoha vs State* (2009) 7 NWLR (pt 1139) 148 at 177 Para C - D. The respondent's counsel finally urged this court to affirm the concurrent findings of the two lower court since the prosecution had duly established the offence of murder against the accused/appellant.

***As rightly conceded by the two learned counsel for the parties in this case the ingredients of the offence of murder are as listed hereunder even at the risk of being repetitive the ingredients are:-***

***(a) That the death of the deceased occurred.***

***(b) That the death of the deceased was caused by the accused or accused person on trial, and***

***(c) That it was the act or omission of the accused that caused the death of the deceased victim and such act or omission was intentional or with knowledge that death or grievous bodily harm was the probable result or consequence.***

***These ingredients I must emphasise here must coexist because if any of them is missing then the offence of murder can be said not to have been proved hence, the prosecution cannot obtain conviction of murder against the accused person and the court must exonerate him and acquit him of the offence of murder.*** See Ogba v. State (1992) & NWLR (pt. 222) 164; Nweze v. State (1996) 2 NWLR (pt. 428) 1; Gira v State (1996) 4 NWLR (pt. 443) 375. I must stress here, that the prosecution always has the heavy task of proving its case or these aforementioned ingredients, beyond reasonable doubt. That is the standard of proof short of which the prosecution shall fail. See Section 135 of the Evidence Act 2011 as amended. The phrase “proof beyond reasonable doubt” does not however mean beyond the shadow of doubt. It is trite to say, that the law will not serve its purpose of protecting the community if it admits fanciful possibilities to deflect the course of justice. Where the evidence is so strong against an accused person as to leave only a remote possibility in his favour which can be dismissed with the sentence, “Of course it is possible but not in the least probable” but nothing short of that will suffice. ***It must however be noted that proof beyond reasonable doubt cannot only be obtained by the prosecution fielding or calling multiplicity of witnesses to prove its case. The requirement in effecting such proof is not in the number, but in the credibility of a witness or witnesses. An offence of murder or any offence, for that matter can be proved beyond reasonable doubt (standard) even through only one credible, honest and untainted witness and not necessarily by calling myriad of witnesses who are not credible or who have interest to serve or who are merely called to tell half-truth.*** See Nkebisi v. State (2010) All FWLR (pt. 521) 1407 or (2010) 3 SCN 170; Miiller v. Minister of Pensions (1947) 2 NIER 372.

***The law is trite, that guilt of an accused person can be proved through any of the following methods:-***

***(1) Through confessional statement of the accused, or***

**(2) Through circumstantial evidence**

**(3) Through the testimony of eye witness or eye witnesses** See *Emeka v. State* (2001) 14 NWLR (pt. 734) 666; *Igbele v. State* (2006) 2 SC (pt. 11) 61.

In the instant case, parties' learned counsel are ad idem that the first ingredient of the offence of murder i.e. causing the death of Godwill Itu was proved by the prosecution. Evidence abound that Godwill Itu, the deceased victim, has died. This was confirmed by PW1, his elder sister, PW2 the medical officer who performed the autopsy and the medical (expert) evidence he gave confirming that he died due to gun shot. The father of the deceased PW2 also confirmed the death of Godwill Itu, his son, among other pieces of evidence led at the trial court by the prosecution now respondent.

On the second issue for determination as to whether the accused/appellant was linked with the death of the deceased, it has to be noted that PW1 was also the victim of the appellant as she was the one he first accosted or attacked and it was her shouts that attracted or alerted the deceased (her younger brother) to come out just to be shot by the appellant with Exhibit C (the single barrel gun) and Exhibit D (the cartridge).

For instance, in her testimony, the PW1 had this to say at page 31 lines 20 to 25 of the record of appeal:

*"As I shouted my brother woke up to come to my rescue. But the accused shot my said brother in the stomach... my brother was rushed to the hospital the Olomoro Baptist Hospital. My brother was 15 years. Before we could get to the hospital my brother died on the way to the hospital. My brother(sic) corpse was brought back to Uli-Iyede".*

Similarly, PW5 the medical officer who performed the post mortem examination on the deceased testified thus:-

*"When I opened up, I discovered that there was a lot of blood clot in the abdomen and recovered a pellets from the abdomen... I came to the conclusion that he died of hyporolemic shock as a result of gunshot injuries".*

**From the pieces of evidence which I highlighted above it will not be out of place to conclude that the deceased died from the gun shot he received from the appellant. Since PW1 confirmed that the accused/appellant her attacker shot the**

**deceased her younger brother when the latter came to her rescue. Other witnesses called by the prosecution, also confirmed that the accused appellant was the owner of the gun which he used in shooting Godwill Itu the deceased. These pieces of evidence were never controverted or contradicted by the defence in any material particular. From the surrounding circumstances of this instant case, I do not see any reason to fault the finding of the trial court when it held the offence was proved by the respondent against the accused/appellant beyond reasonable doubt which said finding was also affirmed by the lower court** when it held at page 104 as reproduced hereunder:-

*“From the totality of the evidence adduced at the trial vide the prosecution witnesses in question there is every cogent reason for the trial court to have come to the conclusion that-*

*“The prosecution proved beyond reasonable doubt that the accused person murdered the deceased Godswill Itu on the 9th day of January 2008 at Ulli-Iyede village and I find the accused guilty of the offence of murder”.*

**The learned appellant’s counsel frowned at the way the trial court convicted and sentenced the accused/appellant on the testimony of only eye witness alone. With profound respect to the learned counsel, the general law in calling of witnesses to testify for party in a criminal trial especially the prosecution, is that it is not the requirement of the law that the prosecution must call all conceivable witnesses. The duty of the prosecution pursuant to the provisions of Section 131 (1) of the Evidence Act 2011 as amended is to call witness or witnesses to prove their case beyond reasonable doubt. See State vs Azeez & Ors (2005) 4 SC 188. I must repeat here, that it is not the number of witnesses the prosecution calls that matters, or that entitles it to prove its case. Rather, it is the quality of the evidence that is given by the witness or witnesses that matter. In fact, one witness alone may be enough to prove a case or even a murder case, like the instant case. See Iyere vs Bendel Feed & Flour Mill Ltd (2008) 7-12 SC151. Another submission of appellant’s counsel worth being considered here is that the PW1 being the only eye witness in the case is a “tainted**

**witness'. Admittedly, the PW1 is the elder sister of the deceased victim. She was also the first person attacked by the appellant. I don't think the PW1 is a tainted witness. My understanding of a "tainted witness" is that he is one witness who is either an accomplice or by the evidence he gives whether for the prosecution or for the defence may and could be regarded as having some purpose of his own to serve.** See Omotola vs State (2009) 7 NWLR (pt 1391) 148 at 177. **The appellant did not show that PW1 had any interest to serve besides giving the true account and real picture of what transpired between herself and the accused/appellant which led to the latter's death.** In the above mentioned case of Omotola, this court stated thus Ogbuagu JSC:-

*"A case is not lost on the ground of those who are witnesses being members of the same family or community. What is important is their credibility and that they are not tainted witnesses. This is because the prosecution should not be encouraged to call hired witnesses especially in murder cases or capital offences. Justice will be defeated if the prosecution of any accused person can only commence when and only when the witnesses are neither related to the accused nor are non-members of the same family. Thus evidence of a relation can be accepted if cogent enough to rule out the probability of deliberate falsehood and bias".*

**Therefore, the fact that the PW1 is related to the deceased is not enough to tag her as a tainted witness, contrary to what the appellant's counsel wanted us to believe. Her evidence was regarded as credible and cogent, hence the trial court could and indeed had the right to accept and act on it as it had done here. I am fully convinced that the trial court had considered the defence posed by the appellant before arriving at its conclusion that the prosecution had proved its case against the accused/appellant beyond reasonable doubt.**

In the instant case, the concurrent finding of the two lower courts is that it was the appellant that killed or murdered Godwill Itu. This finding was made by the trial court and was later affirmed by the court below. It is not the practice of this apex court to interfere with the concurring findings of fact of the lower courts, except in exceptional circumstances such as where it is shown that such finding

is perverse or was not supported by evidence in the record. That has not been so demonstrated in this instant case by the appellant. See *Shorunmu v State* (2010) 12 SC (pt. 1) 73; *Seven Up Bottling Company vs Adewale* (2004) 4 NWLR (pt 862) 183; *Salien v State* (2015) EJSC 39.

B I therefore, in the light of what I stated above, have no reason to interfere with the concurrent finding of the two lower courts. This second issue is hereby also resolved against the present appellant. Thus, the resultant effect of all that I have said supra and in the light of circumstance of this case, I find no merit whatsoever in this appeal  
C which I, without any hesitation, hereby dismiss it. Appeal dismissed.

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### ***GALADIMA JSC***

D I have read in advance the judgment just delivered by my learned brother AMIRU SANUSI, JSC. I agree with his reasoning and conclusions that this appeal has no merit and must be dismissed.

In this appeal, I think the appellant was properly convicted based on the overwhelming pieces of evidence from the prosecution  
E witnesses. I cannot, in any way fault the concurrent findings of facts of the lower courts that it was the appellant who killed one GODWIN ITU. The findings are not perverse. They were fully supported by ample evidence in the record. For this reason and the detailed ones adumbrated in the lead judgment, I hereby dismiss this appeal.  
F Appeal dismissed.

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### ***MUHAMMAD JSC***

G I had a preview of the lead judgment of my learned brother Amiru Sanusi JSC, just delivered. I agree with the reasoning leading to the conclusion therein that the appeal lacks merit and dismiss same. I abide by the consequential orders made in the lead judgment.

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H

### ***KEKERE-EKUN JSC***

I have had a preview of the lead judgment of my learned brother, AMIRU SANUSI, JSC just delivered. His Lordship has exhaustively considered and ably resolved all the issues submitted



for consideration in this appeal. I agree entirely with his reasoning and conclusions. I agree with him that the appeal is devoid of any merit.

I dismiss it and affirm the decision of the court below.

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B

***OKORO JSC***

I had the privilege of reading in draft the judgment just delivered by my learned brother, Amiru Sanusi, JSC. I agree with the reasons advanced to reach the conclusion that this appeal is devoid of merit and should be dismissed. C

My learned brother has quite admirably resolved the two issues nominated by the appellant for the determination of this appeal. I adopt and rely on those reasons to reach my conclusion that there is no merit in this appeal. I affirm the judgment of the lower court D accordingly. Appeal dismissed.

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