

SUPREME COURT OF NIGERIA
FRIDAY 12TH FEBRUARY, 2016. SC. 312/2014
CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA, M. U.
PETER-ODILI, O. ARIWOOLA, M. D. MUHAMMAD, JJSC

OKON ETIM AKPAN APPELLANT
V.
STATE RESPONDENT

CRIMINAL PROCEDURE - Proof - Means of - Establishment of guilt of an accused can be through - Evidence of an eyewitness - Confessional statement of accused - And circumstantial evidence (H1)

MURDER - Ingredients - Proof - To sustain a charge of murder - Prosecution must prove death of deceased - That the death was caused by act of accused - And that the act was intentional (H2)

MURDER - Proof - From content of Exhibit 2 that supported testimony of PW1 - It is difficult to counter concurrent findings of the lower courts - Which held ingredients of the offence established (H3)

MURDER - Judgment - Alternative verdict - Lower court should consider all possible defence open to accused - Including a verdict of manslaughter - But there is nothing to rely on for such verdict in this case (H4)

FACTS

The case brought against accused/appellant by prosecution/respondent before the High Court of Cross River State was for murder contrary to section 319(1) of the Criminal Code Cap C16, Laws of Cross River State of Nigeria 2005. Appellant pleaded not guilty to the charge. Respondent's case is that appellant had during a quarrel with the deceased, took the latter to a road, jerked him up and fell him on the ground. This caused the instant death of the deceased. At the trial, respondent called five witnesses in support of its case. Appellant testified for himself and maintained that nothing happened between him and the deceased and that he had no prior quarrel with the deceased and did not kill him.

PW1 (Alice Effiong Jumbo) testified of how appellant had gone to the compound where the deceased resided and while there an altercation ensued and appellant dragged the deceased to the road. When PW1 tried to stop appellant, he used his legs kicked the PW1 to allow him do what he was doing to the deceased. On getting to the road still dragging the deceased, appellant lifted the deceased up and hit him on the ground and the latter died instantly. Post mortem examination was performed on the deceased and the cause of death was traced to injuries resulting from the act of appellant carrying and throwing the deceased on the ground. Upon these facts and supporting Exhibits, the trial Court convicted and sentenced appellant to death. On appellant's appeal to the Court of Appeal, the Court affirmed the conviction and sentence and dismissed the appeal as lacking in merit. Dissatisfied further, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was not in error when it held upon the totality of the evidence adduced at the Court of trial, that the charge of murder had been established against the Appellant beyond reasonable doubt. OR IN THE ALTERNATIVE

2. Whether on all the established facts in this case, the proper verdict which ought to have been returned by the Court of Appeal against the Appellant is not one of manslaughter rather than one of murder.

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

CRIMINAL PROCEDURE - Proof - Means of

1. In reiteration of what is now trite to establish the culpability of an accused in proof of a crime, anyone of the following means is acceptable, that is:

(a) Direct evidence also known as evidence of an eyewitness or witnesses.

(b) Confessional statement of the accused person.

(c) Circumstantial evidence. (p. 1050 B)

MURDER - Ingredients - Proof

2. The learned counsel for the appellant had held the view that the prosecution had not proved the charge of murder against the Appellant beyond reasonable doubt. That brings up the matter of the essential ingredients of the offence of murder which all have to be proved to sustain a charge of murder and these are thus:-

- a) The death of the victim.**
 - b) The death of the victim was caused by the unlawful act or omission of the accused person and**
 - c) That the act or omission of the accused that resulted in the death of the deceased was intentional and was such an act that would result in death or grievous bodily harm.**
- (p. 1051 B)

MURDER - Proof

3. Again the evidence of PW1 in her description of what transpired between the appellant and the deceased and how he was hit on the hard ground. As the medical report, Exhibit '2' which evidenced the injuries sustained by the deceased supported the version put up by PW1 whose account was graphic. Indeed, it is difficult to go against the concurrent findings of the two Courts below which laid weight to the fact not only that the ingredients of the offence were established but also that done beyond reasonable doubt. The attempt by the defence to regard the comparison of the act of the 40 years old appellant in the encounter with a 68 year old as tantamount to the Court going outside the perimeter of the case of the parties goes to no issue as it was within the purview of the duty of the court to make the finding with the facts available to it in the record of the court.

This issue is resolved against the Appellant. (p. 1052 E)

Judgment - Alternative verdict

4. I agree with learned counsel for the Appellant that it is settled law that before entering the verdict of murder, the Lower court should have considered all possible defences including alternative verdict of manslaughter open to the ac-

cused.

That position of the law is not applied just off the cuff and without more. In the case at hand, the learned trial judge had in making his findings held that Appellant had sought to allude to alibi but in a way that had no particulars, aside from putting forward several versions of what had occurred between him and the deceased and so an alternative remedy of manslaughter instead of murder cannot be sustained in the absence of any supporting evidence. Therefore utilizing the authority of Akpabio v State (1994) 7 NWLR (Pt. 359) 635, there is nothing on which this substitute verdict could be made and so what the appellant seeks as an alternative palliative is not in view. This issue is also resolved against the Appellant and in favour of the Respondent. That being the case, this appeal lacks merit and I hereby dismiss it. (p. 1053 H)

REPRESENTATION

SONNY O. WOGU for the Appellant with him: Arnold Ushiadi
P. S. Bisong DPP Cross-River State for the Respondent

CASES REFERRED TO

- Uguru v. State (2002) 9 NWLR (pt. 771) 90
- Gira v. State (1996) 4 NWLR (443) 375
- Nwaeze v. State (1996) 2 NWLR (pt. 428) 1
- F Ogba v. State (1992) 2 NWLR (pt. 222) 164
- Itauma v. Akpe-Ime (2000) 12 NWLR (pt. 680) 156
- Alabi v. State (1993) 7 NWLR (pt. 307) 511
- Onah v. State (1985) 3 NWLR (pt. 12) 236
- G Haruna v. Police (1967) NMLR 145
- Okpere v. State (1971) 1 All NLR 1
- Adelumola v. State (1988) 1 NSCC 165
- Ikiok v. State (2008) 6 MJSC36
- Nkebisi v. State (2010) 1 - 2 MJSC 78
- H Agbo v. State (2006) 1 SC (pt. II) 73
- Miller v. Minister of Pensions (1942) 2 All ER 372
- Emeka v State (2002) 32 WRN 37

STATUTES REFERRED TO

Criminal Code Cap C 16 Laws of Cross River State of Nigeria 2005,
s. 319(1)

LEAD JUDGMENT BY PETER-ODILI JSC

This is an appeal against the judgment of the Court of Appeal B
Calabar Division Coram: M. L. Garba, U. I. Ndukwe - Anyanwu and
O. A. Otisi, JJCA in which the Court dismissed the appeal of the
Appellant and affirmed the judgment of the trial Court presided over
by B. T. Ebuta J. of the High Court of Cross River State, Akamkpa C
which found the Appellant guilty of the murder of Ekpenyong Ayi
Ekpenyong and sentenced him to death by hanging.

BACKGROUND FACTS:

The Appellant was charged with the offence of murder contrary to Section 319 (1) of the Criminal Code Cap C 16, Laws of D
Cross River State of Nigeria 2005. The version of the Respondent
before the trial court was that the Appellant on the 4th day of December 2004, in the course of quarrelling with the deceased “took the deceased to the road, jerked him up and fell him on the ground. In the process the deceased person died instantly”.

The accused person pleaded not guilty and the Respondent called five witnesses. The Appellant testified for himself and maintained that nothing happened between him and the deceased and that he had no prior quarrel with the deceased and did not kill him.

According to the PW1, the Appellant had had previous quarrels with the deceased and on the 4th day of December, 2004, the appellant had gone to the compound where the deceased resided and while there an altercation ensued and the appellant dragged the deceased to the road and when the PW1 (Alice Effiong Jumbo) tried to stop him, he used his legs kicked the PW1 to allow him do what he was doing. On getting to the road still dragging the deceased, the appellant lifted the deceased up and hit him on the ground and he died instantly. Post mortem examination was performed on the deceased and the cause of death was traced to injuries resulting from the act of the accused carrying and throwing him on the ground. Upon these facts and supporting Exhibits, the trial Court convicted and sentenced the Appellant to death and on appeal to the Lower court, the Lower court affirmed the conviction and sentence and

dismissed the appeal as lacking in merit.

Aggrieved on the Lower court's dismissal of the Appeal the Appellant had to further appeal to this Honourable Court.

On the 19th day of November 2015 date of hearing, the learned counsel for the Appellant, Mr. Sonny Wogu adopted the Brief of Argument of the Appellant filed on the 10th July 2014 and formulated two issues for determination which were one and the other in the alternative.

"1. Whether the Court of Appeal was not in error when it held upon the totality of the evidence adduced at the Court of trial, that the charge of murder had been established against the Appellant beyond reasonable doubt. Grounds 1, 3, 5, and 6 of the Notice and Grounds of appeal OR IN THE ALTERNATIVE

2. Whether on all the established facts in this case, the proper verdict which ought to have been returned by the Court of Appeal against the Appellant is not one of manslaughter rather than one of murder. Grounds 1, 2, 5 and 6 of the Notice and Grounds of appeal.

The learned Director of Public Prosecutions (DPP), Mr. P. S. Bisong adopted the Brief of Argument settled by Attah Ochinke Esq. and filed on 12th September 2014. He accepted for argument, the issues as distilled by the Appellant.

ISSUE 1:

Whether the Court of Appeal was not in error when it held upon the totality of the evidence adduced at the Court of trial, that the charge of murder had been established against the appellant beyond reasonable doubt.

Mr. Wogu of counsel for the Appellant submitted that the Court of Appeal was in error when it held upon the totality of the evidence adduced at the Court of trial that the charge of murder has been established against the Appellant beyond reasonable doubt. That for the respondent to succeed in proof of the offence of murder, there must be proof beyond reasonable doubt of the following:

- (a) The death of the deceased; and
- (b) The act or omission of the accused which caused the death; and
- (c) That the act or omission of the accused stated in (b) above was intentional with knowledge that death or grievous bodily harm

was its probable consequence.

He cited *Uguru v State* (2002) 9 NWLR (Pt. 771) 90 at 106; *Gira v State* (1996) 4 NWLR (443) 375; *Nwaeze v State* (1996) 2 NWLR (Pt. 428) 1; *Ogba v State* (1992) 2 NWLR (Pt. 222) 164. That to prove the offence of murder beyond reasonable doubt, the Respondent had the onus of establishing that the act or omission of the Appellant caused the death of the deceased and that the said act was of such a nature as likely to endanger life or establish the intention to kill or do grievous bodily harm to the deceased. B

For the Appellant was contended that the fragile evidence adduced on behalf of the Respondent was not capable of the proof as required by law. That on the other hand, the Appellant gave credible and unshaken evidence on oath that he did not take part in the offence for which he was charged which was not discredited by cross-examination. C

Mr. Wogu of counsel went on to say that in affirming the conviction, the Lower Court went outside the perimeter of the case set out by the parties and the judgment of the Trial Court, in holding that PW1, the only eye witness for the prosecution was not a tainted witness and other fundamental errors. That it is not within the competence of a court to make a case for the parties. He cited *Itauma v. Akpe-Ime* (2000) 12 NWLR (Pt. 680) 156 at 175. D

Learned counsel for the Appellant urges the court to hold that upon a close examination of the totality of the evidence, the essential element of the offence of murder which is that the appellant had the foresight that the death of the deceased would be the result of his act was missing. He cited *Alabi v State* (1993) 7 NWLR (Pt. 307) 511 at 527; That the case of the Respondent was based on speculations and no more. He cited *Onah v State* (1985) 3 NWLR (Pt. 12) 236 at 244. Also that the trial court equating the appellant's lies in the witness box to his guilt is not within the requirement of the law. He referred to *Haruna & anor v Police* (1967) NMLR 145; *Okpere v State* (1971) 1 All NLR 1 etc. F G

The learned DPP, Mr. P. S. Bisong contended that the respondent proved its case against the appellant beyond reasonable doubt and the ingredients of the offence of murder were well established. He cited *Adelumola v State* (1988) 1 NSCC 165, *Ikiok v State* (2008) 6 MJSC 36; *Nkebis v State* (2010) 1 - 2 MJSC 78.

For the Respondent was submitted that if there is any doubt as contended by the Appellant such doubt is fanciful or mere shadow of doubt. He referred to *Agbo v State* (2006) 1 SC (Pt.II) 73; *Miller v Minister of Pensions* (1942) 2 All ER 372 at 373.

That the Appellant's contention that the PW1 is a tainted witness is misconceived to mislead this court which is impossible. Also that the confessional statement of the Appellant is sufficient to prove his guilt and there was nothing about the Court below going outside the record in affirming the conviction and sentence.

In reiteration of what is now trite to establish the culpability of an accused in proof of a crime, anyone of the following means is acceptable, that is:

(a) ***Direct evidence also known as evidence of an eye-witness or witnesses.***

(b) ***Confessional statement of the accused person.***

(c) ***Circumstantial evidence.*** See *Emeka v State* (2002) 32 WRN 37 or (2006) 6 SCNJ 259.

Bearing in mind the above and contextualising them with what is before us, the Appellant contends that when the direct evidence method is utilized, the only eye witness PW1 being tainted, that method would fall away. This, the Respondent rejects saying that eye witness account of PW1, Alice Effiong Jumbo is good enough in spite of her previous relationship with the Appellant which had gone sour in the course of time.

The Lower Court per Otisi JCA handled the issue at pages 162 - 165 of the Record thus:-

PW1 had a previous relationship with the Appellant. She described it as "friendship" which ended after about one year. The Appellant described her as having been his "2nd wife". A crucial question that should be addressed is this: What purpose of her own did PW1 have to serve in the evidence she gave? It is not in evidence that she was in a similar relationship with the deceased, who she described as her in-law. It is not in evidence that she had any reason to want to frame the Appellant for murder. It was eye witness account of an incident that took place in her presence that she gave before the trial Court. I would not regard her as a tainted witness at all.

"Be that as it may, the point has already been made that PW1 was a tainted witness, and, the evidence of one solitary witness is

enough, if his or her evidence proves the essential issue in dispute, and if he or she is believed. See Adelumola v State (supra); Afolalu v State (supra); Idiok v State (supra)”

In taking that path, the Court below agreed with the findings of the trial court that the testimony of the PW1 was without blemish.

The learned counsel for the appellant had held the view that the prosecution had not proved the charge of murder against the Appellant beyond reasonable doubt. That brings up the matter of the essential ingredients of the offence of murder which all have to be proved to sustain a charge of murder and these are thus:-

a) The death of the victim.

b) The death of the victim was caused by the unlawful act or omission of the accused person and

c) That the act or omission of the accused that resulted in the death of the deceased was intentional and was such an act that would result in death or grievous bodily harm.

I rely on Uguru v State (2002) 9 NWLR (Pt. 771) 90 at 106; Gina v State (1996) 4 NWLR (Pt. 443) 375; Nwaeze v State (1996) 2 NWLR (Pt. 428) 1; Ogba v State (1992) 2 NWLR (Pt. 222) 164; Igabele v State (2005) NCC 59 ‘at 63.

On the proof of the three essential ingredients of the charge of murder, the Court below found that the death of the deceased on the 4th December 2004 was established with the PW1 being an eye witness to the act that brought about that death. That PW2, PW3 and PW4 saw the dead body and an autopsy performed with the report issued to the police. Also to be said is that the two Courts below found that it was the act of the Appellant intentionally done that grievous bodily harm or death would be the probable consequence was proved beyond reasonable doubt. I refer to Adelumola v State (1988) 1 NSCC 165; Idiok v State (2008) 6 MJSC 36; Garba v State (2000) FWLR (Pt. 24) 1448 at 1449 -1460; Ibikunle v State (2007) 1 SC (Pt. 11) 32.

The point being made by the Appellant of his intention not to want the result of his physical engagement with the deceased being his death is difficult to accept in the reality of the appellant, a man of 40 years lifting up an above 60 year old man and throwing him down on a hard bare road. The action leaves no room for any doubt

that no grievous bodily harm was intended or that death could not result. See John Agbo v State (2006) 1 SC (Pt. II) 73.

Still on the matter of the PW1 being a tainted witness whose testimony should not be believed the trial Court had stated thus:

*“From this accounts, the Appellant and PW1 had a previous
B amorous relationship which was no longer in existencePW1 had a
previous relationship with the Appellant. She described it as “friend-
ship” which ended after about one year. The Appellant described her
as having being his “2nd wife”. A crucial question that should be
C addressed is this: what purpose of her own did PW1 have to serve in
the evidence she gave? It is not in evidence that she was in a similar
relationship with the deceased, who she described as her in-law. It is
not in evidence that she had any reason to want to frame the appel-
lant for murder. It was an eyewitness account of an incident that took
D place in her presence...”*

The Appellant on his part had described PW1 as his second wife after the death of his first wife. Nothing was put forward as to the bias that was part of the testimony of the PW1. This situation taken alongside the finding of the learned trial judge that by the statement
E of the Appellant to the police, Exhibit ‘1’, the appellant stated his presence at the scene at the material time.

***Again the evidence of PW1 in her description of what transpired between the appellant and the deceased and how he was hit on the hard ground. As the medical report, Exhibi
F ‘2’ which evidenced the injuries sustained by the deceased supported the version put up by PW1 whose account was graphic. Indeed, it is difficult to go against the concurrent find-
ings of the two Courts below which laid weight to the fact not
G only that the ingredients of the offence were established but also that done beyond reasonable doubt. The attempt by the defence to regard the comparison of the act of the 40 years old appellant in the encounter with a 68 year old as tanta-
mount to the Court going outside the perimeter of the case of
H the parties goes to no issue as it was within the purview of the duty of the court to make the finding with the facts available to it in the record of the court.***

This issue is resolved against the Appellant.

The learned counsel for the Appellant had sought another ref-

uge on Issue 2 or alternative issue.

ISSUE 2 OR ALTERNATIVE ISSUE:

Whether on all the established facts in this case, the proper verdict which ought to have been returned by the Court of Appeal against the Appellant is not one of the manslaughter rather than one of murder. B

Learned counsel for the Appellant stated that having regard to the established facts in this case, the proper verdict which ought to have been returned by the Court of Appeal against the appellant is one of manslaughter rather than one of murder. That all possible defences including alternative verdict of manslaughter was open to the accused/appellant. He cited *Ojo v The State* (1973) NSCC 590; *Sokoto v The State* (1976) NSCC 96 etc. C

For the Respondent, it was submitted that the alternative verdict of manslaughter is not available to the Appellant as nothing in the record goes in favour of that alternative verdict and the case of *Akpabio v State* (1994) 7 NWLR (Pt. 359) 635 was not applicable herein. D

The two sides had relied on the case of *Akpabio v State* (1994) 7 NWLR (Pt. 359) 635 per Iguh JSC wherein he stated thus:- E

“The law is settled that it is the duty of a trial Court to consider all defences raised by the evidence whether or not the accused person specifically put up such defences or relied on them and to deal adequately with any other view of the facts which might reasonably arise out of the evidence given and which would reduce the offence from murder to manslaughter...” F

There can be no doubt that the Court of appeal, like the trial Court, before entering the verdict of murder had a duty on its own to consider all possible defences open to the appellants.... It seems to me under the circumstance that if there is some evidence in this appeal upon which the alternative verdict of manslaughter would have been returned, the court is entitled to substitute verdict of manslaughter for that of murder”. G

I agree with learned counsel for the Appellant that it is settled law that before entering the verdict of murder, the Lower court should have considered all possible defences including alternative verdict of manslaughter open to the accused. See *Ojo v State* (1973) NSCC 590; *Sokoto v The State* (1976) H

That position of the law is not applied just off the cuff and without more. In the case at hand, the learned trial judge had in making his findings held that Appellant had sought to allude to alibi but in a way that had no particulars, aside from putting forward several versions of what had occurred between him and the deceased and so an alternative remedy of manslaughter instead of murder cannot be sustained in the absence of any supporting evidence. Therefore utilizing the authority of Akpabio v State (1994) 7 NWLR (Pt. 359) 635, there is nothing on which this substitute verdict could be made and so what the appellant seeks as an alternative palliative is not in view. This issue is also resolved against the Appellant and in favour of the Respondent. That being the case, this appeal lacks merit and I hereby dismiss it. I affirm the judgment of the Court of Appeal in its affirmation of the decision, conviction and sentence of the trial High Court.

E **ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead Judgment of my learned brother, PETER-ODILI JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. I therefore order accordingly. Appeal dismissed.

NGWUTA JSC

G I have read in draft the lead judgment just delivered by my learned brother, Peter-Odili, JSC and I entirely agree with the reasoning leading to the conclusion that the appeal is devoid of merit.

In a murder trial the burden of proof is not discharged unless the prosecution establishes the case of death and also that the act of the accused caused the death of the deceased. (See Philip Omogodo H v. The State {1981} 5 S 15 at 26-27; R v. Samuel Abengowe 3 WACA 85; Raymond OZO v. The State {1971} 1 All NLR 111 at 115.

The cause of death is a medical and that was answered by the medical report, Exhibit 2. The manner of death relates to the ques-

tion whether the deceased died in an accident, whether he committed suicide and whether he was killed with the requisite intent. In this case, there is evidence accepted by the trial Court and affirmed by the Court below that the deceased was killed by the appellant with the prescribed intent. That is a concurrent finding of fact, a finding borne out by the evidence before the trial Court; which evidence included the confessional statement of the appellant. B

The respective ages of the deceased and the appellant were part of the evidence the trial Court evaluated to reach its decision. The argument that the Court went outside the case of the parties by having referred to the respective ages of the appellant and the deceased is grossly misconceived C

There was no basis for the learned Counsel for the appellant to classify the PW1 as tainted witness. A tainted witness connotes a person who is either an accomplice or who may be regarded as having some purpose of his/her own to serve. See *Moses v. The State* (2006) 4 SC (Pt. 11) 30. D

The determination of the status of the witnesses - whether he is an accomplice as one who has a purpose of his own to serve is made from the evidence before the Court. There is no shred of evidence that the PW1 is an accomplice in the crime with which the appellant was charged or that she had a purpose of her own to serve. E

Both the PW1 and the appellant conceded there was a relationship between them. Whether they were friends as the PW1 said or husband and wife as the appellant claim will not, without more, make the PW1 a tainted witness. F

For the above and the fuller reasons in the lead judgment I also dismiss the appeal for want of merit. Appeal dismissed. G

ARIWOOLA JSC

I had the privilege of reading in draft the lead judgment of my learned brother, Peter-Odili, JSC just delivered. I agree with the reasoning therein and the conclusion arrived thereat. The appeal is devoid of any merit and lacking in substance. Accordingly, I too will dismiss the appeal. H

Appeal is dismissed and I affirm the judgment of the court below which had earlier affirmed that of the trial court.

MUHAMMAD JSC

From the preview I had of the lead judgment of my learned brother Peter-Odili, JSC, just delivered I agree with the reasoning and conclusion therein, which I hereby adopt, that the appeal which B lacks merit stands dismissed. I adopt the consequential orders made in the lead judgment.

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