

**SUPREME COURT OF NIGERIA**  
FRIDAY 26TH FEBRUARY, 2016. SC. 200/2013  
**CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA, M. U.**  
**PETER-ODILI, O. ARIWOOLA, M. D. MOHAMMAD, JJSC**

CHUKWUEMEKA EZEUKO ..... APPELLANT  
(ALIAS DR. REV. KING)

V.

STATE ..... RESPONDENT

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APPEALS - Issues - Determination - Appellant by his failure in CA to raise issue from grounds 1 & 2 - Has deprived the court of opportunity to pronounce on issue arising from the grounds (H1)

EVIDENCE - Evaluation - Trial court does not need address from counsel to parties - To decide whether or not a piece of evidence or exhibit admitted - Should be ascribed probative value (H2)

ALIBI - Defence - Proof - The defence does not avail appellant - As evidence of witnesses placed appellant at the crime scene - Hence police need not conduct any investigation (H3)

EVIDENCE - Tainted witness - Concurrent findings of the lower courts that PW1 was an eye witness and not a tainted witness - Cannot be faulted by the Supreme Court (H4)

COURTS - Evidence - Evaluation - Court being an impartial arbiter - Does not launch investigation to prove the truth of an exhibit - Which prosecution failed to link with its case (H5)

MURDER - Evidence - Evaluation - Trial court properly evaluated evidence and convicted appellant - As his case that the burns on deceased were from Exhibits P16 & 17 - Cannot be sustained (H6)

EVIDENCE - Contradiction - Weight - Evaluation by trial court endorsed by C.A - That there was no material contradiction in prosecution's case - Is borne out of evidence in the record (H7)

**1058** Ezeuko v. State (2016) 2 KLR (pt. 380) 1057; (2016) 6 NWLR  
JUDGMENTS - Crime - Writing - Method of - Once the essential elements are present - It will not matter what method was employed in writing the judgment (H8)

EVIDENCE - Dying declaration - Statements made to PW7 by deceased were not dying declarations - As they did not relate to the actual incident - From which death of deceased resulted (H9)

CHARGES - Crime victim - Listing of - It is not the law that such victim cannot be named against accused - Unless he makes statement to police - Regarding commission of offence against him (H10)

CRIMINAL PROCEDURE - Proof - Means of - Respondent can fairly use any relevant material - Within the limits of the law and rules - To prove the guilt of appellant (H11)

MURDER - Proof - Weapon of offence - Facts of attempted murder and murder can be proved - Without the weapon used in the commission of either offence (H12)

### ***FACTS***

Before the High Court of Lagos State Ikeja, accused/appellant was arraigned on a six count charge of attempted murder contrary to section 320 of the Criminal Code Law Cap C17 Vol. 2 Laws of Lagos State 2003 and murder contrary to section 316 of the same Law. Appellant pleaded not guilty to the charge. The case against appellant – Chukwuemeka Ezeuko alias Dr. Rev. King (General-Overseer of Christian Praying Ministry) is that he accused five members of his congregation and the deceased – Miss Ann Uzoh King of immoral behaviour. Appellant summoned them and beat them with various objects. At the peak of his fury, he caused them to kneel down huddled together in an open space on his premises. It was alleged that while they were kneeling down he caused them to be doused with fuel and a burning match to be thrown at them.

Five of the six victims managed to escape with various injuries inflicted on them by appellant during the beating and burns from the burning fuel. The deceased was not as lucky as her colleagues. She was alleged to have suffered 65% degree burns from which she later

died. Appellant denied the charge, raised a defence of alibi and claimed that the deceased sustained the injuries that led to her death from explosion from a generator set. At the trial, prosecution/respondent called 12 witnesses and closed its case. Appellant testified in his defence and called 8 other witnesses. At the end of the trial, the Court found appellant guilty as charged. He was therefore sentenced for various prison terms on counts 1 to 5 and to murder on count 6. Dissatisfied, appellant promptly approached the Court of Appeal Lagos Division on an appeal. The Court dismissed the appeal for lack of merit and affirmed the judgment of the trial Court. Still not satisfied, appellant appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. Whether the trial of the Appellant on the amended information in this case is competent when the original information is undated, uninitiated and un-filed and whether failure of the lower Court to consider and decide on this issue as raised in Appellant’s Brief of argument is proper.*

*2. Whether the lower Court is obliged to invite parties to address it on the issue it raised suo motu before expunging same from its record when delivering it (sic) judgment, any evidence that was admitted without objection. Was the lower Court right in raising the issue of inadmissibility of Exhibits P1, P4 and P9 as well as part of the oral evidence if PW2, PW5 and PW7 suo motu from the record when delivering its judgment without hearing the Appellant, and was the lower Court right when it upheld the conviction of the Appellant despite the fact that the evidence adduced by investigating Police Officer (PW2) lack credibility.*

*3. Whether the lower Court was right to have dismissed the defence of alibi put up by the Appellant, and was the lower Court right when it upheld the conviction of the appellant by the trial Court despite the fact that the trial Court place (sic) the burden on the appellant to prove his innocence by not giving effect to the written statements of the deceased, in which she unequivocally stated that what happened to her was caused by generator accident.*

*4. Whether PW1 is a tainted witness whose evidence required corroboration and in the absence of which her evidence should be treated as unreliable.*

*5. Whether the lower Court was right when it held that the*

evidence of PW3 and PW4 were (sic) corroborated by the evidence of PW1, PW8, PW9 and PW10 as well as other real evidence before the Court; was the lower Court right when it relied on the uncorroborated evidence of PW1, PW3, PW4, PW9, PW10 and PW11 adduced by the prosecution at the trial Court to uphold the appellant (sic) conviction for attempted murder and murder, and was the lower Court right when it upheld the conviction of the appellant despite the fact that the trial Court was saddled with the responsibility of conducting investigation with respect to the genuineness of Exhibit (sic) PW10, PW11 and PW12 as the prosecution had failed to prove the said Exhibits against the appellant beyond reasonable doubt.

6. Whether the lower Court properly evaluated the evidence of the parties before arriving at the decision to convict the appellant, and was the lower Court right when it upheld the conviction of the appellant despite the fact that the trial Court in evaluating the evidence adduced by the prosecution has not established by credible evidence and beyond reasonable doubt that it was the appellant that caused the burnt (sic) injuries, consequently resulting to the death of the deceased and that the deceased - Ann King is dead.

7. Whether the lower Court was right when it upheld the conviction of the appellant by the trial Court despite the fact that the charges were brought by the prosecution against the appellant without any credible and reasonable suspicion that the appellant committed the offences of attempted murder and murder, and was the lower Court right when it upheld the conviction of the appellant, that the prosecution proved the cases of murder and attempted murder against the appellant beyond reasonable doubt when the prosecution failed to prove the ingredients of the offences of murder and attempted murder beyond reasonable doubt.

8. Whether the lower Court duly considered the contradictions and inconsistencies complained of by the appellant in the prosecution's case and arrived at its decision that they are not material to be fatal to the prosecution's case.

9. Whether the lower Court was right to have agreed with the trial Court that it considered and evaluated all evidence adduced as against the appellant complained that the trial Court considered the evidence of prosecution witnesses and made up its mind before considering the evidence of the appellant (sic) witnesses which show bias.

10. *Whether the belief of the deceased in danger of approaching death can be inferred from his declaration or statements, surrounding circumstances or opinion of third parties and whether the contention of the appellant that the deceased (sic) belief in danger of approaching death can be garnered and inferred from surrounding circumstances and evidence is correct and was the lower Court right when it upheld the conviction of appellant despite the fact that Section 33(1)(b) of the Evidence Act relied on by the trial Court to hold that the first two statements of the deceased does (sic) not constitute dying declaration as the accused did not believe herself to be in danger of approaching death is founded in law.* B C

11. *Whether the lower Court was right when it upheld the conviction of the appellant despite the fact that the trial Court failed to reach the conclusion from the conduct of the Honourable Director of Public Prosecution (DPP) in the matter that the prosecution (sic) are interested in persecuting appellant and not prosecuting him.* D

12. *Whether the lower Court was right when it upheld the conviction of the appellant for the offence (sic) of attempted murder and murder despite the fact that no weapon was found or recovered from the accused/appellant.*” E

**HELD** (Unanimously dismissing the appeal per

**NGWUTA JSC)**

*APPEALS - Issues - Determination* F

**1. Now an appeal is an invitation to a higher Court to review the decision of a lower Court to find out whether on proper consideration of the facts placed before it and the applicable law, the lower Court arrives at a correct decision. By the above definition of appeal an appellate Court has a duty or power to deal with an issue or point on which the Court below did not make a pronouncement.** G

**In the appeal before the Court below the appellant, by failure to raise any issue from his grounds 1 and 2 of the notice of appeal, deprived that court of an opportunity to pronounce on the issue(s) arising therefrom. It is therefore not fair for learned Counsel for the appellant to accuse the Court below of failure “to consider and decide on this issue as raised** H

**in the appellant’s brief of argument.”**

**The issue was not before the Court below and in this Court it has not been raised as new issue which was not argued in the Court below. This Court has no jurisdiction to pronounce on an issue which was not dealt with by the Court below. Issue 1 is therefore resolved against the appellant.**  
(p. 1090 G)

*EVIDENCE - Evaluation*

**2. In other word, the trial Court saw no reason to ascribe probative value to either of the exhibits or oral evidence of PW5 and PW7 relating to them. It is not known from where the learned Counsel for the appellant imported the word “expunge” into the proceeding of the trial Court or the reasons for so doing. May be learned Counsel for the appellant laboured under the mistaken impression that the use of stronger word will enhance his chances of success in the appeal. Whatever his intention in the use of the word “expunge”, on the facts of this case, the negative effect of expunge and discountenance are the same to the effect that the exhibits and the oral evidence on them have no probative value; and this is the decision the lower Court rightly affirmed in my view.**

**The exhibits and oral evidence were received by the trial Court. The trial Court did not need address from Counsel to the parties to decide whether or not a piece of evidence and exhibits admitted should be ascribed probative value, nor are Counsel to the parties entitled to be heard in the evaluation of the evidence before the Court. Learned Counsel to the appellant had a duty to persuade the trial Court that the evidence adduced by the investigating Police Officer (PW2) lack credibility. He cannot assume that fact and hang part of his case on it. I resolve issue 2 against the appellant.** (p. 1091 G)

*ALIBI - Defence - Proof*

**3. I will now deal with the issue of *alibi*. *Alibi* in its Latin origin means “Elsewhere”. The defence of *alibi* postulates that the accused was somewhere other than the *locus criminis* at the time the offence was committed. It means he was not at the**

**scene at the time of the commission of the crime and could therefore not have committed it or participated in its commission.**

**The burden of proof of alibi is on the accused person. Though proof is on the balance of probabilities. For an accused person to successfully plead alibi, the plea must be unequivocal, he must state the time, the place and the people who were with him at the time and place and he must raise the plea during investigation and not at the trial, so that the veracity of his statement to the Police to that effect can be verified.**

**Once the defence of alibi is raised and the evidential burden discharged, the onus lies on the prosecution to disprove it. In the case at hand, did the appellant discharge the burden of proof of alibi on the balance of probabilities? The answer is in the negative. Though he said that he was in his bedroom at the material time in his statement, Exhibit P2, he gave no name of anyone with him at the time and it was in Court that he mentioned those he claimed were with him at the time in his room.**

**In any case, there was evidence of witnesses which the trial Court believed placing the appellant at the scene of crime at the time of commission of the crime. The evidence placing the appellant at the scene is overwhelming and it was not necessary for the Police to expend time and resources investigating the obvious.**

**In view of the totality of evidence before the trial Court, the appellant's plea of alibi is an afterthought and was properly dismissed by the trial Court and the dismissal affirmed by the Court below. I resolve issue 3 against the appellant.**  
(p. 1092 G)

#### *EVIDENCE - Tainted witness*

**4. Issue 4 raises two questions: (a) Who is a tainted witness, and (b) on the facts of this case, is PW1 a tainted witness? A tainted witness is a person who may be strictly an accomplice but is a witness with some purpose of his own to serve. The phrase "tainted witness" connotes either of the following: (a)**

**a witness who is by evidence an accomplice in the offence charged or (b) a person who may be regarded on the evidence as having some purpose of his own to serve. The portions underlined above indicate that the question whether one is an accomplice or one who has a purpose of his own to serve in giving evidence is not at large.**

**It is determined from the evidence before the Court including, but not limited to, his evidence. For a witness to be an accomplice, except in case of receiving stolen property and in cases showing system, he must have participated in the actual offence charged whether as principal or accessory before or after the fact. It is an issue to be decided in the circumstance of each case. The same goes for the question whether or not the PW1, in giving evidence, had a purpose of her own to serve.**

**The learned trial Judge heard the witness testify in Court, read her body language and determined that the PW1 was neither an accomplice in the crime charged nor had she a purpose of her own to service and came to the conclusion that the PW1 was not a tainted witness and that her evidence did not need corroboration.**

**The Court of Appeal affirmed the decision of the trial Court, holding that “PW1 being an eye witness and a victim of the crime is not a tainted witness. She is a competent witness and her evidence does not require corroboration...” This is a concurrent finding of fact by the trial Court and the court of Appeal. Appellant did not attempt to demonstrate a perversity in the findings.**

**He did not show that there was no sufficient evidence to support the findings. In the circumstances, this Court will not disturb the findings. (p. 1094 A)**

*Evidence - Evaluation - Neutrality of*

**5. This is only a part of an issue for determination. An issue in an appeal is a succinct and precise question based on one or more grounds of appeal for the determination of the Court. It is a question of law or fact or both and should not include argument or opinion or fact not yet established. The court as**

**an umpire and does not take sides in the dispute. If at the end of the day the prosecution “failed to prove the said exhibits against the Appellant beyond reasonable doubt”, the Court will reject the exhibits.**

**It is not the business of the Court to launch an investigation to prove the genuity of an exhibit which the prosecution has failed to link with its case. The court is an impartial arbiter and does not help one party against the other. Issue 5 is resolved against the appellant.** (p. 1095 E)

*MURDER - Evidence - Evaluation*

**6. Evaluation of evidence is primarily the exclusive preserve of the trial Court except in case of documentary evidence in which the trial Court and the appellate court have equal right to evaluate the evidence. Where the trial Court failed to evaluate the evidence or to evaluate it properly or the evaluation resulted in a perverse conclusion the appellate Court would re-assess and evaluate the evidence to reach a joint conclusion - which may be different from that of the trial Court, but not necessarily so.**

**It was submitted that in view of the volatility of petrol the person who lit the match could have been burnt. Appellant must have forgotten that the person who threw the match at the victims did that from a distance - he threw it - and did not stand close to the victim nor was he bathed in petrol as the victim. I am of the view that the trial court evaluated the evidence properly, came to the conclusion that appellant was guilty and convicted him.**

**The Court of Appeal in its review of the case, endorsed the findings of the trial Court, having found no perversity therein. The unexplained failure of the appellant to produce the burnt generator raises a presumption that the victims and the deceased did not sustain their injuries from any burnt generator but that in the circumstances of this case, they were deliberately set ablaze. This is the outcome of proper evaluation of evidence before the trial court. The issue is resolved against the appellant.** (pp. 1096 B/1097 F)

*EVIDENCE - Contradiction - Weight*

**7. Issue 8 is on whether the lower Court duly considered the contradictions and inconsistencies the appellant complained of before its decision that they are not material. Again, I must correct the learned Counsel for the appellant. It was the trial Court that duly considered the contradiction and inconsistencies alleged to beset the prosecution's case, determined that they are not material and so cannot be fatal to the prosecution's case. This finding was endorsed by the lower Court.**

**He said that the PW1 told the Court that PW4 brought the fuel in a bowl whilst PW3 said that PW4 brought the fuel in a jerry can. Fuel was brought and on the facts before the Court, the container in which it was brought is immaterial. Also whether the fuel was poured once or twice and whether the match was struck more than once or whether the fire was set by the use of a lighter do not go to the merit but are in circumstances peripheral matters that do not touch the substance of the case against the appellant.**

**As for the description of the deceased in the medical and post mortem report, it is not part of the prosecution's case that the deceased was burnt beyond recognition. By his reliance on the so called contradictions and inconsistencies, the appellant is chasing shadows in place of substance. In any case, in human affairs, if two people who observe an incident give evidence of what they observed and the evidence tallies in all respects, the evidence is suspect. The depth of observation, concentration and ability to reproduce what is observed must vary from person to person. The consideration of the trial Court, endorsed by the Court below, that there was no material contradiction or inconsistency is borne out of the evidence in the record. I resolve issue 8 against the appellant.**  
(p. 1098 H)

*JUDGMENTS - Writing - Method of*

**8. Judgment writing is an art and once the essential elements are present in the judgment, it will not matter what method was employed in writing the judgment. Also whether the appellant's case or the prosecution's case was considered**

**first will not affect the trial Court's resolution of the issues in contention between the parties. Usually, it is the prosecution's case that is considered before that of the defence but even if the defence case is considered first, it will not necessarily improve his case or diminish the prosecution's case.**

**If the Court considered the prosecution's case and made up its mind that the appellant committed the offence, it would have been unnecessary waste of time for the Court to consider the evidence on the appellant's side. (p. 1099 G)**

#### *EVIDENCE - Dying declaration*

**9. This issue is closely tied to issue 2 which was resolved against the appellant. The question is: were the two statements dying declarations in the sense that the deceased believed herself to be in danger of approaching death at the time she made them? Dying declaration is an exception to the hearsay rule. See Section 33 of the Evidence Act. It is a declaration made in extremity, when the maker is at the point of death and every hope of life is gone. In this state, the motive to tell lies is silenced and the mind is induced by the most powerful consideration: to speak the truth.**

**Dying declaration is admissible only in trials for murder and manslaughter when the declaration is made by the victim of the homicide. It is admissible to prove the cause of death or the transaction resulting in the death of the deceased but not the motive for the crime or to explain subsequent or previous transactions. The declarant must have believed himself/herself to be in danger of approaching death.**

**Was there positive proof at the trial that at the time the deceased made the first two statements she believed herself to be in danger of approaching death. Would she have been a competent witness at the trial if she were alive? All these conditions for the admissibility of the two statements as dying declaration appear to have existed except the belief that she was in the danger of approaching death.**

**Incidentally, the only piece of evidence as to the state of mind of the deceased when she made the statements came from the appellant. At p. 6.03 in his brief, learned Counsel for**

***the appellant referred to the evidence of PW7 to the effect “that the deceased told him that she was feeling the highest pain she had ever felt before and that she did not know whether she was going to make it.” (Underlining mine)***

***In my view, the statement the deceased allegedly made to PW7 does not unequivocally show a hopeless expectation of death. That she did not know whether she was going to make it does not show she believed herself to be in danger of approaching death. The trial Court rightly found, and the Court below rightly affirmed, that the two statements were no dying declarations. In addition, I hold that the two statements, even from their contents, did not relate to the actual incident, as found by the trial Court, from which the death of the deceased resulted. They could not have been used as part of the *res gestae*. The issue is resolved against the appellant.***  
 (p. 1100 F)

*CHARGES - Crime victim - Listing of*

***10. The DPP included one Kosisochukwu (PW10) as a victim of the crime even though he did not make a statement to the Police at the time. It is not the law that a victim of a crime cannot be named in the charge against the perpetrator of the crime unless he makes a statement to the Police regarding the commission of the offence against him. Were it so, an alleged murderer could not be charged to Court as the victim would not be named in the charge for a dead man cannot make a statement to the Police.*** (p. 1102 G)

*CRIMINAL PROCEDURE - Proof - Means of*

***11. Finally on issue 11, learned Counsel for the appellant complained that during the cross-examination of DW9, the DPP quoted verses of the Bible in open court to the prejudice and ad judgment of the appellant as guilty. Learned Counsel for the appellant should have quoted the verses of the Book of Life which prejudiced, and adjudged his client as guilty. The DPP could use any relevant material he could fairly use within the limits of the law and rules to prove the guilt of the appellant.***

**Moreover, the appellant who purports to live by the Bible ought to be tried by the Living Word of the Book of Life. Learned Counsel for the appellant did not demonstrate how any or all of his complaints in issue 11 adversely affected his client's case at the trial Court. The issue is resolved against the appellant.** (p. 1103 D) B

*MURDER - Proof - Weapon of offence*

**12. I will take the case of attempted murder first. Attempt to commit a crime is an inchoate offence, the elements of which are the physical acts of the accused sufficiently proximate to the complete offence with an intent on the part of the accused to commit the complete offence.** C

**It is something more than mere preparation to commit the offence.** D

**In the murder, the definition of the offence does not include the weapon with which it is committed. See for instance Section 316 of the Criminal Code applicable to the Southern part of the country. In neither the case of attempted murder nor murder did the elements constituting the offence include the weapon used in the commission of the offence. In the same way, that the fact of a murder is provable by circumstantial evidence without the body of the deceased or trace thereof and in absence of a confessional statement by the accused, the facts of attempted murder and murder can be proved without the weapon used in the commission of either offence.** E F

**This is more so in a case such as this when eye witnesses gave evidence of what they heard, saw and observed. In any case, when the prosecution proved the necessary elements of the two offences the appellant had the onus of establishing his case that the injuries suffered by the victims from which one of them died resulted from a generator accident in which case he had a duty to himself to tender the generator or its remains. I resolve issue 12 against the appellant.** (p. 1103 H) G H

**NOTABLE POINTS OF INTEREST**  
**NGWUTA JSC**

**1. Appeals – Limit of reply brief**

A reply brief is not a forum for emphasizing the argument in the appellant's brief, it is not a forum for presenting a new and better appellant's brief or repeating arguments already in the said brief; neither is it meant to repeat the issues joined either by emphasis or by expatiation. A reply brief, as the name implies, ought to be confined to new issues or points of law in the respondent's brief. Appellant's reply brief is not one properly so-called. It is a supplementary brief which has no place in our appellate practice and it is therefore discountenanced in the determination of the appeal.

(p. 1088 H)

**2. Suspicion – Meaning of**

Suspicion implies a belief or opinion based upon facts or circumstances which do not amount to legal proof or proof at all. See evidence before the trial Court.

Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. Suspicion arises at or near the starting point of an investigation for the end of obtaining prima facie proof of crime. When such proof has been obtained, the Police case is complete and the matter is taken to Court. (p. 1098 D)

**3. Legal practitioner to conduct case within ethical limits**

Learned Counsel for the appellant would have been of assistance if he had reproduced, or even referred to portions of the judgment herein the trial Court summed up the appellant's case pre-judicially. This is a serious charge which learned Counsel, an officer in the temple of justice, should not have made without facts to back it up.

It amounts to a charge of misconduct against not only the learned trial Judge but also the learned Justices of the Court of Appeal who endorsed the judgment complained about. Learned Counsel has a right to espouse his client's case but he has to do that within the limits prescribed by law and its rules and rules of ethical conduct. The issue is resolved against the appellant. (p. 1100 B)

**REPRESENTATION**

Anne T. U. Ibinola (Mrs.) with Chikezie Eguma for the appellant  
Adeniji Kazeem, A-G Lagos State with E. I. Alakija, DPP; D. A. Idowu,

J. I. Jacobs and Olariroba for the respondent

### **CASES REFERRED TO**

PDP v. Okwocha (2012) All FWLR (pt. 626) 449

Akpa v. State (1991) 5 SCNJ 1

Shande v. State (2005) All FWLR (pt. 229) 1312

B

Sambo Petroleum Ltd. v. UBA Plc (2010) 6 NWLR 530

Odebesin v. State (2014) LPELR 22694 SC

Ikoro v. State (2012) 4 NWLR (pt. 1290) 351

Sowemimo v. State (2004) 11 NWLR (pt. 885) 515

C

Mbeni v. State (1988) 3 NWLR (pt. 84) 615

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

Onubogu v. State (1974) 9 SC 1

Garuba v. Yahaya (2007) 1 SC (pt. 11) 262

D

### **STATUTES REFERRED TO**

Criminal Code Law Cap C17 vol. 2 Laws of Lagos State 2003, ss. 316, 320

Evidence Act 2011 (as amended), ss. 33(1)(b), 140, 167(d)

E

### **LEAD JUDGMENT BY NGWUTA JSC**

On the 26<sup>th</sup> day of September, 2006 the appellant, Chukwuemeka Ezeuko, alias Dr. Rev. King ‘M’ was arraigned on a six count charge (as amended) before the High Court of Justice, Lagos State in the Ikeja Judicial Division. The amended six count charge is reproduced here below:

F

*“Statement of Offence 1<sup>st</sup> Count:*

*Attempted murder contrary to Section 320 of the Criminal Code Law Cap C 17 Vol. 2 Laws of Lagos State 2003.*

G

*Particulars of Offence:*

*Chukwuemeka Ezeuko alia Dr. Rev. King M on or about the 22<sup>nd</sup> day of July, 2006 at No 6B Canal View Layout, Ajao Estate, Lagos in the Ikeja Judicial Division did attempt to murder Olisa Chiejina by intentionally causing fuel to be poured on his person and throwing a lit match on him.*

H

*Statement of Offence 2nd Count:*

*Attempted murder contrary to Section 320 of the Criminal Code Law Cap C 17 Vol 2 Laws of Lagos State 2003.*

*Particulars of Offence:*

Chukwuemeka Ezeuko, alias, Dr. Rev. King 'M' on or about the 22nd day of July 2006 at No. 6B Canal View Layout, Ajao Estate, Lagos in the Ikeja Judicial Division did attempt to murder Onuorah Chizoba by intentionally causing fuel to be poured on her person and throwing a lit match on her.

*Statement of Offence, 3rd Count:*

Attempted murder contrary to Section 320 of the Criminal Code Law Cap C 17 Vol. Laws of Lagos State 2003.

*Particulars of Offence:*

Chukwuemeka Ezeuko, alias Dr. Rev. King 'M' on or about the 27 of July, 2006 at No. 6B Canal View Layout, Ajao Estate, Lagos State in the Ikeja Judicial Division did attempt to murder Vivian Ezeocha by intentionally causing fuel to be poured on her person and throwing a lit match on her.

*Statement of Offence 4th Count:*

Attempted murder contrary to Section 320 of the Criminal Code Law Cap C 17 Vol. 2 Laws of Lagos State 2003.

*Particulars of Offence:*

Chkwuemekaka Ezeuko, alias Dr. Rev. King 'M' on or about the 22nd of July 2006 at No.6B Canal View Layout, Ajao Estate, Lagos in the Ikeja Judicial Division did attempt to murder Jessica Nwene by intentionally causing fuel to be poured on her person and throwing a lit match on her.

*Statement of Offence 5<sup>th</sup> Count:*

Attempted murder contrary to 320 of the Criminal Code Law Cap C17 Vol. 2 Laws of Lagos State 2003.

*Particulars of Offence:*

Chukwuemeka Ezeuko, alia Dr. Rev. King 'M' on or about the 22nd of July 2006 at 6B Canal View Layout, Ajao Estate, Lagos in the Ikeja Judicial Division did attempt to murder Kosisochukwu Nwankwo by intentionally causing him to be poured on his person and owing a lit match on him.

*Statement of Offence 6<sup>th</sup> Count:*

Murder contrary to Section 316 of the Criminal Code Law Cap C17 Vol. 2 Laws of Lagos State 2003.

*Particulars of Offence:*

Chukwuemeka Ezeuko, alias Dr. Rev. King 'M' on or about the

*22nd of July 2006 at No. 6B Canal View Layout, Ajao Estate, Lagos in the Ikeja Judicial Division murdered Ann Uzoh alias Ann Uzoh King.”*

Briefly, the facts leading to the incident of 22nd July, 2006 are as follows: At all material times the appellant, Chukwuemeka Ezeuko, alias Dr. Rev. King, was the General-Overseer of the Christian Praying Assembly with headquarters at Ajao Estate, Ikeja, Lagos. This is not in dispute. Also the parties are ad idem on the father/sons/daughters relationship which existed between the appellant and some of his congregation, particularly the surviving five victims of the July 22<sup>nd</sup> 2006 incident and the deceased (victim). C

At this point the parties parted ways. The prosecution's case is that the appellant accused the surviving victims and the deceased of immoral behavior. He summoned them and beat them with various objects. At the peak of his fury, he caused them to kneel down huddled together in an open space on his premises. It was alleged that while they were kneeling down he caused them to be doused with fuel and a burning match to be thrown on them. D

Five of the six victims managed to escape with various injuries inflicted on them by the appellant during the beating and burns from the burning fuel. The deceased, Ann Uzoh King was not as lucky as her colleagues. She was alleged to have suffered 65% degree burns from which she later died. E

It was stated that appellant applied some ointment on the serious burns sustained by the deceased after which he took her to the hospital. On the other hand, appellant admitted punishing the victims for immoral behavior among themselves but claimed that the punishment was different from the incident giving rise to this charge in time and place. It was alleged that appellant was upstairs in his residence when he heard fire-alarm and went down to see that a generating set had blown up and the deceased suffered burns from the resulting fire. F G

The prosecution opened its case on 9th October, 2006, called 12 witnesses and closed its case. The appellant testified in his defence and called eight other witnesses for the defence. H

In the judgment delivered on 11<sup>th</sup> day of January, 2007 the learned trial Judge after a review of the case of each side, concluded thus:

*"I therefore find the accused person guilty as charged on each of the Counts 1, 2, 3, 4, 5 and 6. I hereby convict him accordingly on each of the said Counts 1, 2, 3, 4, 5 and 6."*

At the sentencing stage, His Lordship remarked, inter alia:

B *"The severity of the offences and the cruel callousness behind them must be reflected in sentencing the accused while in view of the circumstances of the criminal transaction taking benefit of the sentencing directive stated by the Court of Appeal in Bankole v. The State (1980) 1 NCR 334 at 340."*

C The learned trial Judge then sentenced the appellant:

*"The accused is hereby sentenced as follows:*

1. 20 years imprisonment including hard labour in respect of Count 1.

D 2. 20 years imprisonment including hard labour in respect of Count 2.

3. 10 years imprisonment including hard labour in respect of Count 3.

4. 20 years imprisonment including hard labour in respect of Count 4.

E 5. 20 years imprisonment including hard labour in respect of Count 5.

6. All the prison sentences shall run concurrently and shall only take effect if the sentence in respect of Count 6 is commuted or otherwise set aside.

F 7. And having been found guilty of murder in respect of Count 6, the sentence of this Court upon you Chukwuemeka Ezeuko alias Dr. Rev. King is that you be hanged by the neck until you be dead and may the Lord have mercy on your soul."

G By a notice of appeal filed on 16/1/2007, appellant appealed to the Court below on 16 grounds therein stated. Subsequently the appellant was granted leave by the Court below to file and argue additional grounds of appeal, pursuant to which he filed on 17<sup>th</sup> June, 2008 an amended notice of appeal containing a total of 31 grounds  
H from which 16 issues were distilled for the lower Court to resolve.

In its judgment delivered on 1st February, 2013, the Court of Appeal, Lagos Judicial Division concluded as follows:

*"Consequently upon the foregoing and having resolved the issues against the appellant, the appeal herein is devoid of any merit*

*and is hereby dismissed. The Judgment of the High Court of Lagos State, Ikeja Judicial Division delivered on 11<sup>th</sup> January, 2007 in case No. IP/133C/2006 is hereby affirmed. The conviction and sentences imposed on the appellant are hereby affirmed.”*

In the lead judgment, Hon Justice Adamu Jauro, JCA was constrained to remark, *inter alia*:

*“Before I draw the curtain, I must by way of parenthesis observe that the facts of this case are so miserable, sordid and morbid, reflecting the moral decay of the age in which we live. The appellant, a religious leader, instead of protecting and guarding his followers, has turned round, brutalizing them, setting them ablaze, roasting an innocent soul to death and offering them stone when they desire bread and scorpion when they demand bread...”*

Appellant appealed the judgment to this Court on a total of 26 grounds.

In his amended brief of argument deemed filed on 5/11/2015, learned Counsel for the appellant framed the following twelve (12) issues from the 26 grounds of appeal:

*“1. Whether the trial of the Appellant on the amended information in this case is competent when the original information is undated, uninitiated and un-filed and whether failure of the lower Court to consider and decide on this issue as raised in Appellant’s Brief of argument is proper.*

*2. Whether the lower Court is obliged to invite parties to address it on the issue it raised suo motu before expunging same from its record when delivering it (sic) judgment, any evidence that was admitted without objection. Was the lower Court right in raising the issue of inadmissibility of Exhibits P1, P4 and P9 as well as part of the oral evidence if PW2, PW5 and PW7 suo motu from the record when delivering its judgment without hearing the Appellant, and was the lower Court right when it upheld the conviction of the Appellant despite the fact that the evidence adduced by investigating Police Officer (PW2) lack credibility.*

*3. Whether the lower Court was right to have dismissed the defence of alibi put up by the Appellant, and was the lower Court right when it upheld the conviction of the appellant by the trial Court despite the fact that the trial Court place (sic) the burden on the appellant to prove his innocence by not giving effect to the written*

*statements of the deceased, in which she unequivocally stated that what happened to her was caused by generator accident.*

4. *Whether PW1 is a tainted witness whose evidence required corroboration and in the absence of which her evidence should be treated as unreliable.*

B 5. *Whether the lower Court was right when it held that the evidence of PW3 and PW4 were (sic) corroborated by the evidence of PW1, PW8, PW9 and PW10 as well as other real evidence before the Court; was the lower Court right when it relied on the uncorroborated evidence of PW1, PW3, PW4, PW9, PW10 and PW11*  
C *adduced by the prosecution at the trial Court to uphold the appellant (sic) conviction for attempted murder and murder, and was the lower Court right when it upheld the conviction of the appellant despite the fact that the trial Court was saddled with the responsibility of*  
D *conducting investigation with respect to the genuineness of Exhibit (sic) PW10, PW11 and PW12 as the prosecution had failed to prove the said Exhibits against the appellant beyond reasonable doubt.*

6. *Whether the lower Court properly evaluated the evidence of the parties before arriving at the decision to convict the appellant,*  
E *and was the lower Court right when it upheld the conviction of the appellant despite the fact that the trial Court in evaluating the evidence adduced by the prosecution has not established by credible evidence and beyond reasonable doubt that it was the appellant that caused the burnt (sic) injuries, consequently resulting to the death of*  
F *the deceased and that the deceased - Ann King is dead.*

7. *Whether the lower Court was right when it upheld the conviction of the appellant by the trial Court despite the fact that the charges were brought by the prosecution against the appellant with-*  
G *out any credible and reasonable suspicion that the appellant committed the offences of attempted murder and murder, and was the lower Court right when it upheld the conviction of the appellant, that the prosecution proved the cases of murder and attempted murder against the appellant beyond reasonable doubt when the prosecu-*  
H *tion failed to prove the ingredients of the offences of murder and attempted murder beyond reasonable doubt.*

8. *Whether the lower Court duly considered the contradictions and inconsistencies complained of by the appellant in the prosecution's case and arrived at its decision that they are not mate-*

rial to be fatal to the prosecution's case.

9. Whether the lower Court was right to have agreed with the trial Court that it considered and evaluated all evidence adduced as against the appellant complained that the trial Court considered the evidence of prosecution witnesses and made up its mind before considering the evidence of the appellant (sic) witnesses which show bias. B

10. Whether the belief of the deceased in danger of approaching death can be inferred from his declaration or statements, surrounding circumstances or opinion of third parties and whether the contention of the appellant that the deceased (sic) belief in danger of approaching death can be garnered and inferred from surrounding circumstances and evidence is correct and was the lower Court right when it upheld the conviction of appellant despite the fact that Section 33(1)(b) of the Evidence Act relied on by the trial Court to hold that the first two statements of the deceased does (sic) not constitute dying declaration as the accused did not believe herself to be in danger of approaching death is founded in law. C

11. Whether the lower Court was right when it upheld the conviction of the appellant despite the fact that the trial Court failed to reach the conclusion from the conduct of the Honourable Director of Public Prosecution (DPP) in the matter that the prosecution (sic) are interested in persecuting appellant and not prosecuting him. E

12. Whether the lower Court was right when it upheld the conviction of the appellant for the offence (sic) of attempted murder and murder despite the fact that no weapon was found or recovered from the accused/appellant. " F

In his brief of argument deemed filed on 5/11/2015, learned Counsel for the respondent distilled nine (9) issues from the appellant's grounds of appeal for the Court to resolve. The nine issues are reproduced hereunder: G

1. Whether the trial of the appellant on the amended information in this case is competent when the original information is undated, uninitiated, unfilled and whether the failure of the lower Court to consider and decide on the issue as required in appellant's brief of argument is proper? H

2. Whether the Court below was right when it held that the trial Court need not invite parties to address it specifically on evidential value to ascribe to Exhibit P1, P4, P9 and part of the oral testimony

nies of PW2, PW5 and PW7. (Grounds 2 of the Notice of Appeal)

3. Whether having regard to the totality of the evidence, particularly Exhibits P1, P4, P9 and part of the oral testimonies of PW2, PW5 and PW7, the Court below was right to hold and confirm that these (sic) evidence do not amount to dying declaration or res gestae. (Grounds 1, 2 and 25 of the Notice of Appeal)

4. Whether the Court below was right to have dismissed the defence of alibi put up by the appellant. (Grounds 3 and 4 of the Amended Notice of Appeal)

5. Whether PW1 is a tainted witness whose evidence required corroboration and in the absence be treated as unreliable. (Ground 5 of the Amended Notice of Appeal)

6. Whether the Court below was right when it affirmed the decision of the trial Court that the evidence of PW3 and PW4 corroborated by the evidence of PW1, PW8, PW9 and PW10 as well as other real evidence before the Court. (Grounds 6 and 7 of the Amended Notice of Appeal)

7. Whether the Court below was right to have held that the trial Court properly evaluated Evidence of parties before arriving at its decision to convict the appellant. (Grounds 8, 9, 10, 11, 12, 13, 14 and 05 of the Amended Notice of Appeal)

8. Whether the Court below was right to have affirmed the decision of the trial Court that the prosecution proved the cases of murder and attempted murder against the appellant beyond reasonable doubt.

9. Whether the Court below duly considered the contradictions and inconsistencies complained of by the appellant in the prosecution of this case and arrived at its decision that they are not material (sic) to be fatal to the prosecution's case."

In his argument on issue 1, learned Counsel for appellant argued extensively that the original information is undated, uninitiated and un-filed and ipso facto there was nothing to amend. Learned Counsel argued that since the original information does not exist in law, the prosecution cannot amend a process that is incurably invalid. He drew the attention of the Court to the fact that it was at the address stage that Counsel to appellant found that the information as originally filed was incurably defective, and urged the Court to resolve the issue in favour of appellant and set aside the entire pro-

ceeding as the amended information suffer the same fate with its origin.

The complaint in issue 2 is that the lower Court, *suo motu*, raised the issue of admissibility of Exhibits P1, P4 and P9 and part of the evidence of PW2, PW5 and PW7 and resolved the issue so raised without calling learned Counsel for the parties to address it on the said issue. He argued that by raising the issue *suo motu* and resolving same without giving Counsel for the parties the opportunity to address it the appellant was denied his right to fair hearing. He relied on, among others, *PDP v. Okwocha* (2012) All FWLR (Pt. 626) 449 at 471 para. 5-H. B  
C

He impugned the judgment of the Court below which affirmed the judgment of the trial Court which convicted the appellant despite the fact that the trial Court relied on the evidence of PW2 with regard to the generators tendered in evidence. He said that the PW2 did not identify the two generators admitted in evidence and marked Exhibits 16 and 17. D

He argued that the generators specified in the search warrant were Suzuki 8 V7500 and Elemex 5000 DX but that none of Exhibits 16 or 17 is identified with any of the generators brought to Court, and that none of the generators, Exhs. 16 or 17, was tested in Court to confirm whether they malfunctioned. He argued further that there was no expert evidence as to the state of the generators to show whether such generators could have been burnt in the accident. E

Learned Counsel complained that the prosecution merely dumped their exhibits on the Court and expected the Court below to do the prosecution's job perhaps, by tying the exhibits to the evidence of the witnesses). He urged the Court to resolve issue 2 in favour of the appellant. F

In issue 3, learned Counsel stated that as the law requires of him, the appellant, at the earliest opportunity, set up a defence of alibi, thus giving the Police the opportunity to investigate to prove or disprove same. It is his case that at the time of fire, the appellant was alone upstairs while the DW1 was working downstairs. Counsel argued that if there is no *prima facie* case made against an accused, the judge should not import any evidence in order to convict him. G  
H

He complained that the deceased, Ann King, made statements, Exhibits P1 and P4 stating that the injury on her body was caused by

generator accident but the trial Court discountenanced Exhibit P1 and P4 which exonerated the appellant in favour of Exhibit 9 which implicated the appellant. He urged the Court to resolve issue 3 in favour of the appellant.

Issues 4 and 5 were argued together. Learned Counsel argued B that “*after finding that the role played by PW4 could ordinarily make her an accomplice to the alleged crime of the appellant, that she made two contradictory statements to the Police and admitting telling lies under the directive of the appellant, the trial Court and the Court below should have rejected her evidence as unsatisfactory but rather C held that her evidence was corroborated by evidence on the record.*” Learned Counsel also attacked the evidence of PW1 on the grounds that she admitted telling lies on her earlier encounter with the appellant. He argued that the Court below erred in law when it agreed D with the trial court’s evaluation of PW4’s evidence and concluded that the PW4 was telling the truth even though her evidence needed corroboration which the Courts said they found in the evidence of PW1, PW9 and PW10.

He argued that the record shows that: (1) PW1, PW3, PW4, E PW9, PW10 and PW11 were members of the appellant’s church and had ugly encounters with the appellant in the past. (2) PW1, PW3, PW4, PW9, PW10 and PW11 have a purpose of their own to serve by giving evidence at the trial against the appellant. (3) PW1, PW3, PW4, PW9, PW10 and PW11 used the trial to settle old scores and F grudges against the appellant. (4) Some of the prosecution witnesses in their extrajudicial statements stated that the appellant will die. “*These, we submit, with all respect should be resolved in favour of the appellant.*”

G Learned Counsel argued further that Exhibits P10, P11 and P12 were not recovered by PW2 in the presence of the appellant or pursuant to any search warrant and that since the appellant denied ownership of the exhibits, the circumstances of their recovery are questionable.

H He said Exhibit P10 was not subjected to any forensic test for traces of fuel and PW4’s finger print which would have corroborated the evidence that exhibit P10 was indeed used by PW4 in the pouring of the fuel on the victim. On Exhibit P13, learned Counsel argued that the prosecution’s failure to ascertain by forensic test that

the stain was blood, it is human blood and that it was the blood of PW1 was fatal to prosecution's case He urged the Court to resolve issues 4 and 5 in favour of the appellant.

In issue 6 on evaluation of evidence, learned Counsel for the appellant argued that the Police failed to investigate among others, that the appellant and the witnesses for the prosecution have at the material time spiritual father/spiritual children relationship. Learned Counsel made a long list of fact which he alleged the Police failed to investigate but I ignored the list since it does not involve evaluation of evidence by the Court.

However, he said that the deceased made two statements in the Police Statement caution Form but the Police opted to write the third one on plain paper. He said that Exhibits P10, P11 and P12 were not recovered with a search warrant and that the exhibits could have been picked from anywhere and brought to Court to implicate the appellant. He made the same argument on Exhibits P16 and P17, the generators, which he said were not recovered in the presence of the appellant.

He referred to the evidence of PW1, PW3, PW9, PW10 and PW11 to the effect that the appellant did not want to burn his victims in his sitting room where he had "rug and chair/settee" and so took them outside and set them ablaze and submitted that the appellant's cars and the whole of his house could have been burnt if the story of the prosecution were to be true. He urged the Court to accept the evidence of DW6 as the truth of what transpired with the generator. He said that PW11 who was detailed to bring PW6 into the appellant's fold offered PW6 whopping bribe to testify against the appellant.

He referred to the evidence of the six persons on whom petrol was poured and set ablaze and argued that if it were true even the person who threw the lit match to set the fire could have been burnt in the process of setting the fire. He urged the Court to hold that the evidence was not properly evaluated and to resolve issue 6 in favour of the appellant.

In issue 7 on the onus of proof he repeated the argument that if a lit match was thrown at six people kneeling down in a pool of petrol, the whole six persons as well as the person who threw the lit match could have been burnt to death. He reviewed the entire evidence and submitted that the case against the appellant was not proved

beyond reasonable doubt.

In issue 8, on alleged contradiction and inconsistencies in the prosecution's case, he referred to the evidence of the eye-witness, PW1, who told the Court that PW4 brought the fuel in a bowl while the PW3 said that the PW4 brought the fuel in a jerry can, the evidence of PW1 to the effect that the PW4 came to the sitting room, poured the fuel on the victim, struck a match which caught fire and went off, that the appellant directed the PW4 to pour the remaining fuel on the victim after which he struck the second match which caught fire and set the victims ablaze, an evidence of PW3 that appellant brought a lighter which failed and he then ordered PW4 to get matches and submitted that PW1 and PW7 never mentioned lighter but fuel and matches.

He argued that the lower Court failed to avert to the contradiction in the evidence of the prosecution in its judgment. In the circumstances, he submitted that the prosecution's account of what happened on 22/7/2006 and the sequence of events leaves a doubt as to the guilt of the appellant. He said that there was contradiction as to the cause of death of the deceased and the doubt should be resolved in favour of the appellant. He relied on *Akpa v. State* (1991) 5 SCNJ 1 at 661-662 para H-D.

With reference to the medical report, learned Counsel argued that if the deceased was burnt it would have been impossible to describe her hair, scalp and face. He urged the Court to resolve issue 8 in favour of the appellant.

Issue 9 is also on evaluation of evidence. Learned Counsel added that it is prejudicial in law for a trial Court to accept the evidence of the prosecution before considering the case of the defence. He relied on *Strabag Construction v. Ibitokun* (2010) All FWLR (Pt. 535) 203 at 225- 226.

In issue 10 on whether the belief of the deceased that she was in danger of approaching death can be inferred from her statement and surrounding circumstances or opinion of third parties, Counsel referred to the 1st and 2nd statements the deceased made shortly after the fire incident stating how she sustained the burns on her body as a result of a generator accident and that the appellant was not responsible for the accident.

He argued that the two statements should have been admitted

as dying declaration as the PW6 and PW8 said the deceased suffered 65% degree burns and stood no chance of survival. He referred to the evidence of the deceased brother, PW7, who gave evidence that the deceased told him that she was feeling the highest pain she had ever felt and did not know whether she would survive.

Learned Counsel did not refer to the deceased's third statement but argued that the deceased may have entertained hopes of recovery when she made the first two statements. He urged the Court to resolve issue 10 in favour of the appellant.

Issue 11 queries the conviction of the appellant even when the trial Court could not reach a conclusion from the conduct of the DPP that the prosecution was interested in persecuting and not prosecuting the appellant. Learned Counsel directed the argument on this issue to the Court below which he said misdirected itself and caused a miscarriage of justice when it failed to reach a conclusion that the conduct of the DPP showed he was persecuting the appellant.

He listed the conduct of the DPP from which he argued that the Court below should have reached the conclusion that the DPP was persecuting and not prosecuting the appellant as DPP's omission of two statements of the deceased, Exhibits P1 and P4, in which she exculpated the appellant; the omission of extra-judicial statement of PW8 to the effect that most of the victims of the incidents of 22/7/2006 upon arriving at his hospital told him (PW8) that the incident was caused by a generator accident; the inclusion in the charge of PW10 as a victim of the crime even though he did not make a statement to the Police at the time appellant was charged before the Magistrate, while the case was pending the DPP took the prosecution witnesses in three buses to the appellant's premises to rehearse their testimonies, and finally, the DPP coerced PW4 to testify against the appellant in exchange for her freedom.

In addition, he submitted that the DPP quoted verses of the Bible while cross-examining DW9 (the appellant) in open Court to the prejudice of the appellant. He cited the case of *R v. Sugarman* (1936) 25 CR App R 109 at 114-115; *Odojin Bello v. The State* (1967) NMLR 1 at 6-7 and urged the Court to resolve issue 11 in favour of the appellant.

In issue 12, learned Counsel for the appellant impugned the conviction of the appellant by the trial Court as affirmed by the Court

below on the ground that no weapon was found on, or recovered from, the appellant. Counsel drew attention to the fact the prosecution offered no explanation for failure to tender the weapon used in the commission of the crimes with which the appellant was charged, the match box or lighter or the jerry can in which the fuel was brought.

B He added that there was no corroboration of the evidence of prosecution witnesses in the form of exhibits at the trial.

C He submitted that the Court was left to speculate that petrol, matches or lighter were used in the commission of the offences and argued that the doubt thus created ought to be resolved in favour of the appellant. He cited the case of *Shande v. The State* (2005) All FWLR (Pt. 229) 1312 at 1357 para F-G in urging the Court to resolve issue 12 in favour of the appellant.

D In conclusion he urged the Court to allow the appeal, set aside the judgment of the Court below in Appeal No. CA/L/498/2007 and quash the judgment of the trial Court in ID/133C/2006 and enter judgment acquitting and discharging the appellant.

E In issue 1 in his brief of argument, learned Counsel for respondent dealt with the amended information vis-à-vis the original information which was undated, un-initialed and un-filed and the failure of the Court below to resolve the issue as raised by the appellant. With reference to *Sambo Petroleum Ltd & Ors v. UBA Plc & Ors* (2010) 6 NWLR 530 at 531 and *Brawal Shipping v. Onwudikoko* (2000) 6 SCNJ 508 at 522, learned Counsel conceded the general F principle of law that a Court has a duty to consider all issues raised by the parties as failure to do so may lead to a miscarriage of justice.

G He said ground 1 and 2 in the appellant's amended notice of appeal before the Court below complained of error made by the trial Judge and the consequence of the amended information. He referred to appellant's brief in the Court below and stated that appellant did not formulate any issue from grounds 1 and 2 of his amended notice of appeal. He relied on *Akinlagun v. Oshoboja* (2006) 12 NWLR (Pt. 993).

H He argued in alternative that even if the issue was raised and the lower Court failed to resolve it, no miscarriage of justice resulted from the failure. He relied on *Sukanni Odebesin v. The State* (2014) LPELR 22694 SC to urge the Court not to tamper with the lower Court's judgment based on a technical point which does not affect

the substance of the case. He urged the Court to resolve issue 1 against the appellant.

Issue 2 deals with the propriety vel non of the Court below not ascribing probative value to Exhs. P1, P4, P9 and part of the oral testimonies of PW2, PW5 & PW7 without inviting Counsel for the parties to address it. He made the point that contrary to the contention of learned Counsel for appellant, trial Court did not expunge Exhs. 1, P4 & P9 or part of the testimony of PW2, PW5 & PW7. B

He referred to a portion of the judgment of the lower Court and submitted that the Court upheld the refusal of the trial Court to accord weight to the said Exhibits PW2, PW5 and PW7 as they relate to what the deceased told the witnesses as the exhibits do not qualify either as dying declarations or *res gestae*. He argued that the trial Court properly evaluated Exhibits P1, P4 and P9 and the evidence of PW2, PW5 and PW7 relating thereto before reaching its decision D and urged the Court to so hold. C

Issue 3 is on whether Exhibits P1, P4, P9 and part of the oral testimonies of PW2, PW5 and PW7 relating thereto amount to dying declaration or *res gestae*. Learned Counsel said that both Courts below were right to hold that Exhibit P1, P4 and P9 and the evidence of PW2, PW5 and PW7 relating to them do not pass for dying declaration or *res gestae* because the evidence was not spontaneously and contemporaneously made, adding that the danger of approaching death cannot be inferred from surrounding circumstances, or opinion of third parties. He relied on, among others, *Ikoro v. State* (2912) 4 NWLR (Pt. 1290) 351 at 372. Learned Counsel said that the trial Court did not use the word “expunge” contrary to the argument of learned Counsel for the appellant and that even if the word was used, the effect is the same as not ascribing probative value to the exhibits and oral evidence relating to them. E F G

Issue 4 is on the dismissal of the defence of *alibi* put up by the appellant. Learned Counsel conceded that once the defence of *alibi* is correctly made and found to be true, the appellant will be acquitted and discharged. He however submitted that when such defence H is demolished by direct and cogent evidence placing the defendant at the scene of crime the *alibi* raised needs no investigation.

He relied on *Sowemimo v. State* (2004) 11 NWLR (Pt. 885) 515 at 520. Contrary to the argument of learned Counsel for the

appellant that appellant raised the plea of *alibi* at the earliest possible time, he argued that the appellant did not raise the defence at the time he was arrested but only tried in Court to mention the names of those he claimed were with him at the time of incidence.

He submitted that the evidence of DW1 and DW6 in relation to the plea of *alibi* was rejected by the trial Court and the decision was affirmed by the Court below. He urged the Court to resolve the issue against the appellant.

Issue 5 raised the question as to whether PW1 is a tainted witness whose evidence needed corroboration. He submitted that a tainted witness is one who has a purpose of his own to serve. He relied on *Mbeni v. State* (1988) 3 NWLR (Pt. 84) 615. He submitted that PW1 was a victim of the crime as well as an eye witness whose evidence does not require corroboration. He argued that the Court below was right to have affirmed the decision of the trial Court that PW1 was a victim and not a tainted witness. He added that even if the PW1 is a tainted witness the requirement that the Judge should warn himself is a matter of prudence and not law and the failure to do so will not vitiate the conviction of the appellant. He urged the Court to resolve the issue against the appellant.

Issue 6 is whether or not the evidence of PW3 and PW4 was corroborated by the evidence of PW1, PW8, PW9 and PW10 as well as other real evidence as found by the trial Court and affirmed by the Court below. Learned Counsel conceded that the PW4 is an accomplice but argued that the evidence of the said witness pointing to the guilt of the appellant was corroborated by the evidence of PW1, PW2, PW9 and PW10 while evidence shows that the appellant committed the offences of which they were victims.

He relied on *Mbele v. State* (1990) 4 NWLR (Pt. 145) 484. He said that the trial court saw the witness give evidence and explain inconsistencies between her earlier statement and her evidence in Court and was in position to determine and did determine that the witness told the truth. He relied on *Onubogu & Anor v. The State* (1974) 9 SC 1 and others. He urged the court to resolve the issue against the appellant.

Issue 7 is on evaluation of evidence by the trial Court and the affirmation of same by the Court below. He argued that where, as in this case, the trial Court upon evaluation of evidence has made a

finding giving reasons for such findings the appellate Court will endorse the findings and the Court below rightly did in this case. He said that the evidence of DW4 was rightly rejected by the trial Court and that the Court below was right not to interfere with the finding rejecting the evidence.

In reply to the submission of the appellant that the trial Court failed to take judicial notice of the nature of petrol, he submitted that Courts deal with facts not speculation in arriving at their decision. On the appellant's complaint that the dying declaration was improperly discountenanced the trial Court as affirmed by the Court below, learned Counsel for the respondent maintained that the testimony of PW2 and Exhibits 1, P4 and P9 were contradictory and not made spontaneously and contemporaneously and therefore could neither serve as a dying declaration nor *res gestae*.

He added, with reliance on *Garuba v. Yahaya* (2007) 1 SC (Pt. 11) 262 at 289-290, that there is no specific style of writing judgments and that it is immaterial whose evidence is evaluated first by the trial Court as long as the conclusion reached is derived from evidence before the Court. He urged the Court to resolve issue 7 against the appellant.

Issue 8 is on the propriety *vel non* of the Court below affirming the decision of the trial Court that the prosecution proved its case against the appellant beyond reasonable doubt. Conceding the hal-  
lowed principle in criminal trials that the prosecution must prove its case beyond reasonable doubt, learned Counsel submitted that the standard of proof is not beyond any shadow of doubt. He said that the evidence before the trial Court is the direct evidence of victims of the crime charged and that the Court below was right to have affirmed the judgment of the trial Court based on the said eye-witness account of the events of 22/7/2006.

He added that the respondent adduced evidence at the trial to demonstrate that the acts of the appellant complained of were intended to cause death and/or grievous bodily harm. He urged the Court to resolve issue 8 against the appellant.

Issue 9 is on whether or not the lower Court duly considered the contradictions and inconsistencies complained of by the appellant in the prosecution's case before concluding that the inconsistencies and contradictions are not fatal to the case against the appellant.

Learned Counsel submitted that not every contradiction in the prosecution's case will create a doubt to be resolved in favour of the appellant. He argued that for a contradiction to have fatal effect on the prosecution's case, it must be material to the case and must lead to a miscarriage of justice. He relies on the case of *Ikemson v. State* B (1989) 2 NSCC (Vol. 20) 471; *Onubogu v. The State* (1974) 9 SC 1 at 20, among many others.

On the contention of the appellant that there is a contradiction in the evidence of PW6, PW8, the medical report and the post mortem C report, learned counsel argued that the testimonies and exhibits are not in conflict but that they are complementary and in tune with the evidence received in the case, adding that the Court below could not have rightly interfered with the decision of the trial Court based on legally admissible evidence. He urged the Court to resolve the issue D against the appellant. He urged the Court to dismiss the appeal and affirm the decision of the Court below.

Learned Counsel for the appellant filed "Appellant's Reply Brief of Argument." Included in the table of contents is "Summary of facts of Case" which is a review of the facts of the case as stated in the E appellant's amended brief. In the review, learned Counsel for the appellant agreed with some facts as statement by Counsel for the respondent and disagreed with others on the statement of facts.

Learned Counsel for the appellant re-stated the substance of the appellant's case, citing a plethora of authorities. The next item in F the contents is "Reply on Point of Law" pursuant to which the learned Counsel stated "The appellant will reply on point of law to the issues as formulated by the Respondent." Following this, my noble Lords, is another appellant's brief in which all the nine issues in the respondent's G brief were argued.

It is to be noted here that the appellant's 12 issues encompassed the 9 issues in the respondent's brief. What is supposed to be a reply on point of law is actually the appellant's reply to the respondent's argument. In other words, the appellant purporting to H reply on points of law in the respondent's brief presented a repetition of the argument in his brief. As expected the respondent's brief joined issue with the appellant brief.

A reply brief is not a forum for emphasizing the argument in the appellant's brief, it is not a forum for presenting a new and better

appellant's brief or repeating arguments already in the said brief; neither is it meant to repeat the issues joined either by emphasis or by expatiation. See *Ochemaje v. The State* (2008) 6-7 SC (Pt. 11) p.1. A reply brief, as the name implies, ought to be confined to new issues or points of law in the respondent's brief. Appellant's reply brief is not one properly so-called. It is a supplementary brief which has no place in our appellate practice and it is therefore discounted in the determination of the appeal. See *Ehot v. State* (1993) 4 NWLR (Pt. 290) 644. B

My Lords, the virtue of good formulation of issues upon which a brief of argument in an appeal is predicated is known and appreciated in the lack of it. The main purpose of formulation of issues for determination in an appeal is to enable the parties to narrow the issues in controversy in the grounds of appeal in the interest of accuracy, clarity and brevity. See *Ogbu Inyinya & Ors v. Obi Okudo & Ors* (1990) 4 NWLR (Pt. 146) 551 at 568. C D

Contrary to the principle in the above case, most of the 12 issues in the appellant's brief are vague, imprecise, inaccurate and verbose. Most of the issues are inelegantly drafted and contain multiple sub issues, the concept of which is alien to rules of appellate practice. See *Salami & Anor v. La al* (2008) 6-7 SC (Pt. 11) 242. E The brief itself does not fair better. Contrary to brief properly so called, it is verbose and repetitive as if repetition of an issue or argument will invest it with cogency if it is lacking in it.

In spite of what I said above I will determine the appeal on the appellant's issues which as I said earlier in the judgment, encompass the nine issues formulated by the respondent. I will resolve the issues *seriatim*, unlike the procedure adopted by learned Counsel for the appellant. I have already reproduced the issues earlier in the judgment and I do not need to repeat them. F G

Issue 1: This questions the validity of the trial of the appellant on the amended information when the original information is undated, uninitiated and un-filed and the propriety *vel non* of the lower Court's failure to consider and resolve the issue in appellant's brief. H

First of all, I will deal with the alleged failure of the lower Court to resolve the issue of alleged defect in the original information. In the appeal against the judgment of the trial Court, appellant raised a total of 31 grounds of appeal from which he formulated 16 issues.

The respondent raised 7 issues in its brief. The Court below in its judgment faithfully reproduced the 16 issues of the appellant and the 7 issues in the respondent's brief.

Grounds 1 and 2 of the appellant's grounds of appeal to the Court below are reproduced hereunder:

B *"1. Error in Law: The learned trial Judge erred in law and was without jurisdiction to entertain or to have undertaken the trial of the Accused/ Appellant on the undated un-initiated and unfiled six (6) count information before him.*

C *2. Error in Law: The learned trial Judge erred in law and mis-directed himself in law in the following portions of his judgment ....thereby reached an erroneous conclusion that the failure to date the original charge is of no effect on this trial which conclusion has worked injustice on the Accused/Appellant."*

D The parties herein did not dispute the fact that the original SIX count information was amended. An amendment on the facts of this case is akin to amendment of pleadings which speaks from the date the original process was filed. See Rotimi v. Macgregor (1974) 11 SC 133 at 152; Sneade v. Watherton (1904) 1 KB 295; Adesunmi v. A-  
E G Ekiti State (2002) 3 LRCN 43. By the principle of "relating back" it is incorrect for learned Counsel for the appellant to assert, in his ground 1 of the notice of appeal that the appellant was tried "on undated, un-initialed and unfiled six (6) count information before him."

F I have carefully scrutinized the 16 issues appellant formulated from his 31 grounds of appeal in the Court below. None of the 16 issues related, even remotely, to either or both of the appellant's grounds 1 and 2 in his notice of appeal in the Court below. The two grounds of appeal from which no issue was formulated are deemed  
G abandoned. See Ogufile v. Odi (1994) 2 SCNJ 1.

***Now an appeal is an invitation to a higher Court to review the decision of a lower Court to find out whether on proper consideration of the facts placed before it and the applicable law, the lower Court arrives at a correct decision.***

H See Oredatin v. Arowolo (1989) 4 NWLR (Pt. 114) 172 at page 211.

***By the above definition of appeal an appellate Court has a duty or power to deal with an issue or point on which the Court below did not make a pronouncement.***

***In the appeal before the Court below the appellant, by***

***failure to raise any issue from his grounds 1 and 2 of the notice of appeal, deprived that court of an opportunity to pronounce on the issue(s) arising therefrom. It is therefore not fair for learned Counsel for the appellant to accuse the Court below of failure “to consider and decide on this issue as raised in the appellant’s brief of argument.”*** B

***The issue was not before the Court below and in this Court it has not been raised as new issue which was not argued in the Court below. This Court has no jurisdiction to pronounce on an issue which was not dealt with by the Court below. Issue I is therefore resolved against the appellant.*** C

Issue 2: This issue complains that the Court below raised the issue of PW1, PW4 and PW9 and the oral evidence relating thereto given by PW2, PW4 and PW19 and expunged same from its records without hearing the appellant and whether the lower Court was right when it upheld the conviction of the appellant despite the fact that evidence adduced by the IPO, PW2, lacked credibility. D

This is an expanded version of issue 3 in the Court below in which appellant referred only to Exhs. PI and P4. The learned Counsel for the appellant got mixed up in his reference to the trial Court as well as to the Court of appeal as the lower Court. The complaint is against the judgment of the trial Court and the complicity of the lower Court is that it affirmed the decision of the trial Court on Exhs. PI, P4 and P9 and the oral evidence of PW2, PW5 and PW7 relating to the exhibits. Exhs. PI, and P9 are statements made by the deceased. PW2 recorded the statements and PW5 and PW7 gave evidence relating to them. In its judgment as affirmed by the lower Court, the trial Court said of the exhibits and oral evidence relating to them: E

*“... I shall therefore discountenance the purported statements credited to the deceased as contained in Exhibits PI, P4 and P9 and in the oral testimonies of PW5 and PW7 ...”* F

***In other word, the trial Court saw no reason to ascribe probative value to either of the exhibits or oral evidence of PW5 and PW7 relating to them. It is not known from where the learned Counsel for the appellant imported the word “expunge” into the proceeding of the trial Court or the reasons for so doing. May be learned Counsel for the appellant laboured under the mistaken impression that the use of stronger word*** H

**will enhance his chances of success in the appeal. Whatever his intention in the use of the word “expunge”, on the facts of this case, the negative effect of expunge and discountenance are the same to the effect that the exhibits and the oral evidence on them have no probative value; and this is the decision the lower Court rightly affirmed in my view.**

**The exhibits and oral evidence were received by the trial Court. The trial Court did not need address from Counsel to the parties to decide whether or not a piece of evidence and exhibits admitted should be ascribed probative value, nor are Counsel to the parties entitled to be heard in the evaluation of the evidence before the Court. Learned Counsel to the appellant had a duty to persuade the trial Court that the evidence adduced by the investigating Police Officer (PW2) lack credibility. He cannot assume that fact and hang part of his case on it. I resolve issue 2 against the appellant.**

Issue 3: Here again, the learned Counsel for the appellant referred wrongly to the trial Court and the Court below as lower Courts interchangeably. The complaint is that the lower Court affirmed the judgment of the trial Court dismissing the defence of *alibi* and placing the burden of proof on appellant by rejecting the two statements in which the deceased stated that she was burnt in a generator accident.

I have already dealt with the statements credited to the deceased as dying declaration. The trial Court found, and the lower Court affirmed, that the statements have no value as dying declaration or *res gestae* and discountenanced them, and this does not mean that the trial Court or the Court below placed the burden of proof of his innocence on the appellant.

**I will now deal with the issue of *alibi*. *Alibi* in its Latin origin means “Elsewhere”. The defence of *alibi* postulates that the accused was somewhere other than the *locus criminis* at the time the offence was committed. It means he was not at the scene at the time of the commission of the crime and could therefore not have committed it or participated in its commission.** See Mohammed Chewon v. State (1986) 7 NWLR (Pt. 22) 331; Udoebere & Ors v. The State (2001) 88 CRNC 2144 at 2153.

**The burden of proof of *alibi* is on the accused person.** See Gachi & Anor v. The State (1965) NMLR 333 at 335; Nwosisi v.

The State (1976) 6 SC 109. ***Though proof is on the balance of probabilities.*** See Ozuki v. The State (1988) 2 NSCC 75. ***For an accused person to successfully plead alibi, the plea must be unequivocal, he must state the time, the place and the people who were with him at the time and place and he must raise the plea during investigation and not at the trial, so that the veracity of his statement to the Police to that effect can be verified.*** See Alami v. State (1988) 2 NSCC 271; Obakpolo v. State {1991} 1 NSCC 71; Njovens v. The State (1973) NSCC 257 at 258. B

***Once the defence of alibi is raised and the evidential burden discharged, the onus lies on the prosecution to disprove it. In the case at hand, did the appellant discharge the burden of proof of alibi on the balance of probabilities? The answer is in the negative. Though he said that he was in his bedroom at the material time in his statement, Exhibit P2, he gave no name of anyone with him at the time and it was in Court that he mentioned those he claimed were with him at the time in his room.*** C D

***In any case, there was evidence of witnesses which the trial Court believed placing the appellant at the scene of crime at the time of commission of the crime. The evidence placing the appellant at the scene is overwhelming and it was not necessary for the Police to expend time and resources investigating the obvious.*** E

***In view of the totality of evidence before the trial Court, the appellant's plea of alibi is an afterthought and was properly dismissed by the trial Court and the dismissal affirmed by the Court below. I resolve issue 3 against the appellant.*** F

Issue 4 queries whether or not PW1 is a tainted witness whose evidence needed corroboration. Issue 5 which was argued by the appellant with issue 4 is whether or not it was right to have held that evidence of PW3 and PW4 was corroborated by the evidence of PW1, PW8, PW9 and PW10 and whether the lower Court rightly affirmed the conviction of the appellant “*despite the fact that the trial Court was saddled with the responsibility of conducting investigation with respect to the genuity of Exhibits P10, P11 and P12 as the prosecution had failed to prove the said exhibits against the appellant beyond reasonable doubt.*” G H

I will deal with the issues separately.

**Issue 4 raises two questions: (a) Who is a tainted witness, and (b) on the facts of this case, is PW1 a tainted witness? A tainted witness is a person who may be strictly an accomplice but is a witness with some purpose of his own to serve.** (See *Onuoha v. The State* {1987} 4 NWLR (Pt. 65) 331 at 346. **The phrase “tainted witness” connotes either of the following: (a) a witness who is by evidence an accomplice in the offence charged or (b) a person who may be regarded on the evidence as having some purpose of his own to serve.** See *Ishola v. The State* (1978) 9 & 10 SC 81 at 100 (underlining mine). **The portions underlined above indicate that he question whether one is an accomplice or one who has a purpose of his own to serve in giving evidence is not at large.**

**It is determined from the evidence before the Court including, but not limited to, his evidence. For a witness to be an accomplice, except in case of receiving stolen property and in cases showing system, he must have participated in the actual offence charged whether as principal or accessory before or after the fact. It is an issue to be decided in the circumstance of each case.** See *The Queen v. Ezechi* (1982) AMLR (Pt. 1) 113 at 112-118. **The same goes for the question whether or not the PW1, in giving evidence, had a purpose of her own to serve.**

**The learned trial Judge heard the witness testify in Court, read her body language and determined that the PW1 was neither an accomplice in the crime charged nor had she a purpose of her own to service and came to the conclusion that the PW1 was not a tainted witness and that her evidence did not need corroboration.**

**The Court of Appeal affirmed the decision of the trial Court, holding that “PW1 being an eye witness and a victim of the crime is not a tainted witness. She is a competent witness and her evidence does not require corroboration...”** This is a concurrent finding of fact by the trial Court and the court of Appeal. Appellant did not attempt to demonstrate a perversity in the findings.

He did not show that there was not sufficient evidence to

**support the findings. In the circumstances, this Court will not disturb the findings.** See Njoku & Ors v. Erne & Ors (1973) 3 SC 293 at 306; Kale v. Coker (1982) 12 SC 252 at 271. Issue 4 is resolved against the appellant.

Issue 5, I have affirmed the concurrent findings of facts by the two Courts below that the PW1 is not a tainted witness and that her evidence needed no corroboration. In the same vein, there is a concurrent finding of fact that PW3 and PW4 were corroborated by the evidence of PW1, PW8, PW9, PW10 and PW11. The lower Court, based on the evidence on record, affirmed the determination of the trial Court regarding the quality of the evidence of the witnesses. This Court has no business to disturb a finding of the trial Judge who watched the witnesses testify as the findings were endorsed by the Court below.

The last portion of issue 5 deserves some detailed consideration. The portion of the issue reads: “...and was the lower Court right when it upheld the conviction of the Appellant despite the fact that the trial Court was saddled with the responsibility of conducting investigation with respect to the genuity of Exhibits P10, P11, and P12 as the prosecution had failed to prove the said exhibits against the Appellant beyond reasonable doubt.”

**This is only a part of an issue for determination. An issue in an appeal is a succinct and precise question based on one or more grounds of appeal for the determination of the Court.** See Onwo v. Oko & Ors (1996) 6 NWLR (pt. 56) 584 at 615. **It is a question of law or fact or both and should not include argument or opinion or fact not yet established. The court as an umpire and does not take sides in the dispute. If at the end of the day the prosecution “failed to prove the said exhibits against the Appellant beyond reasonable doubt”, the Court will reject the exhibits.**

**It is not the business of the Court to launch an investigation to prove the genuity of an exhibit which the prosecution has failed to link with its case. The court is an impartial arbiter and does not help one party against the other. Issue 5 is resolved against the appellant.**

Issue 6 is on the evaluation of evidence by the lower Court. Learned Counsel for the appellant has again mixed up the two Courts

below. He complained that the lower Court did not properly evaluate the evidence before reaching a decision and queried whether the lower Court was right when it upheld the conviction of the appellant. I understand the issue to complain that the trial Court failed to evaluate the evidence properly before convicting the appellant and that  
 B the lower Court erred in affirming the conviction.

***Evaluation of evidence is primarily the exclusive preserve of the trial Court except in case of documentary evidence in which the trial Court and the appellate court have equal right to evaluate the evidence.*** See Iwuoha v. Nipost (2003) 4 SC (Pt. 11) 37. ***Where the trial Court failed to evaluate the evidence or to evaluate it properly or the evaluation resulted in a perverse conclusion the appellate Court would re-assess and evaluate the evidence to reach a joint conclusion - which may***  
 C ***be different from that of the trial Court, but not necessarily so.***  
 D See Okolo. v. Uzoka (1978) 4 SC 77 at 86; Abusamwan v. Merchantile Bank (Nig) Ltd (No.2) (1987) 3 WLR (Pt. 60) 20.

Learned Counsel for the appellant made a long list of facts or presumed facts to back the complaint that the trial Court did not  
 E properly evaluate the evidence before convicting the appellant, I will deal with only a few of them. He complained that appellant's previous travails with the police contributed to sloppy investigation by the police. He mentioned specifically that the plea of *alibi* was not investigated. The trial Court found the prosecution witnesses credible and  
 F believed them irrespective of the alleged sloppy investigation.

It is the appellant, not the Court, who claimed the investigation was sloppy. When arrested, appellant claimed he was alone in his room at the time of the incident. He did not name who were with  
 G him until the trial started. In any case, what was there for the Police to investigate? Credible witnesses put the appellant at the venue and time of the commission of the crime. At the hearing of the appeal, I asked learned Counsel for the appellant the nature of the punishment which he said the appellant meted on the victims for immoral  
 H conduct and she said it was a different matter.

However, there is no evidence that the infliction of punishment on the victims for immoral behaviour was different from the incident that gave rise to the trial. The appellant could not have been elsewhere when he punished the victims for immoral behaviour. He

personally inflicted the punishment on the victims, thus giving the lie to the plea of alibi.

It was also stated that the IPO saw two men painting the gate of the appellant's house to conceal evidence of crime but neither arrested them nor got their names. The Police did not charge anyone with concealing evidence and the fact that he did not arrest the painters or take their names and particulars has no effect on the case against the appellant. Also that the Police visited the scene of the crime many times without a search warrant and without taking the appellant along is of no moment. That the Police recorded two statements of the deceased in the statement caution form but wrote the third statement on plain papers has no bearing on the veracity of the statements or the trial in which they were tendered.

It was also argued that the generators tendered as Exhibits P16 and P17 could have been picked from anywhere as they were not recovered in the premises of the appellant. Appellant's case is that the burns on the surviving victims and the death of the deceased resulted from explosion of a generator. This is the gravamen of the appellant's case but he failed to show the Police the carcass or the remains of the burnt generator.

Appellant cannot alter the facts by engaging in the speculation that P16 and P17 could have been taken from anywhere. The incident took place in the presence of people and in the circumstance; the fact that the stain on the cloth of PW1 was not tested to confirm it is blood has no effect on the case against the appellant. It is a matter especially within the knowledge of the appellant. See Section 140 of the Evidence Act 2011 (as amended).

***It was submitted that in view of the volatility of petrol the person who lit the match could have been burnt. Appellant must have forgotten that the person who threw the match at the victims did that from a distance - he threw it - and did not stand close to the victim nor was he bathed in petrol as the victim. I am of the view that the trial court evaluated the evidence properly, came to the conclusion that appellant was guilty and convicted him.***

***The Court of Appeal in its review of the case, endorsed the findings of the trial Court, having found no perversity therein. The unexplained failure of the appellant to produce***

***the burnt generator raises a presumption that the victims and the deceased did not sustain their injuries from any burnt generator but that in the circumstances of this case, they were deliberately set ablaze.*** See Section 167 (d) of the Evidence Act, 2011. ***This is the outcome of proper evaluation of evidence before the trial court. The issue is resolved against the appellant.***

Issue 7 as many other issues framed by the appellant is a tautology. The complaint that the charges against the appellant were brought “*without any credible and reasonable suspicion that the appellant committed the offences ...*” displays abysmal ignorance of the criminal process. If the prosecution had arraigned the appellant even with “credible and reasonable suspicion, the Court would have dismissed the charge and acquitted and discharged the appellant.

**D** Suspicion implies a belief or opinion based upon facts or circumstances which do not amount to legal proof or proof at all. See evidence before the trial Court. Ben Okafor v. Police (1965) NMLR 89, 90/91; Adio & Anor v. The State (1986) 2 NWLR 381, 389; Onah v. The State (1985) 3 NWLR 236, 244.

**E** Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. Suspicion arises at or near the starting point of an investigation for the end of obtaining prima facie proof of crime. When such proof has been obtained, the Police case is complete and the matter is taken to Court. See Shasban Bin Itussain v. Chong Jook Kam (1969) 3 All ER 1926 at 1630 per Lord Delvin.

**F** Appellant’s Counsel ended the marathon submission in this issue by submitting that the judgment of the lower Court is unreasonable, unwarranted and cannot be supported having regard to the evidence on record. The question appellant would not dare to answer is where is the generator that exploded and from which the surviving victims got burnt and the deceased got death? That was the centre point of the defence set up by the appellant and he failed to address it. I resolve issue 7 against the appellant.

**H** ***Issue 8 is on whether the lower Court duly considered the contradictions and inconsistencies the appellant complained of before its decision that they are not material. Again, I must correct the learned Counsel for the appellant. It was the trial Court that duly considered the contradiction and in-***

***consistencies alleged to beset the prosecution's case, determined that they are not material and so cannot be fatal to the prosecution's case. This finding was endorsed by the lower Court.***

***He said that the PW1 told the Court that PW4 brought the fuel in a bowl whilst PW3 said that PW4 brought the fuel in a jerry can. Fuel was brought and on the facts before the Court, the container in which it was brought is immaterial. Also whether the fuel was poured once or twice and whether the match was struck more than once or whether the fire was set by the use of a lighter do not go to the merit but are in circumstances peripheral matters that do not touch the substance of the case against the appellant.***

***As for the description of the deceased in the medical and post mortem report, it is not part of the prosecution's case that the deceased was burnt beyond recognition. By his reliance on the so called contradictions and inconsistencies, the appellant is chasing shadows in place of substance. In any case, in human affairs, if two people who observe an incident give evidence of what they observed and the evidence tallies in all respects, the evidence is suspect. The depth of observation, concentration and ability to reproduce what is observed must vary from person to person. The consideration of the trial Court, endorsed by the Court below, that there was no material contradiction or inconsistency is borne out of the evidence in the record. I resolve issue 8 against the appellant.***

Issue 9 complained that the trial Court considered the evidence of the prosecution witnesses and made up its mind (perhaps as to the guilt of the appellant) before considering the evidence of appellant's witnesses and that as evidence of bias.

***Judgment writing is an art and once the essential elements are present in the judgment, it will not matter what method was employed in writing the judgment. Also whether the appellant's case or the prosecution's case was considered first will not affect the trial Court's resolution of the issues in contention between the parties. Usually, it is the prosecution's case that is considered before that of the defence but even if the defence case is considered first, it will***

***not necessarily improve his case or diminish the prosecution's case.***

***If the Court considered the prosecution's case and made up its mind that the appellant committed the offence, it would have been unnecessary waste of time for the Court to consider the evidence on the appellant's side.*** Learned Counsel for the appellant would have been of assistance if he had reproduced, or even referred to portions of the judgment herein the trial Court summed up the appellant's case pre-judicially. This is a serious charge which learned Counsel, an officer in the temple of justice, should not have made without facts to back it up.

It amounts to a charge of misconduct against not only the learned trial Judge but also the learned Justices of the Court of Appeal who endorsed the judgment complained about. Learned Counsel has a right to espouse his client's case but he has to do that within the limits prescribed by law and its rules and rules of ethical conduct. The issue is resolved against the appellant.

Issue 10: From the submission of the appellant's Counsel on this issue I gather that the complaint is the rejection of the first two statements of the deceased and oral evidence relating thereto on the ground that the two statements were not dying declaration because the deceased did not believe herself to be in danger of approaching death at the time she made them.

***This issue is closely tied to issue 2 which was resolved against the appellant. The question is: were the two statements dying declarations in the sense that the deceased believed herself to be in danger of approaching death at the time she made them? Dying declaration is an exception to the hearsay rule. See Section 33 of the Evidence Act. It is a declaration made in extremity, when the maker is at the point of death and every hope of life is gone. In this state, the motive to tell lies is silenced and the mind is induced by the most powerful consideration: to speak the truth.*** See *R v. Woodcock* (1789) 168 ER 353; *Orshior Kugo v. The State* 1960) NMLR 153.

***Dying declaration is admissible only in trials for murder and manslaughter when the declaration is made by the victim of the homicide.*** See *R v Mead* {1824} 107 Eng Rep 509; *Indabo v. Kano N/A* (1957) 2 FSC 4. ***It is admissible to prove the cause***

***of death or the transaction resulting in the death of the deceased but not the motive for the crime or to explain subsequent or previous transactions. The declarant must have believed himself/herself to be in danger of approaching death.*** See R v. Ogbuewu {1949} 4 WACA 67; Garba v. R (1959) 4 FSC 162. B

***Was there positive proof at the trial that at the time the deceased made the first two statements she believed herself to be in danger of approaching death.*** See Kuge v. The State (1969) NMLR 153. ***Would she have been a competent witness at the trial if she were alive?*** See R v. Pike 172 ER 562. ***All these conditions for the admissibility of the two statements as dying declaration appear to have existed except the belief that she was in the danger of approaching death.*** C

Learned Counsel for the appellant relied on the report that the deceased suffered 65% degree burns to argue that she stood no chance of survival. The respondent's Counsel did not deal with this issue. However, the Court cannot infer from the gravity or seriousness of the injury that the deceased believed herself to be in danger of approaching death. It must be shown that the deceased believed herself to be in danger of approaching death when she made the statement. D E

***Incidentally, the only piece of evidence as to the state of mind of the deceased when she made the statements came from the appellant. At p. 6.03 in his brief, learned Counsel for the appellant referred to the evidence of PW7 to the effect "that the deceased told him that she was feeling the highest pain she had ever felt before and that she did not know whether she was going to make it."*** (Underlining mine) F G

***In my view, the statement the deceased allegedly made to PW7 does not unequivocally show a hopeless expectation of death. That she did not know whether she was going to make it does not show she believed herself to be in danger of approaching death. The trial Court rightly found, and the Court below rightly affirmed, that the two statements were no dying declarations. In addition, I hold that the two statements, even from their contents, did not relate to the actual incident, as found by the trial Court, from which the death of the deceased*** H

**resulted. They could not have been used as part of the *res gestae*. The issue is resolved against the appellant.**

Issue 11 is hereunder reproduced once more:

*“Whether the lower Court was right when it upheld the conviction of the appellant despite the fact that the trial*

B *Court failed to reach the conclusion from the conduct of the Honourable Director of Public Prosecution (DPP) in the matter that the prosecution are interested in persecuting the appellant and not prosecuting him.”*

C Learned Counsel for the appellant listed five grounds to back his claim that the DPP was persecuting his client. I will deal with the grounds seriatim:

1. The DPP omitted two written statements by Ann-King – the deceased, Exhibits P1 and P4 in which she stated that the appellant  
D has no hand in what happened to her. If the DPP had omitted the two statements of the deceased, Ann-King, how did the statements appear in the record? If the two statements were omitted they could not have been tendered, received and marked Exhibits P1 and P4. They were tendered as dying declarations but the trial Court later  
E rejected them for not amounting to dying declaration and this was affirmed by the Court of Appeal. This is a concurrent finding of fact that the two statements, Exhibit P1 and P4, are not dying declarations.

F 2. The DPP omitted the extra-judicial statement made by PW8 that most of the victims had told him ... that the incident was caused by a generator accident. What the unnamed victims (most of the alleged victims) told the PW8 is inadmissible hearsay evidence. It had no probative value, either exculpatory or inculpatory, in the case.

G 3. ***The DPP included one Kosisochukwu (PW10) as a victim of the crime even though he did not make a statement to the Police at the time. It is not the law that a victim of a crime cannot be named in the charge against the perpetrator of the crime unless he makes a statement to the Police regarding the commission of the offence against him. Were it so, an alleged murderer could not be charged to Court as the victim would not be named in the charge for a dead man cannot make a statement to the Police.***

4. While the case was pending, the DPP took the prosecution

witnesses in three bus loads on an excursion tour or rehearsal to appellant's premises. Appellant's premises were the scene of crime to which the prosecution had access. He could go to the premises alone or in company of his witnesses to obtain information or evidence relating to the case. It is not appellant's case that the DPP entered the premises without a valid warrant. The DPP and his team did not go in excursion or rehearsal as alleged but to collect evidence. B

5. It has been alleged and on the record that the DPP coerced PW4 to testify against the appellant for freedom. Learned Counsel for the appellant failed to state who made the allegation or the portion of the record containing the allegation. When a number of people are suspected of having committed a crime, any of such persons can agree with the prosecution to trade his evidence against his co-accused for his freedom. It is a prosecutorial strategy dictated by prudence and common sense. C D

***Finally on issue 11, learned Counsel for the appellant complained that during the cross-examination of DW9, the DPP quoted verses of the Bible in open court to the prejudice and ad judgment of the appellant as guilty. Learned Counsel for the appellant should have quoted the verses of the Book of Life which prejudiced, and adjudged his client as guilty. The DPP could use any relevant material he could fairly use within the limits of the law and rules to prove the guilt of the appellant.*** E

***Moreover, the appellant who purports to live by the Bible ought to be tried by the Living Word of the Book of Life. Learned Counsel for the appellant did not demonstrate how any or all of his complaints in issue 11 adversely affected his client's case at the trial Court. The issue is resolved against the appellant.*** F G

In issue 12, the appellant queried the affirmation by the Court below of his conviction on charges of attempted murder and murder despite the fact that no weapon was recovered from him (appellant).

***I will take the case of attempted murder first. Attempt to commit a crime is an inchoate offence, the elements of which are the physical acts of the accused sufficiently proximate to the complete offence with an intent on the part of the accused to commit the complete offence.*** H

***It is something more than mere preparation to commit the offence.*** See Hope v. Brown (1954) 1 WLR 250 at 252; Ozigbo v. COP (1976) All NLR 109 at 115 per Alexander, CJN.

***In the murder, the definition of the offence does not include the weapon with which it is committed. See for instance Section 316 of the Criminal Code applicable to the Southern part of the country. In neither the case of attempted murder nor murder did the elements constituting the offence include the weapon used in the commission of the offence. In the same way, that the fact of a murder is provable by circumstantial evidence without the body of the deceased or trace thereof and in absence of a confessional statement by the accused,*** see R v. Sala (1938) 4 NACA 10; R v. Onufrejek (1955) 1 QB 388: ***the facts of attempted murder and murder can be proved without the weapon used in the commission of either offence.***

***This is more so in a case such as this when eye witnesses gave evidence of what they heard, saw and observed. In any case, when the prosecution proved the necessary elements of the two offences the appellant had the onus of establishing his case that the injuries suffered by the victims from which one of them died resulted from a generator accident in which case he had a duty to himself to tender the generator or its remains. I resolve issue 12 against the appellant.***

My Lords, we need to be warned that the bitch that gave birth to the monster may be in heat again. Extremism in politics or religion results in disaster. When Hitler, the Austrian house painter lunatic snatched power and led his Nazi party in Germany, one of his motive forces was the maintenance of the purity of the Aryan race for which he slaughtered about six million Jews and people of other races.

Here is a mere mortal being who has arrogated to himself the power and function of his Maker. To punish them for their real or perceived offences, he had his so called godsons and goddaughter doused with petrol and set ablaze at the peak of his smoldering anger. He brought the hell fire from hell on to his victims. Clarence Darwin (1957-1938) would hate sin but not the sinner. Appellant, Chukwuemeka Ezeuko, alias Dr. Rev. King, in his turn would not hesitate to roast his perceived sinner in petrol fire while sparing the sin. When a man-made god, a tin god with clay legs leads people in

whom he has installed extreme fear of the unknown, the words of God are put in abeyance and the mundane are brought to the front burner.

Not long a poor follower of a particular lunatic who claimed to be the confidant of God, was doused in petrol and set ablaze. The devil incarnature shocked the nation by his claim that God instructed him to douse the woman with petrol and set her ablaze and that the resulting fire, having been deprived of its qualities, would leave the woman untouched. B

Human life, even that of a sinner, is sacred to God. Religious freedom, freedom of association do not in any way derogate from the sanctity of life. Activities of these “Religious” bodies should be scrutinized before their crazy leaders embark on mass murder of their followers or lead them to mass suicide. C

Having considered all the arguments proffered by learned Counsel for the parties in addition to the record, I resolve all the twelve issues formulated by the appellant against him. Consequently, I hold that the appeal is bereft of merit and it is hereby dismissed. D

The judgment of the Court of Appeal which had affirmed the judgment of the trial Court is hereby affirmed. The prison terms for attempted murder are no longer relevant and are discountenanced in view of the death penalty affirmed herein. Appeal dismissed. E

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**ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead Judgment of my learned brother Ngwuta JSC just delivered. F

I agree with his reasoning and conclusion that the appeal has no merit and should be dismissed. G

Learned counsel for appellant raised twelve (12) issues for determination in this appeal all of which have been exhaustively considered by my learned brother in the lead Judgment and found to be without merit. I have nothing to add except to dismiss the appeal. H

Appeal dismissed.

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**PETER-ODILI JSC**

I am in total agreement with the judgment just delivered by

my learned brother, Nwali Sylvester Ngwuta JSC and to show my support I shall make some remarks.

This is an appeal against the judgment of the Logos Division of the Court of Appeal on 1st day of February, 2013 dismissing the Appeal against the judgment of the trial court.

B On the 10<sup>th</sup> day of December, 2015, Mrs. Anne T. U. Ibinola of counsel adopted the Brief of Argument of the appellant filed on the 5/11/15. She raised twelve issues for determination which are thus:

C 1. Whether the trial of the Appellant on the amended information in this case is competent when the original information is undated, uninitialed and unfiled and whether failure of the lower Court to consider and decide on this issue as raised in Appellant's Brief of argument is proper.

D 2. Whether the lower Court is obliged to invite parties to address it on the issue it raised suo motu before expunging same from its record when delivering it (sic) judgment, any evidence that was admitted without objection. Was the lower Court right in raising the issue of inadmissibility of Exhibits P1, P4 and P9 as well as part of the oral evidence if PW2, PW5 and PW7 suo motu from the record when E delivering its judgment without hearing the Appellant, and was the lower Court right when it upheld the conviction of the Appellant despite the fact that the evidence adduced by investigating Police Officer (PW2) lack credibility.

F 3. Whether the lower Court was right to have dismissed the defence of alibi put up by the Appellant, and was the lower Court right when it upheld the conviction of the appellant by the trial Court despite the fact that the trial Court place (sic) the burden on the appellant to prove his innocence by not giving effect to the written G statements of the deceased, in which she unequivocally stated that what happened to her was caused by generator accident.

4. Whether PW1 is a tainted witness whose evidence required corroboration and in the absence of which her evidence should be treated as unreliable.

H 5. Whether the lower Court was right when it held that the evidence of PW3 and PW4 were (sic) corroborated by the evidence of PW1, PW8, PW9 and PWIO as well as other real evidence before the Court; was the lower Court right when it relied on the uncorroborated evidence of PW1, PW3, PW4, PW9, PWIO and PW11

adduced by the prosecution at the trial Court to uphold the appellant (sic) conviction for attempted murder and murder, and was the lower Court right when it upheld the conviction of the appellant despite the fact that the trial Court was saddled with the responsibility of conducting investigation with respect to the genuity of Exhibit (sic) PWIO, PW11 and PW12 as the prosecution had failed to prove the said Exhibits against the appellant beyond reasonable doubt. B

6. Whether the lower Court properly evaluated the evidence of the parties before arriving at the decision to convict the appellant, and was the lower Court right when it upheld the conviction of the appellant despite the fact that the trial Court in evaluating the evidence adduced by the prosecution has not established by credible evidence and beyond reasonable doubt that it was the appellant that caused the burnt (sic) injuries, consequently resulting to the death of the deceased and that the deceased - Ann King is dead. C D

7. Whether the lower Court was right when it upheld the conviction of the appellant by the trial Court despite the fact that the charges were brought by the prosecution against the appellant without any credible and reasonable suspicion that the appellant committed the offences of attempted murder and murder, and was the lower Court right when it upheld the conviction of the appellant, that the prosecution proved the cases of murder and attempted murder against the appellant beyond reasonable doubt when the prosecution failed to prove the ingredients of the offences of murder and attempted murder beyond reasonable doubt. E F

8. Whether the lower Court duly considered the contradictions and inconsistencies complained of by the appellant in the prosecution's case and arrived at its decision that they are not material to be fatal to the prosecution's case. G

9. Whether the lower Court was right to have agreed with the trial Court that it considered and evaluated all evidence adduced as against the appellant complained that the trial Court considered the evidence of prosecution witnesses and made up its mind before considering the evidence of the appellant (sic) witnesses which show bias. H

10. Whether the belief of the deceased in danger of approaching death can be inferred from his declaration or statements, surrounding circumstances or opinion of third parties and whether the contention of the appellant that the deceased (sic) belief in danger of

approaching death can be garnered and inferred from surrounding circumstances and evidence is correct and was the lower Court right when it upheld the conviction of appellant despite the fact that Section 33 (1) (b) of the Evidence Act relied on by the trial Court to hold that the first two statements of the deceased does (sic) not constitute dying declaration as the accused did not believe herself to be in danger of approaching death is founded in law.

11. Whether the lower Court was right when it upheld the conviction of the appellant despite the fact that the trial Court failed to reach the conclusion from the conduct of the Honourable Director of Public Prosecution (DPP) in the matter that the prosecution (sic) are interested in persecuting the appellant and not prosecuting him.

12. Whether the lower Court was right when it upheld the conviction of the appellant for the offence (sic) of attempted murder and murder despite the fact that no weapon was found or recovered from the accused/appellant.

Learned Attorney General of Lagos, Adeniji Kazzeem Esq. adopted the respondent's Brief of Argument filed on 30/10/15 and deemed filed on 5/11/15. He identified nine issues for determination which are as follows:

1. Whether the trial of the appellant on the amended information in this case is competent when the original information is undated, uninitiated, unfilled and whether the failure of the lower Court to consider and decide on the issue as required in appellant's brief of argument is proper?

2. Whether the Court below was right when it held that the trial Court need not invite parties to address it specifically on evidential value to ascribe to Exhibit P1, P4, P9 and part of the oral testimonies of PW2, PW5 and PW7. (Grounds 2 of the Notice of Appeal).

3. Whether having regard to the totality of the evidence, particularly Exhibits P1, P4, P9 and part of the oral testimonies of PW2, PW5 and PW7, the Court below was right to hold and confirm that these (sic) evidence do not amount to dying declaration or *res gestae*. (Grounds 1, 2 and 25 of the Notice of Appeal).

4. Whether the Court below was right to have dismissed the defence of alibi put up by the appellant. (Grounds 3 and 4 of the Amended Notice of Appeal).

5. Whether PW1 is a tainted witness whose evidence required corroboration and in the absence be treated as unreliable. (Ground 5 of the Amended Notice of Appeal).

6. Whether the Court below was right when it affirmed the decision of the trial Court that the evidence of PW3 and PW4 corroborated by the evidence of PW1, PW8, PW9 and PW10 as well as other real evidence before the Court. (Grounds 6 and 7 of the Amended Notice of Appeal)

7. Whether the Court below was right to have held that the trial Court properly evaluated Evidence of parties before arriving at its decision to convict the appellant. (Grounds 8, 9, 10, 11, 12, 13, 14 and 05 of the Amended Notice of Appeal)

8. Whether the Court below was right to have affirmed the decision of the trial Court that the prosecution proved the cases of murder and attempted murder against the appellant beyond reasonable doubt.

9. Whether the Court below duly considered the contradictions and inconsistencies complained of by the appellant in the prosecution of this case and arrived at its decision that they are not material to be fatal to the prosecution's case.

I shall utilize the issues as crafted by the Appellant though not all of them in the determination of this appeal.

### ISSUE 3

Whether the lower Court was right to have dismissed the defence of alibi put up by the Appellant, and was the lower Court right when it upheld the conviction of the appellant by the trial Court despite the fact that the trial Court placed the burden on the appellant to prove his innocence by not giving effect to the written statements of the deceased, in which she unequivocally stated that what happened to her was caused by generator accident.

Learned counsel for the appellant contended that the appellant set up the defence of alibi as soon as practicable and at the earliest opportunity but the prosecution failed to investigate it. He cited *Ochemaje v State* (2008) ALL FWLR (Pt. 135) 1661; *Shehu v. State* (2010) ALL FWLR (Pt. 523) 1841 at 1858; *Ikaria v State* (2013) ALL FWLR (Pt. 675).

That the lower court glossed over and failed to consider the credibility of prosecution witnesses who were adjudged to have given

evidence pinning down the Appellant to the scene of crime as their evidence were filled with inconsistencies and contradictions.

For the respondent it was submitted that though once the defence of alibi is correctly made and found to be true the court should discharge and acquit the defendant but where the defence of alibi is demolished by direct and cogent evidence placing the defendant at the scene of crime that the alibi need not be investigated by the police. He cited *Sowemimo v State* (2004) 11 NWLR (Pt. 885) 515 at 626; *Balogun v A. G. Ogun State* (2002) 6 NWLR (Pt. 763) 515 at 535 - 535.

That the appellant did not raise the alibi at the earliest possible time when he was arrested and had not given any particulars of those who would have supported his defence of alibi, like the names of the persons with which the prosecution will investigate. He cited *Ebre v. State* (2001) 12 NWLR (Pt. 728) 621.

The stance of the appellant that the trial court later supported by the court below did not consider the defences available to the appellant with particular reference to the alibi appellant had raised. That position the respondent disagreed with. Indeed considering what the trial court did, it is clear that court was on firm ground backed by the evidence proffered by the respondent/prosecution that there was sufficient to pin the appellant at the scene of crime and the role he played in the act that culminated in the death of the deceased and the other victims who suffered various burn injuries.

Also cannot be faulted is the evaluation of all that was before the two lower courts from which they found and concluded that the evidence in P1, P4, P9 and part of the oral testimony of PW2, PW5, and PW7 could not pass the standard required to be classified as dying declaration and *res gestae* because the evidence were not spontaneously and contemporaneously made. The courts in coming to its findings did not rely on them as the court was satisfied that the victim did not believe herself to be in danger of approaching death nor could the danger of an impending death be inferred from surrounding circumstances or opinion of third parties. I refer to *Okoro v State* (2012) 4 NWLR (Pt. 1290) 351' at 372; *Hausa v State* (1994) 6 NWLR (Pt. 350) 281 at 289; *R v Ogbuewu* (1949) 12 WACA 483.

Again to be said is that the trial court cannot be faulted merely because the said exhibits P1 and P4 had been admitted in evidence.

This is because even if a document is admitted in evidence having passed the test of admissibility, the court in taking in hand all before it is at liberty to discountenance such a document if it did not add value to the assessment of probative value, all the evidence before court being taken in mind. In doing so, the court bearing in mind that no miscarriage of justice must occur, can ascribe probative value or not as the occasion demands and once the court has arrived at the appropriate decision, the discountenanced piece of evidence would not change the situation since it can be seen that the court acted with other available oral or documentary valid evidence. I rely on *Obidiozo v State* 16 (1987) 12 SC 74 at 103; *Akpanu v State* (1994) 9 NWLR (Pt. 368) 361. B  
C

In the matter of the said alibi raised by the appellant which he contends the court of trial did not consider. One is surprised at this standpoint especially when the appellant failed to supply the necessary materials at the earliest opportunity to the police with which to investigate to prove the alibi or debunk it especially the names of witnesses to the defence of alibi. This failure by the appellant taken together with the evidence which the prosecution made available to the court which enabled the court particularly that of trial which had the advantage of seeing and evaluating the credibility and demeanor of the witnesses to come to the conclusion that the alibi had nothing to hang on and that what was really on ground was that the prosecution had effectively pinned the appellant not only at the scene of crime but also well connected with the injuries on the victim which led to her death. See *Solola v State* (2005) 11 NWLR (Pt. 937) 460. D  
E  
F

For a fact this is one of those instances where this court cannot interfere with the concurrent findings of the two courts below as the findings were a throw up from available evidence in the context of the guiding principles of law and no miscarriage of justice occasioned. See *Kazeem Popoola v State* (2013) LPELR 20973. G

From the above I have no difficulty in resolving the issue against the appellant.

#### ISSUE 4 & 5 H

Whether PWI is a tainted witness whose evidence required corroboration and in the absence of which her evidence should be treated as unreliable.

Whether the lower court was right when it held that the Evi-

dence of PW3 and PW4 were corroborated by the evidence of PW1 PW8 PW9 and PW10 as well as other real evidence before the court was the lower court right when it relied on the uncorroborated evidence of PW1 PW3, PW4, PW9, PW10 and PW11 adduced by prosecution at the trial court to uphold the appellant conviction for attempted murder and murder and was the lower court right when it upheld the conviction of the appellant despite the fact that the trial court was saddled with the responsibility of conducting investigation with respect to the genuity of Exhibits P10, P11, and P12 as the prosecution had failed to prove the said Exhibits against the appellant beyond reasonable doubt.

For the appellant it was canvassed that the trial court ought not to have given weight to the evidence of PW4 who it found to be almost an accomplice and who made two contradictory statements to the police of the incident and admitted to telling several lies. That PW1 as an eye witness and a victim of the alleged crime was a tainted witness due to her strained relationship with the appellant and so her and there was poor evaluation of the evidence. He relied on *Joseph v State* (2011) ALL FWLR (Pt. 599) 1006 at 1018.

It was submitted for the respondent that PW1 was a victim of crime and an eye witness whose evidence does not require any form of corroboration. That where the evidence is unassailable the mere fact that the witness is the appellant's mortal enemy will not render her evidence unreliable. He relied on *Q v Ukut* (1960) 5 FSC 183; *Oteki v A.G. Bendel State* (1986) 2 NWLR (Pt. 24) 648 etc.

That the court below was right to have affirmed the findings of the trial court and that evaluation of evidence is the primary duty of the trial court.

In my humble understanding a tainted witness is one who has a purpose to serve and even though when faced with the evidence of such a witness the court has a duty as a matter of caution or prudence to warn itself as to how far it can go in awarding probative value to such evidence. Having stated that, I believe it is taking it too far that merely because the PW1 had a nasty encounter with the appellant in the past she should be classified as a tainted witness *even* though she was a victim and an eye witness. This is because, while a tainted witness needs his evidence corroborated, PW1 in her position of victim and an eye witness needs no corroboration to have her

evidence accepted without discredit. Also needing be said is that where the evidence of a witness is unassailable the fact that the witness is the appellant's mortal or lifelong enemy would not render her evidence unreliable. See *Mbenu v State* (1988) 2 NWLR (Pt. 84) 615; *Q v Ukut* (1960) 5 FSC 183; *Oteki v A. G. Bendel State* (1986) 2 NWLR (Pt. 24) 648; *Udo v Eshiet* (1994) 8 NWLR (Pt. 363) 483 at 502. B

Indeed the court below was right in affirming the findings and conclusion of the court of first instance and so I resolve the issue against the appellant.

#### ISSUE 7

Whether the lower court was right when it upheld the conviction of the appellant by the trial court despite the fact that the charges were brought by the prosecution against the appellant without any credible and reasonable suspicion that appellant committed the offences of attempted murder and murder and was the lower court right when it upheld the conviction of the appellant that the prosecution proved the cases of murder and attempted murder against the appellant beyond reasonable doubt I when the prosecution failed to prove the ingredients of the offences of murder and attempted murder beyond reasonable doubt. C D E

Learned counsel for the appellant submitted that there was an unresolved conflict in the testimonies of PW6 and PW8 as to the cause of the death of the deceased which was not also duly considered by the lower court. That the medical report and post mortem reports were not tendered in evidence by PW6 and PW8. That the Court of Appeal erred in law when it upheld the conviction of the appellant for the offences of attempted murder and murder by the trial court when the prosecution had failed to prove the ingredients of the offences beyond reasonable doubt. He cited *Adava v State* (2006) ALL FWLR (Pt. 311) 1777 at 1787 - 1788; *Micheal v State* (2008) ALL FWLR (Pt. 431) 875 at 886; *Ochema State* (2008) ALL FWLR (Pt. 435) 1661 at 1682, F G

The learned counsel for the respondent contended that there are no contradictions in the evidence of PW6 and PW8 who tendered the medical report and the post mortem report respectively which are complementary. I agree with the stand of the respondent's counsel that the evidence of PW6 and PW8 and the reports each tendered are complementary and support the evidence led in the H

case. The appellants hinging his submission on the difference in narration as to how the fuel was poured on the victims and the match lit, if there is a difference in the mode, it certainly is not so material as to change the course of events and would not be such a contradiction that would vitiate a conviction as the evidence before court is clear leaving no doubt as to what caused the death of the deceased and the linkage with the accused/appellant. See Mohammed Sele v State (1993) 1 NWLR (Pt. 269) 276.

Again, I see no basis to disturb the findings of the two courts below as I resolve the issue against the appellant.

From the above and well articulated and adumbrated reasoning in the lead judgment. I have no difficulty in coming to the conclusion that the trial court was correct in holding that the prosecution proved the cases of murder and attempted murder against the appellant beyond reasonable doubt and the Court of Appeal right in affirming what the trial court did. I too dismiss this appeal and abide by the consequential orders made.

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**ARIWOOLA JSC**

I had the privilege of reading in draft the lead judgment of my learned brother, Ngwuta, 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.

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

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**MUHAMMAD JSC**

I had a preview of the lead judgment of my learned brother, Ngwuta JSC, and entirely adopt same as mine in dismissing this unmeritorious appeal. I abide by the consequential orders made in the judgment.