

SUPREME COURT OF NIGERIA
FRIDAY 26TH FEBRUARY, 2016. SC. 338/2012
CORAM:- S. GALADIMA, M. U. PETER-ODILI,
C. B. OGUNBIYI, K. M. O. KEKERE-EKUN,
A. SANUSI, JJSC

MATHEW NWOKOCHA APPELLANT
V.
ATTORNEY-GENERAL OF IMO STATE RESPONDENT

CRIMINAL PROCEDURE - Interpreter - Use of an interpreter was only out of abundance of caution - Since appellant understood English language - And thus needed no service of an interpreter (H1)

FAIR HEARING - Armed robbery - Breach of fair hearing - Where party has been given opportunity of being heard - But refuses to enter his defence - He is deemed to have voluntarily abandoned his case (H2)

CRIMINAL PROCEDURE - Proof - Single witness - Evidence of a witness if believed - Can be acted upon by court to establish a case beyond reasonable doubt - Except where corroboration is required (H3)

FACTS

Accused/appellant and two others were jointly charged with armed robbery contrary to section 1(2)(b) of the Robbery & Firearms (Special Provisions) Act Cap. 398 Vol. XXII LFN 1990 (applicable to Imo State). They pleaded not guilty to the charge. Prosecution/respondent's case is that some armed robbers invaded the house of PW1. They robbed him of his money and a radio set. In the course of the robbery, PW1 recognized the robbers. In order to silence PW1 from reporting the crime, appellant stabbed PW1 on the head with the intention to kill him.

PW1 however survived the incident. The next morning, PW1 reported the incident to the police. He made statements to the Police and mentioned the names of appellant and the others as the people that robbed him. Appellant and the others were arrested and they

1458 Nwokocha v. A-G Imo State (2016) 2 KLR (pt. 381) 1457;
confessed to the crime. At the trial, appellant refused to testify. There-
after, the case witnessed several adjournments. On the date fixed for
judgment, appellant and the others were convicted and sentenced to
death. Appellant's appeal to the Court of Appeal was dismissed. Ap-
pellant has appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether the learned justices of the Court of Appeal were
right to have upheld and affirmed the decision, conviction and sen-
tencing of the trial Court when it was manifestly clear that the appel-
lant was not afforded a fair trial at the trial Court?

(ii) Whether the learned justices of the Court of Appeal were
right to have upheld and affirmed the conviction and death sentence
passed on the appellant for armed robbery when it was clear, from
the record, that the prosecution failed to prove the offence against
the Appellant beyond reasonable doubt as required by law?

HELD (Unanimously dismissing the appeal per
OGUNBIYI JSC)

CRIMINAL PROCEDURE - Interpreter

1. The need for an interpreter is not applicable to the case at hand. I seek to say also that the provision having been made for one is a sheer surplusage. Consequently the contention advocated by the appellant's counsel that there should be a repeat of the use of interpreter at every subsequent adjournment and evidenced on the record, is unreasonable. It is understood on the onset as shown at page 17 of the record supra that service of interpreter was provided.

The measure was only out of abundance of caution since the accused/appellant, from his statement to PW1 understood English Language and therefore needed no service of an interpreter. This is more so when the appellant is now raising the issue of interpreter for the first time in this Court. It is borne out on record also that the appellant was represented by counsel at the trial and he did not object to the proceedings on account of absence of an interpreter. The right, having been lost is now too late in the day and cannot be revisited. It is an afterthought. (p. 1468 E)

Armed robbery - Breach of fair hearing

2. From all indication, a neutral observer, as a reasonable man would in my view, have endorsed the patience exhibited by the trial Court in giving the appellant ample opportunity to have entered his defence and taken advantage of the Constitutional and legal provisions relating to fair trials and fair hearing. The onus was on the appellant who refused to avail himself of the opportunities. It is no longer open for him now to turn round and lay a complaint that he was denied fair hearing.

The rule pertaining to fair hearing simply means that parties must be given the opportunity to present their case. Where a party delays deliberately the hearing of his case, he will not be classified as coming within the rule. The appellant acted without reasonable consideration in this case: the Court could not have folded its hands and waited endlessly for the appellant's convenient time which may never come.

The Court must be proactive and in control of the proceedings to ensure that justice and fair play are done to all parties.

The Lower Court was right when it endorsed the line of action taken by the trial Court in the exercise of its discretion Judicially and Judiciously. Judicial authorities are well pronounced that, where a party to a suit has been accorded every opportunity of being heard evidently, and for no just cause whatsoever refuses to enter his defence or neglects to attend the sittings of the Court, he is deemed to have voluntarily abandoned his case or defence and cannot be heard to complain of any breach or denial of fair hearing. (p. 1472 D)

CRIMINAL PROCEDURE - Proof - Single witness

3. For all intents and purposes, it is apparent that the evidence of PW1, PW2 and PW3 was sufficient to fix the appellant with the commission of the offence charged. The prosecution has the duty to prove its case against the accused person beyond reasonable doubt.

However the law gives it the discretion to call only those witnesses required to unfold its case. Given all the circum-

stances of the case, the evidence of PW1 alone was sufficient to discharge the burden on the prosecution. The law is trite that evidence of a single witness if believed can be acted upon by the Court to establish a case beyond reasonable doubt except where the law requires corroboration. (p. 1477 C)

B

NOTABLE POINT OF INTEREST

OGUNBIYI JSC

1. Fair hearing – Concept of

C The use of the phrase concept of fair hearing: involves a fair trial and a fair trial of a case consists of the whole hearing. Therefore there is no difference between the two.

The true test of a fair hearing is the impression of a reasonable person who was present at the trial whether from his observation
D justice has been done in the case.

The term fair hearing therefore has been defined variously by this Court to mean trial conducted according to all legal rules formulated to ensure that justice is done to all parties to the case.
(p. 1466 D)

E

REPRESENTATION

Adedapo Tunde - Olowu with him, A. M. Sanusi, S. R. Akinrinlade and Raymond Ofagbor, for the Appellant

F Respondent not represented

CASES REFERRED TO

Anyanwu v. State (2002) 10 NSCQR 1335

Effiom v. State (1995) 1 NWLR (pt. 373) 507

G Mohammed v. Kano Native Authority (1968) 1 All NLR 424

Ogunsanya v. State (2011) 12 NWLR (pt. 1261) 401

Ugoru v. State (2002) 4 SC (pt. 11) 13

Amamchukwu v. F.R.N. (2009) 8 NWLR (pt. 1144) 475

Abdullahi v. State (2008) 16 LCRN 96

H Utteh v. State (1992) 2 NWLR (pt. 223) 257

Alabi v. State (1993) 7 NWLR (pt. 307) 511

Nwokedi v. C.O.P. (1977) NSCC 127

Adekoya v. State (2012) MRSCJ Vol. II p. 20-21

Nkebisi v. State (2010) 5 NWLR (pt. 1188) 471

Okputor v. State (1990) 7 NWLR (pt. 164) 581

Igbo v. State (1975) 9 -11 SC

STATUTES REFERRED TO

Robbery & Fire Arms (Special Provisions) Act Cap 398 vol. XXII B
LFN 1990, s. 1(2)(b)

Constitution of the Federal Republic of Nigeria 1999, s. 36

Criminal Procedure Laws, s. 210

LEAD JUDGMENT BY OGUNBIYI JSC

This is an appeal against the Judgment of the Court of Appeal sitting at its Owerri Judicial Division affirming the conviction of the appellant by High Court of Imo State. The appellant alongside one David Amadi and Ikechi Ukanacho were found guilty of the offence of Armed Robbery contrary to s. 1(2)(b) of the Robbery and Fire Arms (Special Provisions) Act Cap 398 Vol. XXII Laws of the Federation of Nigeria 1990 and sentenced to death on the 28th September, 2006.

The historical background of this appeal was that the appellant was jointly charged alongside one David Amadi and Ikechi Ukanacho with the offence of Armed Robbery contrary to Section 1(2) (b) of the Robbery and Firearms (Special Provisions) Act Cap.398 Vol. XXII Laws of the Federation of Nigeria 1990 as applicable in Imo State. He was the 3rd accused person in the said charge.

The accused persons pleaded not guilty to the charge. The appellant refused to testify and did not call any witness. The case of the prosecution was that on 3/5/1998 around 2a.m. armed robbers invaded the house of PW1 one Mr. Vitalis Abareke, at Umuebe in Akabor. PW1 who was sleeping at that time was awoke by the barking of his dogs. He drew near the window and saw people dressed in black shirts and trousers. The robbers tried to force the door open and he was shouting “thieves, thieves”.

When the robbers eventually gained entrance into his house, they robbed him of various sums of money totaling N90,000.00 (Ninety Thousand Naira) and a trident radio worth N7,400.00 (Seven Thousand Four Hundred Naira).

In the course of the robbery he saw and recognized the rob-

bers as David Amadi, the 1st accused: Ikechukwu Ukanacho, the 2nd accused; Mathew Nwokocha, the 3rd accused/appellant and one Kingsley Amadi who is still at large. During the robbery, that the 3rd accused/appellant, Mathew Nwokocha instructed the others to beat PW1 to death or he will retaliate. To drive home his point, the 3rd
B accused/appellant picked up an empty bottle on PW1's dining table and broke same on his (PW1) head and used the sharp edge to stab PW1 on the head. PW1 recognized the robbers by the aid of moon-light through his window glass which he opened a little having drawn the curtain earlier. The robbers were people from his community
C and he knew them prior to the incident.

In the morning, PW1 reported the incident to the police at Iho. He made a statement to Iho Police and mentioned the names of the accused persons the appellant inclusive and Kingsley Amadi still
D at large as the people that robbed him. The matter was subsequently transferred to the State CID Owerri where he also made a statement on 11/5/98 and mentioned the names of the accused persons again.

The 1st and 2nd accused persons were first arrested and arraigned while the search for the appellant and other fleeing accused
E person continued.

Eventually, the appellant, Mathew Nwokocha was arrested at Port Harcourt and brought back to the State CID Owerri where he volunteered his statements. In his 1st statement the appellant mentioned the 1st and 2nd accused persons as his co-accused persons.
F His 2nd statement led to the recovery of a Yamaha RK 125 motorcycle which he had earlier stolen. The statements were admitted as Exhibits D and E respectively-

At the close of the case for the 2nd accused, Ikechi Ukanacho,
G the Court called on the 3rd accused/appellant, Mathew Nwokocha to enter his defence but he refused.

Thereafter and on the 23rd January, 2006, the Court adjourned the case to 2nd March 2006 for addresses. On that day, the Court granted the appellant's counsel, Mr. E. F. Njemanze, (who had
H earlier claimed that the accused/appellant has lost confidence in him), the liberty to submit written address on behalf of the appellant.

The case was subsequently adjourned first to 3/5/2006 and later to 18/5/2006 for address. On 18/5/2006, the counsel for the 1st and 2nd accused persons addressed the Court. The prosecution's

reply was taken on 19/5/2006. On that date, the case was adjourned for judgment on 28/9/2006 when the trial Court convicted the appellant and the two other accused persons and sentenced them to death for the offence of Armed Robbery. The appellants appeal to the Court of Appeal was dismissed.

Dissatisfied with the Judgment of the Lower Court, the appellant has now filed a notice of appeal containing four (4) grounds of appeal before this Court on 11th June, 2012. In compliance with the rules of Court, briefs of arguments were filed and exchanged between parties. The appellants brief of argument dated 8th October, 2012 was filed on the same date, and the reply brief also deemed filed on the 22nd April, 2015: the respondents brief dated 30th January, 2013 and filed 4th February, 2013 was however deemed properly filed on 9th October, 2013.

On the 3rd December, 2015 when the appeal was for hearing, the learned counsel Mr. Adedayo Tunde - Olowu represented the appellant and led a number of counsels. The respondent was however neither in Court nor was he represented by any counsel. There was evidence on record confirming service of the hearing notice sent and received by the respondent's chambers. The learned appellant's counsel adopted and relied on their two briefs in urging the Court to allow the appeal. In the absence of the respondent but with his brief having been duly filed, same was deemed as argued and the appeal was adjourned for judgment.

On behalf of the appellant, the issues that fall for determination on their brief of argument in this appeal are two fold as follows:-

(i) Whether the learned justices of the Court of Appeal were right to have upheld and affirmed the decision, conviction and sentencing of the trial Court when it was manifestly clear that the appellant was not afforded a fair trial at the trial Court? (The issue is distilled from grounds 1, 2 & 3)

(ii) Whether the learned justices of the Court of Appeal were right to have upheld and affirmed the conviction and death sentence passed on the appellant for armed robbery when it was clear, from the record, that the prosecution failed to prove the offence against the Appellant beyond reasonable doubt as required by law? (This is formulated from ground 4)

It is pertinent to point out that the issues raised by the appellant's

counsel were adopted in totality by the respondent's counsel and the resolution of same were also made by both counsel in the same sequence. I will also consider the issues in the order adopted by the learned counsel.

1st Issue raised is whether the appellant did not have fair hearing in the course of his trial in this case.

It is the contention of the appellant's counsel that his client was not afforded a fair hearing/trial as provided by Section 36(1), (4) and (6) of the Constitution of the Federal Republic of Nigeria, 1999, that what transpired at the Trial Court, counsel laments, was a travesty of Justice and gave the detailed explanation of the grounds predicating his contention as follows:- That

(a) counsel for appellant was not in Court when the PW3 testified and was not cross-examined by him.

(b) the appellant did not testify at the trial because of the heated arguments/accusations and loss of confidence appellant had, both towards the trial Court and his counsel in other words, the scene is properly captured from the record of appeal with specific reference at page 125 where a dialogue ensued between the appellant and the trial judge.

(c) counsel for appellant applied to withdraw from the matter and be discharged since appellant had lost confidence in him to handle his defence but the trial Court refused to adjourn for the appellant to engage another counsel that the case continued notwithstanding that defence counsel was no longer in the matter

The summary of the foregoing counsel argues, portrays a clear denial of the appellant's right to fair hearing as demonstrated by the absence of exercise of proper discretion judicially and judiciously by the trial Court and wrongly affirmed by the Lower Court.

The counsel submits regrettably that a careful reading of the record of appeal, will reveal a complete replete of so many actions/in- actions/utterances of the learned trial judge from which it can be discerned with high degree of certainty that the appellant was not afforded fair trial at the trial Court.

In his response, the respondent's counsel submits the appellants contention as unfounded and a complete figment of tales full of fury and signifying nothing. In other words, that it is not true to say that the appellant was refused a fair hearing at the trial Court: that a

reasonable man observing the totality of the trial will see clearly that there was a fair trial and that the appellant refused to enter his defence because he had none to offer and would rather have the case delayed and dragged on indefinitely. This, counsel confirms especially in view of the answer by the appellant to a question put to him by the trial Court as follows:-

Court: If this case transferred it will affect the co-accused as it will start de novo.

Answer: I do not know or care about them. I was arrested and detained alone.” See page 125 of the record.

In further submission, the respondent’s counsel related copiously to S.36 of the 1999 Constitution and emphasized in strong terms that the trial judge duly observed the constitutional requirement right from the arraignment till judgment was given; that for all intents and purposes, counsel submits that the appellant did understand both English and Igbo language: that counsel to the appellant was therefore wrong when he concluded that the charge was not read over and explained to the appellant. Reference was made to the case of *Anyanwu V. The State* (2002) 10 NSCQR 1335 where the law lays as mandatory that the service of an interpreter must be employed in a charge of a criminal trial where an accused person does not understand the language of the Court.

Counsel also submits that the failure to state categorically on the record that such interpreter was used at every subsequent adjournment will not vitiate the trial: see the case of *Anyanwu V. The State* (supra) at P.1355, that the appellant’s Insistence to a non-existing statement, to be given him before he would testify in his defence, is a play to stagnate the hearing of the case; that the evidence of several adjournments at the instance of the appellant, who refused to testify in his defence, is a clear strategy of an intention to frustrate the hearing of the case. Reference was made to S.210 of the Criminal Procedure Laws (CPL) where the law dispenses with the presence of the appellant in Court in situation where he misconducts himself by interrupting the proceedings or otherwise as to render their continuance in his presence impracticable.

In the circumstance of this case the learned counsel endorsed the move taken by the trial Court wherein it proceeded with the trial of the case and dispensed with the presence of the 3rd accused/ap-

pellant: that the trial of the accused/appellant was in compliance with the provisions of Section 210 of the Criminal Procedure Laws of Eastern Nigeria 1963 : that the appellant was duly represented by counsel of his choice throughout the hearing of the case and he should not be heard to complain therefore.

B The totality of the submission by the respondents counsel is urging before us that the appellant, contrary to the submission by his counsel was not denied a hearing/fair trial in this case and that the issue should be resolved against him.

C The 1st issue seeks to question the propriety of the appellant's trial which his learned counsel argues was not conducted in accordance with legal rules formulated for the purpose of doing justice. The decision in the case of Effiom v. The State (1995) 1 NWLR (pt. 373) 507 at 528 cited by the appellant's counsel is an authority in
D which several legal rules were formulated for purpose of ensuring that justice/fairness is done in a criminal trial.

The use of the phrase concept of fair hearing: involves a fair trial and a fair trial of a case consists of the whole hearing. Therefore there is no difference between the two.

E The true test of a fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case. See the case of Mohammed V. Kano Native Authority (1968) 1 All NLR 424 at 436.

F The term fair hearing therefore has been defined variously by this Court to mean trial conducted according to all legal rules formulated to ensure that justice is done to all parties to the case. See Ogunsanya v. The State (2011) 12 NWLR (pt. 1261) 401 at 434; also Ugoru v. State (2002) 4 SC (P 11) 13 at 19 where U. A. Kalgo, JSC said:-
G

“...the term ‘fair hearing’ in relation to a case in my view, means that trial to the case of the conduct of the proceedings thereof, is in accordance with the relevant law and rules in order to ensure justice and fairness...”

H Broadly speaking, this Court had extended the interpretation of fair hearing from the perspective of a mere adherence to the twin pillars of justice so as to include anything improperly done during the trial which may cause an unbiased by-stander to feel that justice has not been done. See the case of Amamchukwu v. F.R.N. (2009) 8

NWLR (pt. 1144) 475 at 486 where Tabai, JSC extended the concept and said:

“It encompasses not only the compliance with the rules of natural justice, but also audi alteram partem. It also entails doing in the course of trial, whether civil or criminal, all things which will make an impartial observer leave the Court room with the belief that the trial has been balanced and fair on both sides to the trial.” (Emphasis is supplied).

The question that calls for an answer in this issue is whether the accused/appellant in question was accorded fair hearing? In other words, were the proceedings both at the trial Court and the Court below conducted in accordance to all legal rules formulated to ensure Justice is done to the parties? The measuring yardstick is the opinion of the said unbiased by-stander who must approve in satisfaction.

The appellant’s counsel submits emphatically that there are serious errors in law/irregularities committed by the trial Court, also the Court below which have breached seriously the appellants right to fair trial and fair hearing as shown on the record and thus occasioning a miscarriage of Justice. Finally that the totality of evidence did not disclose any prima facie case against the appellant. Counsel urges the Court to resolve the issue in favour of the appellant.

To the contrary, it is the submission by the respondents counsel that the appellant did have a fair hearing/fair trial throughout the Proceedings at the Lower Court and also the trial Court: that the learned trial judge duly observed all the constitutional requirements from the arraignment right through till Judgment was given.

It is pertinent to restate that the arraignment of the appellant and two others, kick started at page 17 of the record after the charge was amended and the trial judge noted on the record lines 27 - 30 and said thus:

“Application is granted and charge is amended accordingly. Plea: charge as amended is read over to accused persons and explained to them in Igbo Language.” (Emphasis is mine).

The significance of the foregoing proceeding is to the effect that the accused, appellant inclusive, were provided the service of an interpreter who interpreted the amended charge and the proceed-

ings to the accused persons in Igbo Language. The same procedure was again repeated on 31st August 1999 when there was a further amendment of the charge and a fresh plea was taken from all the accused persons inclusive of the appellant, who pleaded not guilty.

B PW2, by name Emmanuel Igwe, Force No. 135244 the Sgt attached to the Criminal Investigation Department (CID) Anti-robbery section was the IPO and knew all the accused persons. This was the witness' evidence at page 47 of the record:

C *"He (accused/appellant) was brought back to the office where I charged and cautioned him with the offence in the house of PW1. He volunteered a statement in English Language which I recorded read it over to him he accepted it as correct signed and I counter signed."*(emphasis supplied).

D Contrary to the contention portrayed by the appellant's counsel. In addition to the charge been read and explained to the accused/appellant by an Interpreter in Igbo Language, he did understand the language of the Court and hence his volunteering a statement in English Language to PW2.

E In the case of Anyanwu V. The State (supra) at 1344 it was held by this Court thus:-

"The use of interpreter is mandatory where a person charged with a criminal offence does not understand the Language used in the trial."

F ***The need for an interpreter is not applicable to the case at hand. I seek to say also that the provision having been made for one is a sheer surplusage. Consequently the contention advocated by the appellant's counsel that there should be a repeat of the use of interpreter at every subsequent adjournment and evidenced on the record, is unreasonable. It is understood on the onset as shown at page 17 of the record supra that service of interpreter was provided.***

H ***The measure was only out of abundance of caution since the accused/appellant, from his statement to PW1 understood English Language and therefore needed no service of an interpreter. This is more so when the appellant is now raising the issue of interpreter for the first time in this Court. It is borne out on record also that the appellant was represented by counsel at the trial and he did not object to the proceedings on***

account of absence of an interpreter. The right, having been lost is now too late in the day and cannot be revisited. It is an afterthought. See again the case of Anyanwu V. The State (supra).

On whether or not the appellant was given right or adequate opportunity to present his case, regard should be had to the trial Court's record of proceedings of 7/11/2005 at page 119 wherein the appellant was in Court but refused to testify and insisted on seeing the statement he alleged to have made to the police in September, 1998. B

The Court adjourned the proceedings to the 29th November, 2005 with a further order that the appellant's counsel should be in Court. C

On the said 29th November, 2005 when the matter came up for further hearing, accused/appellant was in Court but his counsel was absent. The trial Court however inquired from the prosecuting D counsel thus:-

"Court to Mr. Amaechi (State Counsel)

Is there any statement by 3rd accused in

Ans: All statements made by the 3rd accused were tendered through the IPO they are in Court as Exh. "D and E" E

Also at lines 25 - 27 the Court proceeded and ask thus:-

"Court: Is there any statement made by 3rd accused to other Police officer in the file?"

Ans: None, the only statement made by 3rd accused were those tendered and marked." F

Again and of further relevance and consideration is the evidence of PW2. At the same page 47 of the record at lines 3 - 23 PW2 the witness had this to say:-

"The search for the fleeing robbers however continued.... We received information that Mathew Nwokocha. 3rd accused was spotted in Port Harcourt, Rivers State. G

Inspector Lasisi Adisa led a team of detectives to Port Harcourt where the 3rd accused was arrested....In his statement he mentioned the 1st and 2nd accused as people in his company when he robbed the PW1. He made two statements but not the same day. In the 2nd statement he confessed to other robberies. His second statement led to the recovery of a Yamaya RX 125 (sic) motorcycle which he had earlier robbed."(emphasis supplied). H

There is nowhere on the record that PW2 was cross examined by the appellants counsel on his evidence (supra) as to the existence of any other statement. This is taking into account and notwithstanding that both the accused/appellant and his counsel Mr. E. F Njemanze were in Court.

B It is expedient to restate that PW2 was so emphatic when he stated that after the appellant was arrested he was charged and cautioned of the offence in the PW1's house. As rightly submitted by the respondent's counsel, the appellant's insistence on a non-existent statement as a pre-condition to his giving evidence in his defence was
C nothing short of a play to stagnate the hearing of the case.

Another scheme or strategy employed by the appellant to frustrate the hearing of the case was where the case was adjourned seven times at the instance of the 3rd accused/appellant for refusal to testify
D in his defence. At page 123 lines 18 - 30 of the record, the learned trial judge said:-

Court: This case came up for defence by 3rd accused person on 7th November, 2005, he refused to testify claiming that he would only do so if given the statement which he made to a Cpl. Ogbolu in
E 1998. He again refused to enter his defence on 29th November 2005 to which date the case was adjourned and that prompted the question put to the prosecuting counsel on that date. He has again refused to enter his defence today. In the circumstance my belief is that he has nothing to offer in deference, I shall therefore adjourn the
F case for address by counsel. Case adjourned to 2nd March, 2006 for addresses.

On 2nd March, 2006 when the trial Court reconvened, the accused was in Court so also his counsel Mr. E. F. Njemanze who
G applied for an order renewing his application for his discharge from further representing the accused on account of the refusal to heed the counsel's instruction. In other words that the accused, instead of giving evidence had engaged himself in calumny against him as his counsel and the trial Court.

H In summary and a nutshell, the reproduction of certain aspects of the dramatic event that took place in Court as reflected in the proceedings at pages 124 - 126 of the record will give a better exposure of the appellant's outright and persistent refusal to enter his defence.

“Court: To the 3rd accused:

You heard your counsel, what do you say?

Ans: I had said that I have lost confidence in this Court and that I do not want this Court to continue with my trial

Court: What reasons have you for the loss of confidence?

Ans: I have been facing trial in this Court since 1999 and nothing has happened. The statement which I made to police in September was not tendered before this Court. The only brother I have who has been financing the case is now deceased and the counsel has been asking for money.

I have been receiving threats from this Court e.g. when the Court told me that I will meet him next year. That was in November, 2005. I see that as a threat.

The Court said last year that I was using delay tactics. He called me a criminal and that I would stay in prison.

Court: you said that your counsel was asking of money - what if he is prepared to go on without money?

Ans: I do not need his assistance anymore

Court: Are you prepared to get another counsel?

Ans: Yes but not if the case is still in this Court.

Court: Have you applied for transfer?

I will do that if necessary.

Court: If this case is transferred, it will affect the co-accused as it will start de novo.

Ans: I do not know or care about them. I was arrested and detained alone.

Mrs. Amadi in re-action says that the application of both of counsel and transfer are belated. The accused cannot now ask for change of counsel or Court. Says that the charge is for armed robbery and legal aid counsel do not take up armed robbery matters. Urges the Court to refuse the application.

Court: Much as the Court appreciated the position of the defence counsel it has also taken notice of the effect of granting the application considering the nature of the charge, length and stage of this trial.

I shall refuse both application of the 3rd accused counsel to be discharged and that of the 3rd accused as that of an accused refusing to put up a defence. The case is adjourned for address. Counsel for

the 3rd accused is allowed to submit a written address...”

In summary and on a combined reading of the entire events and happenings that took place on the 2nd March, 2006. I agree with the view held by the Lower Court that the refusal of the applications by the learned trial judge cannot be separated from the antecedents of the case which invariably include the length of time the trial had taken between 1999 - 2006: the fact that the appellant was charged along with two other accused persons: the fact that it was after the appellant failed to enter his defence for no valid reasons at all on two occasion and the Court had to adjourn on 23rd January, 2006. In addition to the foregoing conclusions it cannot be ruled out also that the learned counsel for the 3rd accused/appellant would not have asked for discharge from the case ordinarily without an objection by the State.

From all indication, a neutral observer, as a reasonable man would in my view, have endorsed the patience exhibited by the trial Court in giving the appellant ample opportunity to have entered his defence and taken advantage of the Constitutional and legal provisions relating to fair trials and fair hearing. The onus was on the appellant who refused to avail himself of the opportunities. It is no longer open for him now to turn round and lay a complaint that he was denied fair hearing.

The rule pertaining to fair hearing simply means that parties must be given the opportunity to present their case. Where a party delays deliberately the hearing of his case, he will not be classified as coming within the rule. The appellant acted without reasonable consideration in this case: the Court could not have folded its hands and waited endlessly for the appellant’s convenient time which may never come.

The Court must be proactive and in control of the proceedings to ensure that justice and fair play are done to all parties.

The Lower Court was right when it endorsed the line of action taken by the trial Court in the exercise of its discretion Judicially and Judiciously. Judicial authorities are well pronounced that, where a party to a suit has been accorded every opportunity of being heard evidently, and for no just cause

whatsoever refuses to enter his defence or neglects to attend the sittings of the Court, he is deemed to have voluntarily abandoned his case or defence and cannot be heard to complain of any breach or denial of fair hearing. The following authorities are

well settled: Mirchandani V. Pinhero (2001) 3 NWLR (pt 701) 557. Folbod Investment Ltd. (1996) 10 NWLR (pt. 478) 344, Abubakar V. INEC (2004) 1 NWLR (pt 854) 207, Scott Emukpor V. Ukaube (1979) 1 SC 6, Oyeyipo v. Oyinloye (1987) 1 NWLR (Pt 50) 356; Omo V. JSC (2000) 12 NWLR (Pt 682) 444, and A.N.P.P. v. REC Akwa Ibom State (2008) 8 NWLR (1990) 453.

Niki Tobi, JSC in the case of Adebayo V. Attorney-General of Ogun State (2008) 7 NWLR (pt 1085) 201 at 205 to 206 had the following to say also on the growing tendency to abuse the fair hearing principle:-

“...The fair hearing, provision in the Constitution is the machinery or locomotive of Justice, not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in a case and force the Court to apply it to his advantage.

On the contrary, it is a formidable and fundamental provision available to a party who is really denied fair hearing because he was not heard or that he was not properly heard in the case.”

In the instant case, and as rightly held by the Lower Court, the learned trial Judge was not expected to wait indefinitely in reaching a decision in the case pending before him, for the written address of the learned counsel to an appellant who had refused to enter his defence,

In my view the two Lower Courts could not have acted otherwise than they did. I also endorse their line of action and tow same as reasonable. I therefore hold that the 1st issue is resolved against the appellant.

The 2nd issue is whether the prosecution had proved its case against the appellant beyond reasonable doubt.

It is submitted by the appellant's counsel that the Court below wrongly affirmed the decision of the trial Court in convicting and sentencing the appellant to death for armed robbery, in spite of the fact that it was glaringly clear (from the record) that the essential ingredients of armed robbery were not proved beyond reasonable

doubt, against the appellant; that the prosecution failed to show that something was stolen indeed from PW1 without proving strictly the existence of the money and radio allegedly stolen before the robbery complained of; that PW3, (the doctor that attended to PW1), in his testimony totally contradicted PW1's story of how he may have sustained the 'healed scar' on his head (upon which prosecution and the Learned trial Judge so heavily relied to say that violence was used the incident): that the prosecution failed to strictly establish that the appellant was one of the persons who attacked PW1.

It is counsel's further submission that Exhibits "D" & E (the alleged Appellant's confessional statements on which the two Lower Courts heavily relied) are totally impracticable and impossible as they were made on 12th and 15th August, 1998 respectively while PW2 (the IPO) positively testified that the appellant was arrested for the very first time in Port-Harcourt. In September, 1998... i.e. the confession was made some weeks before the Appellant's arrest, which counsel submits could not have been possible: that the whole uncorroborated story told by PW1 is nothing but mere imagination.

In reaction to the appellant's issue No 2, on the question of proof, the learned counsel for the respondent reiterates the ingredients that must be proved to establish the offence of armed robbery as enumerated in the case of *Abdullahi v. The State* (2008) 16 LCRN 96 at pages 113 - 114: that from the evidence of PW1, the prosecution did prove that there was robbery and the robbery was armed robbery and the appellant was one of the robbers.

Counsel in his unshaken submission reiterates further that based on the totality of evidence adduced at the trial Court, the prosecution had proved its case beyond reasonable doubt against the appellant: that PW1 was an eye witness whose evidence was never impugned: that the appellant, counsel submits, is within his constitutional right absolutely, in choosing not to testify in his defence. However, that the implication is also obvious that where the prosecution laid sufficient evidence that calls for rebuttal by the accused and such response is not forth coming, the trial Court will be entitled to rely on the uncontroverted evidence of the prosecution witnesses in finding the accused person guilty. Reference in support was made to the case of *Sylvester Utteh v. The State* (1992) 2 NWLR (pt. 223) 257 which held that it is the accused's constitutional right to remain silent during

investigation or in Court and the prosecution has the duty to prove him guilty.

In the case of *Alabi v. The State* (1993) 7 NWLR (pt. 307) 511 at 523, this Court highlighted and restated the essential ingredients of the offence of armed robbery as established by numerous decided authorities and said:-

“...For the prosecution to succeed in the case, there ought to be proof beyond reasonable doubt:

- i. That there was a robbery or a series of robberies.*
- ii. That each robbery was an armed robbery.*
- iii. That appellant was one of those who took part in the robberies...”*

It is the submission by the learned counsel for the appellant that the above three requirements/ingredients must be contemporaneously proved and co-exist: that failure to establish any one will be fatal to the case of the prosecution and would inexorably lead to a verdict of not guilty. See *Nwokedi v. C.O.P.* (1977) NSCC 127. The same principle was reiterated again in the case of *Adekoya v. The State* (2012) MRSCJ Vol. II p. 20-21.

In proof of prosecution's case, the encounter by PW1, the victim of the robbery is very informative and in his evidence, while testifying at pp.35-37 of the records, he states thus:-

“On the 3rd day of May, 1998 at about 2a.m., I was sleeping in my house when I heard my dogs barking. I got up, drew the door blinds in my house and saw people dressed in black shirts and trousers I shouted on them as to who they were. What I heard next was gun shot.

Before the gun shot, three of them were already at my door step. As they tried to force open my door, I started shouting “thieves, thieves” as I was shouting they were still gun shots.

This prevented the villagers from coming out to answer my alarm. As I was shouting, I saw the three accused as they stood by the door trying to force the door open.

When they eventually succeeded in gaining entry, the first question they asked was about the money I realize (sic) from the sale of palm fruits. As they were asking the question, they were beating me. I answered that the money was sent to Owerri on the same day I received it.

As they were beating me, 3rd accused warned them to beat me to death or else I would retaliate.

As he was still issuing the warning he third accused laid hand on an empty bottle on my dining table and hit it on my head. At the same time used the sharp end to chuke me on my head asking me to tell the truth. I then showed them the location of the money at my bedside safe. They left the place I showed them and collected the money belonging to my wife which was N50,000.00 (Fifty thousand naira) later, they broke the safe. I earlier showed them and collected the N30,000.00 (thirty thousand naira) I realized from sale of the palm fruits. They also collected N10,000.00 (ten thousand naira) I left on top of the safe which was meant for the hospital bill of my daughter in the hospital. As they were leaving they collected my tri-dent radio cassette which I bought for (N7,400.00).

As they were leaving, they kicked my son between 8 yrs and 10 yrs who was running out to invite our neighbours.”

Furthermore the witness PW1 continued and said thus again at page 37 of the record -

“I opened the window glass a little having drown the blind. There was moon light that night. I saw the following: One Kingsley Amadi. I also saw Matthew Nwokocha Onyewueze (underling mine) the third accused who hit me with a bottle. I saw Ikechi Ukanacho, 2nd accused. I also saw David Amadi the 1st accused. These are the ones I identified before I was wounded.”

From the testimony of PW1 supra, as the victim of the robbery, he did not only mention appellant by name to the police, he also stood in a strong position to identify those who robbed him, this is especially wherein PW1 knew the appellant previously before the incident and whose identity did not pose any difficulty to the witness in recognizing the appellant.

Furthermore it is on record that the 3rd accused - Mathew Nwokocha/appellant, refused to testify in his defence. His statements Exhibits “D” and E are accepted as voluntary and admitted in evidence. His said statements, particularly Exhibit “D” has confessed the crime and further corroborated the evidence of PW1. On a careful perusal of the statement by 3rd accused/appellant at pages 28 - 29 of the record, certain facts contained therein are such that it is the said accused/appellant only and non other person that could have had

the knowledge thereof and supplied the information which peculiar facts include the following:-

(a) The names of the other members in the gang other than Kingsley Amadi mentioned also by the PW1.

(b) The meeting and contributions at the meeting where the decision to rob the PW1 was taken. B

(c) The weapon carried by the armed members of the gang

(d) The sharing of the loot

(e) The sale of the Trident Radio Cassette as well as the sharing of the proceeds at Owerri.

The confirmation of the only conclusion is that the statement Exhibit "D" was as in fact made voluntarily and not obtained by duress. C

For all intents and purposes, it is apparent that the evidence of PW1, PW2 and PW3 was sufficient to fix the appellant with the commission of the offence charged. The prosecution has the duty to prove its case against the accused person beyond reasonable doubt. D

However the law gives it the discretion to call only those witnesses required to unfold its case. See the case of Nkebisi V. State (2010) 5 NWLR (Pt.1188) 471, and Okputor V. The State (1990) 7 NWLR (Pt 164) 581 at 589 - 593. ***Given all the circumstances of the case, the evidence of PW1 alone was sufficient to discharge the burden on the prosecution. The law is trite that evidence of a single witness if believed can be acted upon by the Court to establish a case beyond reasonable doubt except where the law requires corroboration.*** See the cases of Igbo V. The State (1975) 9 -11 SC, 129-136; Onafowokan v. The State (1987) 3 NWLR (Pt. 61) 538 or 552; (1987) 7 SCNJ 233; Ogoala V. The State (1991) 2 NWLR (Pt 175) 509 at 533 (1991) 3 SCNJ 61; Ugwumba V. The State (1993) 5 NWLR (Pt 296) 660 at 674; 6 SCNJ 217. F

The appellant's statement Exhibit D is a corroborating factor to the evidence of PW1 which either could have been sufficient to prove the prosecution's case. It is no wonder that the Lower Court was obviously on track when it endorsed the conclusion arrived at by the trial Court when it said thus:-

"The 3rd accused Mathew Nwokocha refused to testify in his

defence. He made Exhibits D and "E" which are accepted as voluntary. His said statements particularly Exhibit D confessed the crime and further corroborated the evidence of the PW1. Further his escape to Port-Harcourt in the Rivers State upon the knowledge that he was mentioned as one of the robbers further strengthened the prosecution's case against him."

The concept of what amounts to proof beyond reasonable doubt has been held in *Ndike V. The State* (1994) 8 NWLR (pt. 366) p.33 at P45 to mean:-

"Proof beyond reasonable doubt as a requirement for conviction in criminal cases does not mean proof beyond the shadow of doubt."

Also in the case of *Ehor V. The State* 1 (1993) 4 NWLR (Pt. 290) P663 it was held that a finding of guilt ensures that the accused and no one else committed the offence charged.

The appellant did not cross examine PW1 on the material aspect; in particular the injury he received from the appellant at the robbery encounter. The logical conclusion is the prosecution has indeed proved its case against the appellant and I therefore resolve the 2nd issue also against the appellant.

The finding by the trial Court of the accused/appellant's guilt was affirmed by the Lower Court as a fact. The law is settled that it is not the attitude of this Court to interfere with such findings. In the case of *Adekoya v. The State* (supra) at page 24, this Court held and said:-

"It is long settled that this Court rarely interferes with findings of fact by the trial Court that have been confirmed by the Court of Appeal. This is because findings of fact are only established after cross examination, detailed examination of exhibits and a comprehensive assessment of the testimony of witnesses by the trial judge. But concurrent findings would be set aside by this Court, if there have been exceptional circumstance such as the findings are perverse or unsupportable by evidence or there has been miscarriage of justice or violation of some principle of procedures."

The findings by the trial Court that there was robbery in the house of PW1, that the robbery was armed robbery and appellant was one of the robbers which finding was affirmed by the Court of Appeal were concurrent finding of facts. The appellant has not also

shown before us that the finding is perverse by reason of exceptional circumstance such as being unsupported by evidence or that there has been miscarriage of justice or violation of some principle of procedures. No cogent reason is adduced for the setting aside of the concurrent Judgment which I also endorse and dismiss this appeal as lacking in merit. In the result, I therefore affirm the judgment of the Lower Court which affirmed the conviction and sentence of the appellant by the High Court. Appeal is dismissed and conviction and sentence of the appellant is affirmed.

GALADIMA JSC

I have had a preview of the judgment of my learned brother OGUNBIYI JSC just delivered. I agree with the reasons advanced therein to arrive at the conclusion that the appeal lacks merit and should be dismissed. The grouse of the Appellant is that he was not given fair hearing at his trial. He contended that when his plea was taken, the amended charge was not read and explained to him. But at pages 17 - 18 the record of this Court shows that the amended charge was read and explained to him and he pleaded not guilty; thereafter, the case was adjourned to 19th August, 1999, to enable the prosecution produce and charge the third accused (the appellant herein). However, on 31st August, 1999, the prosecution substituted the initial charge with another, which included the appellant. Information and proof of evidence was amended on that day, again the charge was read to the appellant.

The argument that there was no interpreter provided when appellant's plea was taken and that he did not understand the charge before pleading cannot stand. The record of 12th August, 1999 clearly shows that an interpreter was provided to interpret the charge from English to Igbo language and vice versa. What happened after this is the way and manner the appellant decided to use all available means to frustrate his trial. When the appellant was directed by the Court to proceed to the witness box to commence his defence, he refused to testify until the statement he made to one P. C. EGBOLU was produced in Court. On 29th November, 2005 and 23rd January, 2006, he also refused to testify. On 12th June, 2006, the learned trial Judge recorded further evidence of frustration exhibited by the appellant

when he stubbornly refused to be taken to Court. It is observed that the Learned Senior Counsel for the Appellant was in Court when all the prosecution witnesses testified and they were cross-examined by him. Appellant contended that on 4th February, 2003, he was not represented by counsel when PW3 testified. This is not true because
B on that day, I. M. ANYANWU of counsel for the 1st accused held the brief of E. F. NJEMANZE ESQ for 3rd accused/Appellant herein. The said E. F. NJEMANZE in the course of trial applied to withdraw his further appearance due to the uncooperative attitude of the Appellant, although the application was refused.

C No doubt from the foregoing account the Appellant was properly accorded opportunity to present his case, but failed to take the advantage of doing so. He cannot be heard to complain that the trial Court did not give him opportunity to present his case.

D The Appellant's right to fair hearing was not breached in any way. In sum, having agreed with more fuller reasons advanced in the lead judgment of my brother OGUNBIYI JSC, I too dismiss this appeal.

I abide by the consequential orders made in the lead judgment.

PETER-ODILI JSC

F I agree with the judgment just delivered by my learned brother, Clara Bata Ogunbiyi, JSC and in support of the reasoning I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal, Owerri Division delivered on the 18th day of May, 2012, wherein
G they affirmed the conviction and sentence of the appellant for the offence of armed robbery handed down by the High Court of Imo State holden at Owerri Coram: A. O. H. Ukachukwu J.

The facts are well adumbrated in the lead judgment and a repeat here shall pass.

H Learned counsel for the appellant, Adedapo Tunde Olowo Esq. on the 3rd December, 2015 adopted the Brief of Argument settled by Uche V. Obi Esq, filed on the 8/10/2012. He distilled two issues for determination as follows:

1. Whether the learned Justices of the Court of Appeal were

right to have upheld and affirmed the decision, conviction and sentencing of the trial Court when it was manifestly clear that the appellant was not afforded a fair trial at the trial Court. (This issue is distilled from Grounds 1, 2 & 30.

2. Whether the learned Justices of the Court of Appeal were right to have upheld and affirmed the conviction and death sentence passed on the appellant for armed robbery when it was clear, from the record, that the prosecution failed to prove the offence against the appellant beyond reasonable doubt as required by law.? (This issue is distilled from Grounds 4.)

An appellant's Reply Brief settled by Uche V. Obi Esq, filed on 14/3/2013 and deemed filed on 22/4/2015, was also adopted by learned counsel.

On that date of hearing, neither respondent nor counsel was present though there was proof of service of the hearing notice and so the Brief of the respondent settled by C. N. Akowundu, filed on 4/2/2013 and deemed filed on 9/10/2013 was taken by the Court as argued. In the Brief were simply identified two issues for determination which, are thus:

(a) Whether the appellant did not have a fair hearing in the course of trial of this case.

(b) Whether the prosecution did not prove its case beyond reasonable doubt against the appellant.

The issues as crafted on either side were similar which are in effect whether the appellant was afforded fair hearing and if the prosecution proved its case beyond reasonable doubt. It is therefore better to have them dealt with together.

ISSUES 1 & 2

Whether or not the appellant had fair hearing and if the prosecution proved its case beyond reasonable doubt.

The position as taken by the appellant is that he was denied fair hearing starting from the time of arraignment as the Court did not ensure that the accused/appellant understood the charge read to him before being asked to plead. He cited Mohammed v. Kano N. A. (1968) ALL NLR 411; Ogunsanya v. The State (2011) 12 NWLR (pt. 1261) 401 at 434; Amamchukwu v F. R. N. 2009) 8 NWLR (pt. 1144) 475 at 486; Section 36(5) (b) of the 1999 Constitution etc.

That the prescription of Section 210 of the Criminal Proce-

B
 dure Act was not complied with. That the appellant and his counsel, E. F. Njemanze Esq. had a disagreement which propelled counsel to apply to Court to be discharged from further representing the appellant and thereafter counsel started absenting himself from attendance during the course of the trial and at some point appellant informed the trial judge of his intention to retain a fresh counsel.

C
 Learned counsel stated the that trial judge failed to ensure that the appellant had legal representation thereafter and so an infraction of Section 287 of the Criminal Procedure Act. He relied on *Josiah v. The State* (1985) 1 NSCC 132

He further submitted that the disposition of the learned trial judge towards the appellant questioned his impartiality and rendered the trial one devoid of fairness.

D
 On the matter of whether or not the prosecution proved the case beyond reasonable doubt, learned counsel for the appellant said the answer was negative in that the prosecution failed to establish the material ingredients of the offence of armed robbery charged. He cited *Oteki v. A.G. Bendel State* (1986) 2 NWLR (pt. 24) 648; *Amadi v. The State* (1993) 8 NWLR (pt. 314) 644 at 664; *Alabi v. State* (1993) 7 NWLR (pt. 307) 511 at 523 Section 11 of the Robbery and Firearms (Special Provisions) Act Cap. R11, Laws of the Federation of Nigeria, 2004.

F
 He contended further that from the testimonies of the prosecution witnesses, a lot of questions popped up seeking answers, such that it cannot be said that the proof was made beyond reasonable doubt, including linking the accused to the scene of the crime and also actively participated therein. He cited *Orji v. The State* (2008) 3 4 SC 198.

G
 That the identification of the appellant was equally faulty. He referred to *Usufu v. State* (2007) 1 NWLR (pt. 1020) 94 at 118. Also that vital witnesses were not called to testify and no corroborating evidence. He cited *Zekeri Abudu v. The State* (1985) IBCC 78; *Abdullahi v. State* (2005) ALL FWLR (pt. 263) 698 at 714; *Ojukwu H v. The State* (2002) FWLR (pt.98) 943 at 950.

Responding, learned counsel, C. N. Akowundu Esq, for the respondent said the learned trial judge carried out his duty property in having the charge read out and explained to the appellant and the judge satisfied and that the appellant understood English and Ibo

languages. That there was no need for an interpreter. He cited Anyanwu v. The State (2002) 10 NSCQR 1335 at 1344.

That there was no breach of fair hearing. He cited Ogunsanya v. The State (2011) ALL FWLR (Pt. 590) 1203 at 1233-1334.

For the respondent it was contended that the prosecution proved its case beyond reasonable doubt against the appellant as the essential ingredients of the offence of armed robbery were established. He cited Adekoya v. The State (2012) MSCJ vol. II p. 20 - 21; Okosi v. The State (1998) 1 ACLR 281.

That appellant chose not to testify in his own defence was his right to so do and in keeping with Sec. 36 (11) of the Constitution.

In brief the grouse of the appellant is as stated by his counsel that proper arraignment was not made as the charge was not explained to the appellant in Igbo language as he is an illiterate. Also that fair hearing was denied the appellant when he disagreed with his counsel as he ought to have been allowed to procure the services of another counsel. Also that the essential elements of the offence of armed robbery against the appellant had not been proved beyond reasonable doubt.

On the contrary the respondent posits that at no time was the appellants right to fair hearing breached and the appellant was properly identified as one of the armed robbers as well as the proof of the offence beyond reasonable doubt.

The stance of the appellant seems to run counter with record where the learned trial Judge recorded thus:

"Application is granted and charge is amended accordingly plea: Charge as amended is read over to accused persons and explained to them in Igbo Language.

The above showed clearly that the prescription in Section 215 of the Criminal Procedure Act was met and the position is not changed because the learned trial judge did not record the presence of an interpreter, as that is taken as a given since what is required is that the trial judge was satisfied that the accused understood the charge he was faced with. This being a subjective requirement, the extra standard which learned counsel for the appellant is calling for has not been statutorily provided for. In a related scenario in Anyanwu v. The State (2002) 10 NSCQR 1335 at 1344, this Court had held thus:

In my respectful view, where an interpreter is provided at the

commencement of trial and a record of this is made, it is desirable, and indeed a constitutional duty of the trial Judge to record this fact also on subsequent days of the trial when use is made of the interpreter. Where however the Judge fails to make a record of the use of the interpreter in subsequent days of the trial, the trial is not per se, there vitiated”.

Interestingly the question raised on whether or not an interpreter was used is only just being raised at this stage in the Brief of the Appellant and it is noted that at the time of the plea, the appellant was represented by counsel and no objection raised at any point on the matter of interpreter or any part of the proceedings. That being the case the right to so object later is lost for all time. I rely on *State v. Salihu Mohammed Gwonto & Ors. (1985) 1 ACNJ 142; Anyanwu v. The State (supra) 1355.*

The situation is all the more supported in this instance where the record bears the fact that the appellant was fluent in both English and Igbo which fact was not controverted by the appellant or counsel on his behalf.

Further on this matter of fair hearing, the appellant was given opportunity on seven adjourned dates to testify in his own defence but appellant continuously rejected the offer and on the 23rd January 2006, the learned trial Judge recorded thus:

“Court: This case came up for defence by 3rd accused person on 7th November, 2005, he refused to testify claiming that he would only do so if given the statement which he made to a CPL Ogbolu in 1998.

He again refused to enter his defence on 29th November, 2005 to which date the case was adjourned and that prompted (sic) to question part to the prosecuting counsel on that date. He has again refused to enter his defence today. In the circumstances my belief is that he has nothing to offer in defence I shall therefore adjourn the case for address by counsel.

This recording of what the learned trial Judge did is well covered by Section 36(11) of the 1999 Constitution of the Federal Republic of Nigeria which enjoins that, no person who is tried for a criminal offence shall be compelled to give evidence in his trial. It needs be said that while the Court of trial is obligated to ensuring that the defences that could be called for an accused are made available

to him and every opportunity given him to state his side of the story in defending himself, that does not translate to the trial judge abdicating his position to the accused for him to teleguide which way the Court should go and for the said accused to dictate to the Court and the respondent. There is a procedure to be followed as prescribed by the appropriate legislation and if an accused, like the appellant chooses to script a procedure different from that within the public trust then he does so at his own risk and has no one to blame

The Court below well captured the various presentations vis-a-vis, the proceedings at the trial Court and I shall quote the necessary findings thereof as stated at pages 224 - 226 of the Record thus:

“The first thing to note in deciding appellant issue No. 1 is that the learned trial Judge in exercising a discretion to refuse the application of the appellant and his counsel acted judiciously and judiciously as he is expected to do.

Their Lordships continued:

“In the first place, he acted with great wisdom given the circumstance of the case and he was also guided with sound legal principles. The refusal of these applications by the learned trial Judge cannot be separated from the antecedents in this case which include length of time the trial has taken between 1999 - 2006 the fact that appellant was charged along with two other accused persons, the fact that it was after the appellant failed to enter his defence for no valid reasons at all on two occasions that the Court had adjourned to 23rd January 2006, the fact that the learned counsel for 3rd accused/appellant ordinarily would not have asked for a discharge for the case and finally the fact that the applications were opposed.”

The Court of Appeal went on to state further at p. 225 as follows:

“Secondly in my humble opinion, the appellant in the instant case was given every opportunity to enter his defence and to take advantage of the constitutional and legal provisions relating to fair trials and fair hearing but refused to avail himself of the opportunities. It is clear from the fact and circumstance of the case that appellant was in a deliberate, conscious and calculated attempt to frustrate and forestall the prosecution of the case.

Their Lordships went further to observe at pp. 225-226 that:

“It is now settled that a party who deliberately spurns an op-

portunity to present his case like the appellant an this case cannot turn around to make a complaint that he was denied fair hearing. The rule pertaining to fair hearing simply means that parties must be given the opportunity to present their case. It is not the rule that no matter the circumstance, the Court must sit on its hands, wait at all costs and at all times for a party to present his case. If this is the rule then cases will never be determined. Therefore at some points as it happened in the Instant case, the Court must put its foot down. Again, where as in the instant case, a party to a suit has been evidently accorded every reasonable opportunity of being heard and for no just cause whatsoever refuses to enter his defence or refuses or neglects to attend the sittings of the Court he is deemed to have voluntarily abandoned his case or defence and cannot thus complain of breach or denial of fair hearing. See *Mirchnadi v. Pinheiro* (2001) 3 NWLR (pt. 701) 557; *Okiki v. LPDC* (2006) 1 NWLR (Pt. 960) 67; *Folbod Investment Ltd v. Alpha merchant Bank Ltd.* (1996) 10 NWLR (Pt. 478) 344; *S & D Const. Co. Ltd v. Ayoku* (2003) 5 NWLR (pt. 813) 278, *Abubakar v. INEC* (2004) 1 NWLR (pt. 854) 207”

What I see in this submission of learned counsel for the appellant on the matter of the denial of fair hearing is an abuse of that concept of natural law for the purpose of clutching at something however feeble, a scenario earlier decried by this Court in *Adebayo v. Attorney General Ogun State* (2008) 7 NWLR (Pt. 1085) 201 at 205 206 succinctly stated by Tobi JSC, thus:

“Learned counsel for the appellant roped in the fair hearing principle. I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision for fair hearing to bamboozle the adverse party and the Court, with a view to moving the Court away from the live issues in litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened. They do not stop there they rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the Constitution is the machinery or locomotive of justice not a spare part to propel or invigorate the case of the user. It is not a causal principle law available to a party to be picked up at will in a case and force the Court to apply it to his advantage.

On the contrary, it is a formidable and fundamental provision

available to a party who is really denied fair hearing because he was not heard or that he has nothing useful to advocate in favour of their cases leave the fair hearing constitutional provision alone because it is not available to them Just for the asking."

Indeed, the contention of the denial of fair hearing as pushed across by learned counsel for the appellant has no leg to stand, not even on the ground that no address of counsel was made for the appellant at the trial as this Court had settled the issue that failure to address will not be fatal or cause a miscarriage of justice since the Court has a duty with or without address of counsel to get into the materials made available in evidence with the aim of seeking out the truth to make its decision on which way to go. I place reliance on Ogunsanya v. State (2011) ALL FWLR (pt. 590) 1203 at 1233 1334.

From the above it is evident that there was no breach of fair hearing whatsoever.

Having reached the conclusion above, the follow up question is whether the prosecution proved its case beyond reasonable doubt against the appellant. It is to be noted that the essential ingredients of the offence of armed robbery are:

- (1) That there was a robbery.
- (2) That it was an armed robbery.
- (3) That the accused was the robber or one of the robbers.

All the three ingredients must be altogether proved for the offence to be said to have been proved. See Adekoya v. State (2012) MSCJ vol. II p.20 - 21.

In establishing those material elements of the offence, the evidence of the PW1 was detailed and left no loose-ends with the PW1 even mentioning the names of his assailants including the appellant with what each did stated clearly leaving no doubt as to the identity of the attackers. For effect I shall quote PW1's testimony thus:

On the 3rd day of May, 1998 at about 2 a.m., I was sleeping in my house when I heard my dogs barking. I got up drew the door blinds in my house and saw people dressed in black shirts and trousers. I shouted on them as to who they were. What I heard next was gun shot. Before the gun shot three of them were already at my door step. As they tried to force open my door, I started shouting "thieves, thieves" as I was shouting there were still gun shots.

This prevented the villagers from coming out to answer my

alarm. As I was shouting, I saw the three accused as they stood by the door trying to force the door open. When they eventually succeeded in gaining entry, the first question they asked was about the money I realize (sic) from the sale of palm fruits. As they were asking the question, they were beating me. I answered that the money was sent to
 B Owerri on the same day I received it. As they were beating me, 3rd accused warned them to beat me to death or else I would retaliate.

As he was still issuing the warning, he, third accused laid hand on an empty bottle on my dining table and hit it on my head. At the
 C same time used the sharp end to chuke me on my head asking me to tell the truth, I then showed them the location of the money at my bedside safe. They left the place I showed them and collected the money belonging to my wife which was N50, 000.00 (Fifty thousand naira) later, they broke the safe. I earlier showed them and collected
 D the N30,000.00 (Thirty thousand naira), I realized from sale of the palm fruits. They also collected N10,000,00 (Ten thousand naira) I left on top of the safe which was meant for the hospital bill of my daughter in the hospital. As they were leaving they collected my trident radio cassette which I bought for (N7,400)

E As they were leaving, they kicked my son aged between 8 years and 10 years who was running out to invite our neighbours.”

At page 37, PW1 stated on:

“I opened the window glass a little having drawn the blinds
 F there was moon light that night. I saw the following; one Kingsley Amadi. I also saw Mathew Nwokocha Onyewueze the third accused who hit me with a bottle, I saw Ikechi Ukanacho 2nd accused. I also saw David Amadi the 1st accused. These are the ones I identified before I was wounded.”

G Considering the pieces of evidence of the witnesses including PW1, PW2 and PW3 the trial Court came to the conclusion that the prosecution proved its case beyond reasonable doubt. The Court of Appeal in affirming what the Court of first instance did stated thus at pages 230 - 231 of the records, viz:

H “I have no doubt that the prosecution proved its case against the appellant in this case beyond reasonable doubt. The evidences of the PW1, PW2 and PW3 were sufficient to fix the appellant with commission of police charged. Also in the context of this case, it must further be observed that although the burden on the prosecution

has discretion to call only those witnesses required to unfold its case.

The law does not impose on the prosecution, the duty or function of both the prosecution and defence.

Nkebisi v. State (2010) 5 NWLR (pt. 1188) 471.

The Court below held that even the evidence of PW1 alone would have been sufficient as it was credible and able of its own to establish beyond reasonable doubt that the appellant was one of the armed robbers. The Court then concluded thus at pages 231-132 of the record as follows:

There was nothing wrong in the view expressed by the learned Judge at P. 116 of the record that: the 3rd accused Mathew Nwokocha refused to testify in his defence. He made Exhibit "D" and E which are accepted as voluntary. His said statements particularly Exhibit D confessed to the crime and further corroborated the evidence of the PW. Further his escape to Port Harcourt in the Rivers State upon knowledge that he was mentioned as one of the robbers further strengthened the prosecution case against him.

I see no difficulty in not departing from the concurrent findings of the two Courts below as there is no perversity and the findings were born out of what transpired as shown in the record. This is a typical case, where an Appellate Court has no business in interfering, intervening, interpreting or upsetting what the Courts below did. See Adekoya v. State (2012) MSCJ vol. II p. 20.

From the foregoing and the better reasoning in the lead judgment, I too dismiss the appeal and affirm the judgment of the Court of Appeal in its upholding of decision and orders of the trial High Court.

KEKERE-EKUN JSC

I have had the benefit of reading in draft the judgment of my learned brother, Ogunbiyi, JSC just delivered. I agree that the appeal lacks merit and ought to be dismissed. I shall make few a comments in support of the lead judgment.

My Lord, Ogunbiyi, JSC has adequately summarised the facts that gave rise to this appeal in the lead judgment. I deem it unnecessary to repeat the exercise.

Under the appellants first issue for determination, it is con-

tended that his right to fair hearing was breached by the trial Court in several respects. It is contended inter alia, that on the day the appellant's plea was taken, there was no record that the charge was explained to him in the language he understands before he was asked to plead to it and thus there was no proper arraignment as required by Section 36 (6) (a) of the 1999 Constitution (as amended).

The facts, as can be gleaned from the record, is that initially, only two accused persons were arraigned before the trial Court. On 12/8/1999, before the charge was read to the two accused persons, an application was made by learned counsel for the prosecution to amend the charge. The application was granted accordingly. The pleas of the accused persons were then taken. The record at pages 17 - 18 reads thus:

Court; Application is granted and charge is amended accordingly.

Plea: Charge as amended is read over to accused persons and explained to them in Igbo language.

Individually they plead as follows:

Count 1: 1st Accused - Not Guilty

2nd Accused - Not Guilty

Count 2: 1st Accused - Not Guilty

2nd Accused - Not Guilty

Court: Case is adjourned to 19th August, 1999 for hearing.

(SGD)

A.D.H. UKACHUKWU

JUDGE

12/04/1999."

The case was then adjourned to 19/8/1999 to enable the prosecution produce and charge a third accused person (the present appellant) if need be and for hearing.

On 31/8/1999, the prosecution substituted the initial charge with another, which included the appellant herein. The Courts record at pages 31 - 32 of the record reads thus:

Court: Application is granted. The information and proof of evidence are amended accordingly.

Charge is now read over to accused as follows:

1st Accused - Not Guilty

2nd Accused - Not Guilty

3rd Accused - Not Guilty

Adjourned to 2nd September 1999 for hearing.

(SGD)

A.O.H. UKACHUKWU

31/08/1999

It is contended that the appellant, who was not represented by B
counsel at his arraignment, did not understand the charge before
pleading thereto. However, it is noteworthy that before his plea was
taken, the appellant informed the Court that he intended to secure
the services of legal counsel on his own. Section 36 (6) (a) and (e) of C
the 1999 Constitution (as amended) provides as follows:

“36. Every person who is charged with a criminal offence shall
be entitled to -

(a) be informed promptly in the language that he understands
and in detail of the nature of the offence: D

(e) have, without payment, the assistance of an interpreter if
he cannot understand the language used at the trial of the offence.

The conditions for a valid arraignment of a person charged
with a criminal offence are as follows: -

(a) he shall be placed before the Court unfettered, unless the E
Court shall see cause to otherwise order;

(b) the charge or information shall be read over and explained
to him to the satisfaction of the Court by the registrar or other officer
of the Court; and

(c) he shall be called upon to plead instantly thereto (unless F
there are valid reasons to do otherwise as provided in Section 100 of
the Criminal Procedure Law).

See: *Eyorokoromo v. The State* (1979) 6-9 SC 3; *Kajubo v.*
The State (1988) 1 NWLR (pt. 73) 721; *Blessing v. F.R.N.* (2015) 13 G
NWLR (pt. 1475) 1 @ 22 E-H.

Now, as stated earlier, it is argued on behalf of the appellant
that no interpreter was provided when his plea was taken and that he
did not understand the charge before pleading thereto. It is quite
clear from the record of 12/8/1999 that an interpreter was provided H
to interpret the charge from English Language to Igbo Language and
vice versa. There is a presumption that the substituted charge was
interpreted to all the accused persons, including the newly joined 3rd
accused/appellant in Igbo Language.

It was held by this Court in *Anyanwu v. The State* (2002) 13 NWLR (pt. 783) 107 @ 127 C-D and F-H; 137 - 138 H - A, that while it is desirable and indeed a constitutional duty for a trial Judge to make a full record of the proceedings before it in a criminal case, where a trial Judge indicates in his record that an interpreter was provided at the commencement of the trial, failure to record this fact on subsequent days of the trial, will not vitiate the trial per se. It is only when it is shown that there was no interpreter provided at all and that the accused person does not understand the language in which the proceedings of the Court is conducted, that such failure would be vital and would vitiate the trial. Once it is shown that there was an interpreter at the commencement of the trial, there is a presumption of regularity that the interpreter was present on subsequent days, even though not so recorded, unless proved otherwise.

In the instant case, since the charge was read and interpreted to the accused persons in Igbo Language at the commencement of the trial, it is presumed that the interpreter was present on subsequent days, including 31/8/1999 when the appellant was arraigned. See also: *Peter Locknan & Anor. V. The State* (1972) ALL NLR 498 @ 501; *Yau Mohammed v. The State* (2014) Vol.19 WRN 1.

Indeed in paragraphs 2.8 and 2.9 of the appellant's Reply brief, it is conceded that an interpreter was provided on the day of arraignment. The following submission by learned counsel for the appellant in paragraph 2.9 at page 6 of his Reply brief is most Instructive. He submitted thus:

"We humbly submit that since the trial Judge (by whatever means) had become aware that the appellant may not be able to understand the language of the Court and therefore required an interpreter and indeed provided him with one on the day of arraignment, it behooves (sic) the Court to ensure the attendance of that interpreter on every adjourn (sic) date that [the] matter was to come up as long as the trial lasted and the failure of the Court so to do has prejudiced the appellant and vitiated the trial." (Emphasis mine)

It is my considered view that having conceded that an interpreter was provided on the day of arraignment, in the absence of any evidence to the contrary, it must be presumed that an interpreter was provided throughout the proceedings.

No such evidence to the contrary was proffered. That concession has

knocked the bottom off this particular complaint and it cannot be sustained. In any event, as observed earlier, even before his plea was taken, the appellant informed the Court that he would secure the services of counsel on his own. The record is replete with various exchanges between the appellant and the learned trial Judge, some of which have been highlighted in the lead judgement. This fortifies the presumption that he understood the proceedings either because he understood the language of the Court or because the proceedings were duly interpreted to him in the language he understands. Either way, his complaint of a denial of fair hearing on this ground is unfounded.

Also on the issue of the alleged breach of his fundamental rights, it is the appellants contention that proceedings took place in the absence of his counsel, who did not diligently prosecute his case after a request to withdraw his appearance for the appellant was refused by the learned trial Judge.

A careful perusal of the record of proceedings reveals that the appellant seemed to be determined to use all available means to frustrate his trial. On 7/11/2005, the appellant was represented by counsel. He was directed by the Court to proceed to the witness box to commence his defence. He refused to testify until a particular statement allegedly made by him to one P.C. Egbolu was produced in Court. He similarly refused to testify on 29/11/2005 and on 23/01/2006. (See pages 119 - 120 & 125 of the record). On 12/6/2006, the learned trial Judge recorded that the appellant refused to be taken to Court. It is noteworthy that the appellants counsel was in Court when all the prosecution witnesses testified and they were thoroughly cross-examined by him. Contrary to the appellants contention that he was not represented by counsel when PW3 testified, the record at pages 84 - 85 shows that on 4/2/2003, when PW3 testified, I.M. Anyanwu of counsel for the 1st accused, held the brief of E.F. Njemanze, Esq., for the 3rd accused/appellant. Furthermore, the appellant effectively frustrated his counsels efforts to defend him by rejecting his advice to testify and generally being uncooperative. This led the said counsel, E.F. NJEMANZE, ESQ., to apply to the Court to be discharged from further appearance for him. The Lower Court rightly refused the application of counsel to withdraw having regard to the stage at which the application was made i.e. just before final

addresses in a case that had spanned seven years (1999 - 2006), where there were two other accused persons, and which would have necessitated the trial commencing de-novo.

The law is settled that where a party is afforded every opportunity to present his case and he fails to take advantage of such opportunity, he cannot later contend that his right to fair hearing was breached. See: *MFA & Ors. V. Inongha* (2014) 4 NWLR (pt. 1397) 343; *Pam & Anor. v. Nasiru Mohammed & Anor* (2008) 16 NWLR (pt. 1112) 1 @ 48 E-G.

I agree with my learned brother, Ogunbiyi, JSC that there was no breach of the appellant's right to fair hearing in this case.

For these and the more detailed reasons advanced in the lead judgment, I also resolve the first issue against the appellant.

I agree entirely with the way and manner in which my learned brother has resolved issue 2. I agree that the prosecution established its case against the appellant beyond reasonable doubt. I have not found any reason to interfere with the judgment of the Court below, which affirmed the conviction and sentence of the appellant by the trial Court.

I accordingly dismiss the appeal and abide by the consequential orders made in the lead judgment.

SANUSI JSC

I had the advantage of reading in draft form, the judgment just delivered by my learned brother Clara Bata Ogunbiyi JSC just delivered. His lordship had ably and thoroughly dealt with all the salient issues canvassed by learned counsel in this appeal before she arrived at the conclusion that this appeal is unmeritorious and deserves to be dismissed. The reasons and conclusion arrived at in the lead judgment are agreeable to me.

I adopt them as mine and have nothing to add. I also hereby dismiss the appeal for being meritless and affirm the judgment of the Court of Appeal which had also affirmed the judgment of the trial Court in convicting the appellant as charged. I shall abide by the consequential orders made in the lead judgment.