

SUPREME COURT OF NIGERIA
FRIDAY 26TH FEBRUARY, 2016. SC. 511/2014
CORAM:- S. GALADIMA, M. U. PETER-ODILI,
C. B. OGUNBIYI, K. O. KEKERE-EKUN, A. SANUSI, JJSC

UWUAUDO APPELLANT
V.
STATE RESPONDENT

DOCUMENTS - Crime - Public document - Admissibility of - As Exhibit 5 was tendered in its original form - It was properly admitted in evidence - As it is the best evidence of the contents thereof (H1)

JUDGMENTS - Distinctive nature of - Decision of a court must always be considered in the light of its peculiar facts - As no case is identical to another - But only an authority for what it decides (H2)

CRIMINAL PROCEDURE - Proof - Burden of - Is on prosecution and never shifts to accused - But evidential burden may be placed on either side - Depending on facts of the case (H3)

ALIBI - Defence - Conditions - Accused must raise the defence at earliest opportunity - To afford prosecution opportunity to investigate same - Otherwise the defence would be rejected (H4)

MURDER - Ingredients - Proof - Prosecution must prove that the deceased died - That his death was caused by accused - And that the act of accused causing the death was intentional (H5)

FACTS

Before the High Court of Benue State Holden at Makurdi, accused/appellant was arraigned on a two count charge of criminal conspiracy and culpable homicide punishable with death and contrary to sections 96 and 221 of the Penal Code. Appellant pleaded not guilty to both counts. The case against appellant is that appellant and another person (still at large) had lured the deceased (a 3 year old boy - Msughter Iortyom) to an uncompleted building. It was said that appellant and the other participated in killing the deceased. The

1972 Udo v. State (2016) 2 KLR (pt. 382) 1971; (2016) 12 NWLR

corpse was left in the uncompleted building, where it was discovered by PW2, who then led PW1 - the father of the deceased, who had been searching for the deceased, to the site.

Upon his arrest, appellant made a confessional statements, wherein he confessed to his part in the crime and stated that his co-conspirator promised him a fee of N60,000.00 if he assists in killing the deceased. At the trial, respondent called three witnesses and tendered exhibits, including Exhibits 4 & 5 (appellant's confessional statements). Appellant testified in his own defence and did not call any other witness. At the conclusion of the trial and having considered the written addresses of learned counsel, the learned trial Judge found appellant guilty as charged. He was convicted and sentenced to death. Aggrieved, appellant appealed to the Court of Appeal Makurdi Division. The appeal was dismissed. Hence, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether it is the original or Certified True Copy of Exhibit 5 that is, the Appellant's alleged confessional statement to the Police), being a public document that is admissible in evidence under the Evidence Act, 2011.

2. Whether the defence of alibi raised by the Appellant, but was not properly considered by the Courts below, would avail the Appellant.

3. Whether the respondent proved the guilt of the appellant beyond reasonable doubt.

HELD (Unanimously dismissing the appeal per

KEKERE-EKUN JSC)

DOCUMENTS - Public document - Admissibility of

1. There is no doubt that Exhibit 5, which forms part of the official acts of the Police, is a public document within the meaning of Section 102 (a) (iii) of the Evidence Act.

The law has always been that the best evidence of the contents of a document is the document itself produced for the inspection of the court.

It is also the law that the only admissible secondary evidence of a public document is a certified true copy thereof.

Exhibit 5 is the statement made to the Police on 30/7/2004 by the appellant in its original form, i.e. primary evidence thereof within the meaning of Section 86 (1) of the Evidence Act. Sections 104 and 105 of the Evidence Act are not applicable in the present circumstances, since what was produced and tendered from the Bar is the original statement and not a copy thereof. The appellant, through his counsel had the opportunity of objecting to the admissibility of the document at the time it was tendered. He failed to avail himself of the opportunity. Indeed as stated above, the statement was produced at his request.

In the instant case, the original statement of the appellant, tendered from the Bar and admitted in evidence without objection was properly admitted in evidence.

This issue is accordingly resolved against the appellant. (pp. 19781 E/1983 E/1984 A)

JUDGMENTS - Distinctive nature of

2. It is important to bear in mind that the decision of a court must always be considered in the light of its own peculiar facts or circumstances. No case is identical to another, though they may be similar. Thus each case is only an authority for what it decides, and nothing more. (p. 1982 C)

CRIMINAL PROCEDURE - Proof - Burden of

3. The position of the law is that the legal burden of proving its case against an accused person beyond reasonable doubt rests squarely on the prosecution and never shifts. However the burden of introducing evidence on an issue, known as the evidential burden, may be placed by law on either the prosecution or the defence depending on the facts and circumstances of the case. Where the evidential burden placed on a party in respect of a particular issue is not discharged, the issue would be resolved against the party without much ado. (p. 1985 G)

ALIBI - Defence - Conditions

4. It was explained in Esangbedo's case (supra) at page 70 E - F that where, for example, a defence of alibi is raised, the ulti-

mate or legal burden remains on the prosecution to establish the guilt of the accused person beyond reasonable doubt. However the evidential burden of eliciting or bringing evidence in respect of his defence of alibi is on the accused. By raising the defence of alibi the accused person is not seeking to prove his innocence but to raise a doubt as to what might otherwise have been a fool proof case by the prosecution.

From the excerpt of the above decision, it is clear that the initial evidential burden of setting up enough facts upon which the defence of alibi can rest, is on the accused person. He must raise the defence at the earliest opportunity to afford the prosecution an opportunity to investigate and rebut the evidence in order to discharge its burden of proving the guilt of the accused beyond reasonable doubt. I think it goes without saying that an alibi raised after the prosecution has closed its case and during the appellant's defence could hardly be described as being "promptly and properly put up."

(pp. 1986 A/1987 A)

MURDER - Ingredients - Proof

5. The ingredients of the offence of culpable homicide punishable with death under Section 221 of the Penal Code are:

- 1. That the deceased died.**
- 2. That his death was caused by the accused.**
- 3. That the act of the accused which caused the death was intentional having the knowledge that death or grievous bodily harm was the probable consequence of the act.**

(p. 1990 D)

NOTABLE POINT OF INTEREST

KEKERE-EKUN JSC

1. Documents - Proof

By the combined effect of Sections 85, 86 (1) and 87 (1) of the Evidence Act 2011, there are two ways by which the contents of documents may be proved: either by primary or secondary evidence. Primary evidence is the document itself produced for the inspection of the court, while secondary evidence includes certified copies of the

original duly certified in accordance with the relevant provisions of the Evidence Act. By Section 88 of the Act, documents shall be proved by primary evidence, except in cases stipulated in Section 89 of the Act, where secondary evidence may be given. Section 87 (a) and (c) provides that secondary evidence includes certified copies of the original and copies made from or compared with the original. Some of the circumstances in which secondary evidence relating to the existence, condition or content of a document may be given include:

(i) where the original has been destroyed or lost and every effort has been made to search for it; (ii) where the original is a public document within the meaning of Section 102 of the Act; and (iii) where the original is a document of which a certified copy is permitted by the Act or any other law in force in Nigeria: See: Section 89 (c), (e) and (f) of the Evidence Act. (p. 1981 A)

REPRESENTATION

Wilson Diriwari for Appellant and with him is Yinka Adeniran Mrs. J. N. Adegba for the Respondent (Assistant Director Ministry of Justice, Benue State)

CASES REFERRED TO

Tabik Invest Ltd. v. GTB Plc (2011) 17 NWLR (pt. 1276) 240
 Araka v. Egbue (2003) 17 NWLR (pt. 848) 1
 Ajao v. Ambrose Family (1969) 1 NMLR 24
 Anatogu v. Iweka II (1995) 8 NWLR (pt. 415) 547
 Yero v. UBN Ltd. (2000) 5 NWLR (pt. 657) 470
 Lawson v. Afani Const. Co. Ltd. (2002) 2 NWLR (pt. 752) 585
 Fagbenro v. Arobadi (2006) 7 NWLR (pt. 978) 172
 Iteogu v. LPDC (2009) 11 - 12 (pt. 1) SCM 47
 Kubor v. Dickson (2012) LPELR-9817 (SC)
 Omisore v. Aregbesola (2015) 15 NWLR (pt. 1482) 205
 Okafor v. Nnaife (1987) 4 NWLR (pt. 64) 129

STATUTES REFERRED TO

Penal Code, ss. 96, 221
 Interpretation Act, s. 18(1)
 Constitution of the Federal Republic 1999 (as amended), s. 318(1)(h)
 Evidence Act 2011, ss. 85, 87, 88, 102(a)(iii), 104, 105

LEAD JUDGMENT BY KEKERE-EKUN JSC

This is an appeal against the judgment of the Court of Appeal, Makurdi division, delivered on 2nd May, 2014, affirming the judgment of the High Court of Benue State, Holden at Makurdi delivered on 6/12/2006, which convicted the appellant of the offence of culpable homicide and sentenced him to death.

On 17/5/2006, the appellant was arraigned before the trial court on a two-count charge of criminal conspiracy and culpable homicide punishable with death contrary to sections 96 and 221 of the Penal Code. He pleaded not guilty to both counts.

The prosecution's case was that on 28/7/2004, at Asase Village, North Bank, Makurdi, one Abu (still at large) lured the deceased, Msughter Iortyom, 3 years old, from his parent's house, where he was playing with other children into an uncompleted building where the appellant was waiting with a knife. It was further alleged that the said Abu held the deceased down while the appellant slashed his throat with the knife and killed him. The corpse was left in the uncompleted building, where it was discovered by PW2, who then led PW1, the father of the deceased, who had been searching for the deceased, to the site. According to the prosecution, the appellant made a confessional statement, upon his arrest, wherein he confessed to his part in the crime and stated that the said Abu promised him a fee of N60, 000.00 if he assisted in killing the deceased. The respondent called three witnesses and tendered exhibits, including Exhibits 4 & 5, the appellant's confessional statements. The appellant testified in his own defence and did not call any other witness.

At the close of the trial, and after considering the written addresses of learned counsel, the trial court found the appellant guilty of the offences charged, convicted him and sentenced him to death. His appeal to the lower court was unsuccessful, hence the instant appeal to this court.

At the hearing of the appeal on 3rd December 2015, WILSON DIRIWARI ESQ., leading YINKA ADENIRAN ESQ., adopted and relied on the appellant's brief of argument filed on 4/9/2014 and urged the court to allow the appeal, set aside the judgment of the lower court and discharge and acquit the appellant. MRS. J.N, ADAGBA, Assistant Director Legal Drafting, Ministry of Justice, Benue

State, adopted and relied on the respondent's brief, which was deemed properly filed on 18/2/2015 and urged the court to dismiss the appeal and affirm the judgment of the lower court.

From the 4 grounds of appeal contained in the notice of appeal filed on 13/3/2014, the appellant framed 3 issues for determination. They are:

1. Whether it is the original or Certified True Copy of Exhibit 5 that is, the Appellant's alleged confessional statement to the Police), being a public document that is admissible in evidence under the Evidence Act, 2011.

2. Whether the defence of alibi raised by the Appellant, but was not properly considered by the Courts below, would avail the Appellant.

3. Whether if this Honourable Court agrees with our contention under Issue one above, to the effect that it is only a Certified True Copy of Exhibit 5 and not the original that is admissible in law, the Respondent herein has proved the guilt of the Appellant beyond reasonable doubt, with cogent, credible and compelling evidence as required under Nigerian criminal jurisprudence to secure the conviction and sentence of the Appellant.

The respondent, on its part, formulated two issues for determination as follows:

1. Whether Exhibit 5 is a public document requiring certification to be admissible.

2. Whether having regard to the weight of evidence, the Court of Appeal rightly held the Respondent proved its case against the appellant and that the defence of alibi does not avail the appellant.

As the issues formulated by both parties are substantially the same, I shall determine the appeal on the issues formulated by the appellant. I however re-couch Issue 3 to read:

Whether the respondent proved the guilt of the appellant beyond reasonable doubt.

Issue 1

In support of this issue, it is the contention of learned counsel for the appellant that Exhibit 5, being a document emanating from the custody of the Nigeria Police Force, qualifies as a public document within the meaning of the Evidence Act, 2011 and therefore only a certified true copy thereof is admissible in evidence. For the

definition of ‘public officer’ he referred to Section 18 (1) of the Interpretation Act and for the definition of ‘public service of the Federation’ he relied on Section 318 (1) (h) of the 1999 Constitution (as amended). He also referred to Sections 102 (a) (iii) and 105 of the Evidence Act, 2011 and submitted that upon a community reading
 B of the provisions referred to, only a certified true copy of Exhibit 5 is admissible in evidence. He relied on the case of: *Tabik Invest Ltd. Vs GTB Plc* (2011) 17 NWLR (Pt.1276) 240 @ 261 - 262 G - A. He submitted that even though no objection was taken to the admissibility of Exhibit 5 at the time it was tendered, the court has inherent
 C power to reject and expunge inadmissible evidence wrongly or inadvertently admitted. He referred to: *Phillips Vs E.O.C. & Ind. Co. Ltd.* (2013) 1 NWLR (Pt.1336) 618 @ 644 - 645 G - B; *Abolade Agboola Alade Vs Salawu Jagun Olukade* (1976) 1 SC 83; *Onichie Vs Odogwu*
 D (2006) 6 NWLR (Pt.975) 65 @ 85 H & 86 C.

He disagreed with the finding of the court below at pages 127 - 128 of the record to the effect that it is not necessary to tender a certified true copy of a document where the original is available. Referring to Sections 85, 86, 87, (1), 88, 89, (1) (e) & (f), 90 (1) (c),
 E 102 (a) (iii), 103, 104 (1), (2) & (3) and 105 of the Evidence Act, 2011, he reiterated his submission that the only kind of public document admissible in law is a certified true copy and no other kind. He referred to the case of: *Araka Vs Egbue* (2003) 17 NWLR (Pt.848) 1
 F @ 18. He conceded that documents may be proved either by primary or secondary evidence and that the primary evidence is the document itself while the secondary evidence is the certified true copy of the original where the document in question is a public document within the meaning of the Evidence Act. He submitted that Sections
 G 88, 89 (1) (e) & (f), 90 (1) (c) and 104 of the Evidence Act constitute exceptions to the general rule that a document may be proved by the production of the document itself. He contended that even where the original of a public document is available, it is only secondary evidence of the document duly certified that is admissible in evidence.
 H In support of this submission, he relied on the cases of *Ajao Vs Ambrose Family & Ors.* (1969) 1 NMLR 24 @ 30; *Anatogu Vs Iweka II* (1995) 8 NWLR (Pt.415) 547 @ 571 - 572; *Yero Vs UBN Ltd.* (2000) 5 NWLR (Pt.657) 470 @ 478 - 479; *Lawson Vs Afani Const. Co. Ltd.* (2002) 2 NWLR (Pt.752) 585 @ 598 & 613 - 615. He noted that

Sections 96, 97 (1) (e) & (f), 2 (c) and 109, 110 and 111 of the Evidence Act, Cap. 112 LFN 1990 construed and interpreted by this Court and the Court of Appeal in the cases cited are in pari materia with the provisions of Sections 88, 89 (1) (e) & (f), 90 (1) (c) and 104 of the Evidence Act, 2011. He urged the court to resolve this issue in the appellant's favour. B

In reaction to the above submissions, learned counsel for the respondent submitted that Exhibit 5 is not one of the public documents under the purview of Section 104 of the Evidence Act, 2011. He noted that Exhibit 5 was tendered from the Bar without objection by learned counsel for the appellant. He argued further that Exhibit 5 constitutes primary evidence under Section 86 (1) of the Evidence Act. He submitted that being the appellant's original statement and not a photocopy, there was no need for it to be certified. He submitted with respect to Section 104 of the Evidence Act, that it only comes into play when a person makes a demand for the use of a public document. He submitted that in that circumstance, such public document must be certified as a true copy of the original, which is not the case here. He submitted that the authorities cited by learned counsel for the appellant are not apposite. He distinguished the case of Tabik Invest. Ltd. Vs GTB Plc. (supra) on the ground that the decision was to the effect that where primary evidence of a public document is not available, the only acceptable secondary evidence is a certified true copy of the document. He asserted that Exhibit 5 is primary evidence, tendered in its original form and therefore rightly admitted in evidence by the trial court. He contended that Sections 85, 87 and 88 of the Evidence Act, 2011 all support the respondent's position. He urged the court to resolve this issue in the respondent's favour. C D E F

For ease of reference, I deem it appropriate to set out the provisions of Sections 85, 86, 87 (1), 88, 89 (1) (e) & (f), 90 (1) (c), 102 (a) (iii), 103, 104 (1), (2) & (3) and 105 of the Evidence Act, 2011 below: G

“85 The contents of documents may be proved either by primary or secondary evidence H

86 (1) Primary evidence means the document itself produced for the inspection of the Court”

87 (1) Secondary evidence includes -

(a) certified copies given under the provisions thereafter con-

tained in this Act;

(c) copies made from or compared with the original.

88 Documents must be proved by primary evidence except in the cases mentioned in this Act.

89 (1) Secondary evidence may be given of the existence,
B condition or contents of a document when:

(e) the original is a public document within the meaning of Section 102 of the Act.

(f) the original is a document of which a certified copy is per-
C mitted by this Act, or by any other law in force in Nigeria.

90 (1) The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of Section 89 is as follows:

(c) in paragraph (e) or (f) a certified copy of the document,
D but no other kind of secondary evidence, is admissible.

103 All documents other than public documents are private documents.

104 (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that
E person on demand a copy of it on payment of the legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy of such document or part of it as the case may be.

(2) The certificate mentioned in subsection (1) of this section
F shall be dated and subscribed by such officer with his name and his official title and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(3) An officer who, by the ordinary course of official duty, is
G authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

105 Copies of documents certified in accordance with Section 104 may be produced in proof of the contents of the public docu-
H ments or parts of the public documents of which they purport to be copies”.

102 The following documents are public documents:- documents forming the acts or records of the acts- of public officers, legislative, judicial and executive, whether in Nigeria or elsewhere.”

By the combined effect of Sections 85, 86 (1) and 87 (1) of the Evidence Act 2011, there are two ways by which the contents of documents may be proved: either by primary or secondary evidence. Primary evidence is the document itself produced for the inspection of the court, while secondary evidence includes certified copies of the original duly certified in accordance with the relevant provisions of the Evidence Act. By Section 88 of the Act, documents shall be proved by primary evidence, except in cases stipulated in Section 89 of the Act, where secondary evidence may be given. Section 87 (a) and (c) provides that secondary evidence includes certified copies of the original and copies made from or compared with the original. Some of the circumstances in which secondary evidence relating to the existence, condition or content of a document may be given include:

(i) where the original has been destroyed or lost and every effort has been made to search for it; (ii) where the original is a public document within the meaning of Section 102 of the Act; and (iii) where the original is a document of which a certified copy is permitted by the Act or any other law in force in Nigeria: See: Section 89 (c), (e) and (f) of the Evidence Act.

There is no doubt that Exhibit 5, which forms part of the official acts of the Police, is a public document within the meaning of Section 102 (a) (iii) of the Evidence Act.

The law has always been that the best evidence of the contents of a document is the document itself produced for the inspection of the court. See: Fagbenro Vs Arobadi (2006) 7 NWLR (Pt.978) 172.

It is also the law that the only admissible secondary evidence of a public document is a certified true copy thereof. In Araka Vs Egbue (2003) 17 NWLR (Pt.848) 1 @ 18 D - E, Tobi, JSC while interpreting Section 97 (2) (c) of the Evidence Act Cap.112 LFN 1990 (now S. 90 (1) (c) of the Evidence Act, 2011), held thus:

“It is clear from the provision of Section 97 (2) (c) that the only acceptable secondary evidence of a public document is a certified true copy of the document. The subsection has put the position precisely, concisely and beyond speculation or conjecture by the words ‘but no other kind of secondary evidence is admissible.’”

Per Edozie, JSC @ 26 C - G (supra):

“Guided as I am by the principles enunciated in the above

cases [on the golden rule of interpretation of statutes] it is my view that section 97 (2) (c) of the Evidence Act (supra) does not admit of any ambiguity. The language is clear, explicit and categorical, that the only admissible evidence to prove the existence, condition and contents of a public document is a certified true copy of the original and
 B *no other type of secondary evidence is admissible.*” (Emphasis mine)

See also: Iteogu Vs LPDC (2009) 11 - 12 (Pt. 1) SCM 47; Kubor Vs Dickson (2012) LPELR-9817 (SC) @ 51 D - G; Omisore Vs Aregbesola (2015) 15 NWLR (Pt.1482) 205 @ 294 H.

C I have given careful consideration to the authority of Tabik Investment Ltd. & Anor. Vs Guaranty Trust Bank Plc. (supra), the judgment of this court in a civil suit, relied upon by learned counsel for the appellant. ***It is important to bear in mind that the decision of a court must always be considered in the light of its***
 D ***own peculiar facts or circumstances. No case is identical to another, though they may be similar. Thus each case is only an authority for what it decides, and nothing more.*** See Skye Bank Plc. & Anor. Vs Chief Moses Bolanle Akinpelu (2010) 9 NWLR (Pt. 1198) 179; Okafor Vs Nnaife (1987) 4 NWLR (Pt.64) 129. The issue
 E that arose in that case was the admissibility of documents purportedly certified but not certified in full compliance with the provisions of Section 111 (1) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria (LFN) 1990. The documents tendered before the
 F trial court from the custody of the Police were purported to be certified true copies of the originals. However no legal fees were paid for the certification. The contention of the plaintiffs/appellants was that since the witness who tendered the documents was a Police officer, he need not pay for the certification of the documents. This court
 G held that in the certification of documents, all the conditions contained in Section 111 of the Evidence Act are mandatory and must be complied with, to wit that is:

- I. the necessary fees must be paid for certification;
- II. there must be an endorsement or certificate indicating that
 H it is a true copy of the document in question;
- III. the endorsement or certificate must be dated and signed by the officer responsible for the certification with his name and official title.

The court further held that the lower court rightly held that

failure to pay the legal fees amounted to non-compliance with the provisions of the Evidence Act. It concluded however that the lower court was wrong to have expunged the documents and ought to have ordered the plaintiffs to pay the necessary fees. I am of the considered view that the facts of the case as stated above are distinguishable from the facts of this case. B

In the instant case, the appellant's statement, Exhibit 5 was produced pursuant to a notice to produce issued to the respondent and tendered from the Bar with the consent of counsel. This is evident from the proceedings of 18/10/2006 reproduced below: C

"18/10/2006

Accused present.

J.N. Adagba, SC, for the State.

S.S. Abba for the accused.

Adagba: We have an application. We were served notice to D produce the statement made by the accused at 'C' Division. We obliged. We made copies available to the defence. We want to tender it from the Bar. This is the statement.

Abba: We do not oppose.

Court: - The statement of the accused dated 30/7/2004, mutually E agreed to be tendered from the Bar, is hereby admitted in evidence as Exhibit 5."

Exhibit 5 is the statement made to the Police on 30/7/ 2004 by the appellant in its original form, i.e. primary evidence thereof within the meaning of Section 86 (1) of the Evidence Act. Sections 104 and 105 of the Evidence Act are not applicable in the present circumstances, since what was produced and tendered from the Bar is the original statement and not a copy thereof. The appellant, through his counsel had the opportunity of objecting to the admissibility of the document at the time it was tendered. He failed to avail himself of the opportunity. Indeed as stated above, the statement was produced at his request. F G

The case of Ajao Vs Ambrose Family & Ors. (1969) 1 NMLR H 24 @ 30 is clearly distinguishable from the facts of the instant case, as what was in issue in that case was the certification of a Photostat copy of a document. In all the references in that case, highlighted at pages 16 - 17 of the appellant's brief, this court clearly made the point that

the document marked Exhibit 2 was not a certified true copy but a photostat copy and it was therefore inadmissible as secondary evidence of a public document which it purported to be.

In the instant case, the original statement of the appellant, tendered from the Bar and admitted in evidence without objection was properly admitted in evidence.

This issue is accordingly resolved against the appellant.

Issue 2

In respect of this issue, it is the contention of learned counsel for the appellant that the trial court and the court below erred in rejecting the appellant's defence of alibi raised during the course of his defence on the ground that he ought to have raised the defence at the Police station at the time he was making his statement. He contended that the appellant could not have raised the defence at that stage on account of prevailing circumstances, to wit: that he was "coerced, compelled and tortured" into confessing to the crime. He referred to the appellant's testimony at pages 46 and 48 of the record wherein he stated that on the day of the incident he was at TSE Bagu. He argued that the circumstances under which the appellant's statements were procured makes his situation peculiar and the defence worthy of consideration by the court. He submitted further that each case must be decided on its own peculiar facts. He cited the case of: *Magit Vs UniAgric Makurdi* (2005) 19 NWLR (Pt.959) 211 @ 247 G. Relying on the case of: *HDP Vs INEC* (2009) 8 NWLR (Pt.1143) 297 @ 319 D - H, he submitted that the current trend is for courts to lean in favour of doing substantial justice and avoid undue reliance on technicalities.

He submitted further citing *Olaiya Vs The State* (2010) 3 NWLR (Pt.1181) 423 @ 436, that once the defence of alibi is raised the prosecution has a duty to investigate and rebut the evidence. He argued further that the court has a duty to consider every defence raised by an accused person at trial, no matter how worthless, improbable, weak or stupid it might be. See: *Ogunye Vs The State* (1999) 5 NWLR (Pt.604) 548 @ 570 - 571 G- A.

In response to the above submissions, learned counsel for the respondent submitted that contrary to the appellant's contention, notwithstanding the fact that the defence of alibi was raised at the trial for the first time; both the trial court and the court below consid-

ered the defence and found that it did not avail him. He submitted that an accused person wishing to rely on the defence of alibi must do so at the earliest opportunity by giving the details and particulars of his whereabouts to the Police promptly upon his arrest in order to avail the Police the opportunity to investigate, verify or confirm the truth or otherwise of the alibi. He referred to: *Ndidi Vs The State* (2007) NWLR (Pt.1052) 633 to the effect that raising a defence of alibi at the trial is of no help to an accused person. He observed that the defence was not raised in either of the appellant's two statements to the Police. He also argued that having not objected to the admissibility of Exhibit 5 when it was tendered, appellant cannot challenge it at this stage. He noted that the defence of alibi was raised in 2006, two years after appellant made his statements to the Police and submitted that the trial court and the court below rightly rejected it.

He submitted further that none of the prosecution witnesses was confronted with the issue of alibi under cross-examination. He referred to the case of: *Agbanifo Vs Aiwere* (1998) 2 SCNJ 149, wherein it was held that it is improper for the appellant or his counsel to hide the issue of alibi from the Police investigator and prosecution witnesses, fail to cross-examine the witnesses, and then attempt to testify in respect thereof after the prosecution has closed its case. He also cited: *Okosi Vs The State* (1989) 2 SCC (Pt.1) 126 @ 132 in support of his contention that the appropriate stage to challenge any evidence led by the prosecution is during cross-examination. Having failed to take advantage of cross-examination, learned counsel argued that the defence raised in the course of the appellant's defence at the trial is improper and the learned trial Judge was right to dismiss it in the absence of any special circumstance shown.

The position of the law is that the legal burden of proving its case against an accused person beyond reasonable doubt rests squarely on the prosecution and never shifts. However the burden of introducing evidence on an issue, known as the evidential burden, may be placed by law on either the prosecution or the defence depending on the facts and circumstances of the case. See: *Esangbedo Vs The State* (1989) NWLR (Pt.113) 57 @ 69 - 70 H - A.; *Woolmington Vs D.P.P.* (1935) A.C. 462. ***Where the evidential burden placed on a party in respect of a particular issue is not discharged, the issue would be re-***

solved against the party without much ado. See: Esangbedo Vs The State (supra) at page 70 B - C. **It was explained in Esangbedo's case (supra) at page 70 E - F that where, for example, a defence of alibi is raised, the ultimate or legal burden remains on the prosecution to establish the guilt of the accused person beyond reasonable doubt. However the evidential burden of eliciting or bringing evidence in respect of his defence of alibi is on the accused. By raising the defence of alibi the accused person is not seeking to prove his innocence but to raise a doubt as to what might otherwise have been a fool proof case by the prosecution.** See: Egbarika Vs The State (2014) 4 NWLR (Pt.1398) 558 @ 584 A-E.

On the meaning of alibi this court, per Obaseki, JSC in: Ozaki v. The State (1990) 1 NWLR (Pt.124) 92 @ 109 C - G, held thus:

"What is the meaning of alibi? It is a defence where an accused person alleges that at the time when the offence with which he is charged was committed. He was elsewhere. It is the law that notice of intention to raise it must be given. This is normally done at the first opportunity by a suspect in answer to a charge by the police at the investigation stage to enable the truth or falsity of the allegation to be established by the police. ...

Once a defence of alibi has been promptly and properly put up, the burden is on the prosecution to investigate it and rebut such evidence in order to prove the case against the accused beyond reasonable doubt. Adedeji Vs The State (1971) 1 ALL NLR p.75, Failure by the police to investigate and check the reliability of [the] alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed in disregard of this requirement as was done in the case of Onafowokan Vs The State (1987) 7 SC; (1987) 3 NWLR (Part 61) page 538...

The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove the alibi beyond that of introducing the evidence of alibi: Bozin Vs The State (supra). Where the accused person gives conflicting stories as to his whereabouts at the material time under consideration there is no duty to investigate the alibi. In such a case, no alibi is established.

The ipse dixit of the accused; i.e. that he was not present is not

enough. To raise the defence he must give particulars of his whereabouts at that particular time.” (Emphasis mine)

From the excerpt of the above decision, it is clear that the initial evidential burden of setting up enough facts upon which the defence of alibi can rest, is on the accused person. He must raise the defence at the earliest opportunity to afford the prosecution an opportunity to investigate and rebut the evidence in order to discharge its burden of proving the guilt of the accused beyond reasonable doubt. See: Agu Vs The State (1985) 9 SC 179; Ayan Vs The State (2013) 15 NWLR (Pt.1376) 34; Ndidi Vs The State (2007) 13 NWLR (Pt.1052) 633. **I think it goes without saying that an alibi raised after the prosecution has closed its case and during the appellant’s defence could hardly be described as being “promptly and properly put up.”**

The sum total of his defence of alibi is as follows:

At page 46 lines 10 & 11 of the record:

“When Msutegher was allegedly killed, I was at Tse Bagu.”

And at page 48 lines 2 & 3:

“When Police arrested me at Tse Bagu one elderly man, who gave me land to farm was present. His name is Chia Bagu.”

Even if it had been raised at the earliest opportunity, the defence is vague and bereft of detailed particulars that would enable the Police investigate. I entirely agree with the court below, which affirmed the finding of the trial court on this issue, that the defence of alibi was unreliable and raised too late in the day to be of any benefit to the appellant. The court gave full consideration to the issue before dismissing it.

It was the further contention of learned counsel for the appellant that the defence could not have been raised at the Police station due to “prevailing circumstances” having regard to the evidence of the appellant at the trial that he was “coerced, compelled and tortured” into confessing to the crime. With due respect to learned counsel, the contention does not hold water. This is because the Appellant’s statement, Exhibit 5, was admitted in evidence without objection. He was duly represented by counsel. It was never contended that the statement was made involuntarily and there was no application for a trial within trial to be conducted to test its voluntariness. Again the issue being raised after the prosecution had closed its case is belated.

It is an afterthought and cannot avail him. I accordingly resolve this issue against the appellant.

Issue 3

In support of this issue, learned counsel for the appellant referred to the evidence of PW1 (the father of the deceased child) and
B PW2 (the neighbour who discovered the corpse of the deceased) and submitted that neither of them was an eyewitness to the crime.

He noted that while PW1 claimed to have been present at the Police station when the appellant allegedly confessed to committing
C the crime, PW2's testimony was that his attention was drawn to the corpse of the deceased in an uncompleted building by his friend, and he thereupon alerted PW1, whom he knew had been searching for his son. He submitted that the testimony of PW3, one of the investigating police officers, was merely to the effect that the appellant
D confessed to him at the Police station that he killed the deceased. Relying on Section 131 (1) of the Evidence Act, 2011 and the case of Ani Vs The State (2009) 16 NWLR (Pt.116B) 443 @ 457 - 458 F - B, he submitted that the burden of proving the guilt of an accused person lies on the prosecution throughout the proceedings and that the
E standard of proof is beyond reasonable doubt.

On the ingredients to be established to secure a conviction for murder, he cited the case of: Folayaki Vs The State (2008) NWLR (Pt.1109) 173 @ 192 - 193 G- B wherein it was held that the prosecution must prove:
F

1. That the deceased had died;
2. That the death of the deceased has resulted from the act of the appellant; and
3. That the act or omission of the accused, which caused the
G death of the deceased was intentional with full knowledge that death or grievous bodily harm was its probable consequence.

That the three ingredients must co-exist and where one of them is absent or tainted with some doubt, the charge cannot be said to have been proved.

H Learned counsel contended that the respondent did not lead any evidence to establish that the death of the deceased resulted from the act of the appellant. He also submitted that the appellant was not linked with the crime. He submitted that the appellant's conviction was against the weight of evidence as the respondent failed to

lead cogent evidence to establish his guilt. He urged the court to set aside the conviction and sentence.

In reaction to the submissions of learned counsel for the appellant, learned counsel for the respondent submitted that the court below rightly held that the respondent had proved its case beyond reasonable doubt and properly dismissed the defence of alibi. He submitted that the appellant's confessional statement, Exhibit 5, is positive and direct and is sufficient to convict him for the commission of the offence charged. He noted that Exhibit 5 contains a detailed narrative of how the appellant and one Abu (now at large) conspired together to slaughter the deceased 3-year-old child. He noted that there was no objection to the tendering of Exhibit 5. He submitted that a free and voluntary confession, which is direct and positive and properly proved, is sufficient to sustain a conviction. See: *Arogundare Vs The State* (2009) Vol.169 LRCN 23. Citing the case of: *Akinmogu Vs The State* (2000) 6 NWLR (Pt.662) 608, he submitted that it is settled law that an admission made at any time by a person charged with an offence, even before it has been decided to formally charge him with committing a crime, without administering a caution, suggesting that he committed the offence is a relevant fact against him. He referred to the evidence of PW1 at page 31 lines 10 - 13 and at page 33 line 4, wherein he testified that the appellant confessed to the crime in his presence.

He maintained that the appellant was linked with the death of the deceased and referred to Exhibit 3, the medical report, which was unchallenged, which stated the cause of death to be "cardiac respiratory failure from laceration of the trachea and carotid arteries and jugular veins." He submitted that this finding corroborates the appellant's confession in Exhibit 5 that he slaughtered the deceased by slicing his neck with a knife. He noted further that the testimony of PW1 and PW2 also corroborated the content of Exhibit 5, as they testified that they found the deceased with his throat cut.

Learned counsel submitted that the duty of the prosecution is to prove its case beyond reasonable doubt and not beyond the shadow of a doubt. He referred to: *Chukwuma Vs FR.N.* (2011) 198 LRCN 73 @ 77; *Kim Vs The State* (1991) 2 NWLR (Pt.175) 622 @ 625; *Alkalezi Vs The State* (1993) NWLR (Pt. 273) 1; *Dibie Vs The State* 9 (2007) 3 SC (Pt. I) 176. He submitted that the re-

spondent in this case proved all the essential elements of the offence of culpable homicide punishable with death under Section 221 of the Penal Code. He urged the court to resolve this issue against the appellant and dismiss the appeal.

The standard of proof required of the prosecution in a criminal case is a heavy one. The prosecution must prove its case beyond reasonable doubt. See: Section 135 (1) of the Evidence Act, 2011. The burden of proof remains on the prosecution throughout and does not shift to the accused person, except in a few limited circumstances, such as where an accused person raises a defence of insanity. See: *The State Vs Emine* (1992) 7 NWLR (Pt.256) 658; *Ogundiyan Vs The State* (1991) 3 NWLR (Pt.181) 519; (1991) 4 SCNJ 44; *Alonge Vs IGP* (1959) 4 FSC 203; (1959) SCNLR 516. There is no obligation on an accused person to prove his innocence. In order to discharge the onus on it, the prosecution must establish all the ingredients of the offence charged. See: *Yongo Vs C.O.P.* (1992) 8 NWLR (Pt. 257) 36; (1992) 4 SCNJ 113; *Alor Vs The State* (1997) 4 NWLR (Pt.501) 511.

The ingredients of the offence of culpable homicide punishable with death under Section 221 of the Penal Code are:

- 1. That the deceased died.***
- 2. That his death was caused by the accused.***
- 3. That the act of the accused which caused the death was intentional having the knowledge that death or grievous bodily harm was the probable consequence of the act.***

Stephen Haruna Vs A.G. Federation (2012) LPELR - SC.72/2010 @ 26 - 27 F - C; *Ubani Vs. The State* (2003) 18 NWLR (Pt.851) 24; *Igbele Vs The State* (2006) 6 NWLR (Pt.975) 100.

There is no dispute regarding proof of the first ingredient of the offence. PW1, the father of the deceased testified that he had been looking for his young son, who had gone missing early in the morning of 28/7/2004 from a nearby compound where he was playing with friends. He was informed by one of his neighbours, PW2, that his corpse had been found in an uncompleted building.

He went there and identified the deceased whose throat had been cut. He also testified that he accompanied the body to the Federal Medical Centre. He identified the deceased to the medical doctor who performed the post-mortem examination and produced a

report, which was omitted in evidence as Exhibit 3, stating the cause of death to be “cardiac respiratory failure from laceration of the trachea and carotid arteries and jugular veins.”

To establish the second and third ingredients, the respondent relied on the evidence of PW1, PW2, PW3 and Exhibits 3 and 5 the post-mortem report and the appellant’s confessional statement respectively. One of his confessional statements Exhibit 4 was expunged from the record by the court below, having been wrongly admitted without the conduct of a trial within trial when objection was taken to its admissibility on grounds of involuntariness.

The law is settled that the free and voluntary confessional statement of an accused alone is sufficient to sustain a conviction, provided the court is satisfied that it was made in a free atmosphere and is direct, unequivocal and positively proved. See: *The State v. Jimoh Salawu* (2011) 18 NWLR (Pt. 1279) 883 @ 920-921 G-A; *LPELR-9351* (SC); *Akinmoju V. The State* (2000) 4 SCNJ 179; *Kanu v. The State* (1952) 14 WACA 30; *Ekpenyong v. State* (1991) 6 NWLR (200) 683

Section 28 of the Evidence Act 2011 (as amended) (formerly section 27 of the Evidence Act 2004) provides:

28. “A confession is an admission made at any time by a person charged with a crime, stating, stating or suggesting the inference that he committed that crime.”

In the instant case, as observed earlier, the appellant did not raise any objection to the admissibility of Exhibit 5. The court therefore had no obligation to conduct a trial within trial to ascertain whether or not it was voluntarily made. The court was entitled to admit it in evidence and consider its probative value along with all the other evidence in the case. See: *Egboghonome v. The State* (1993) 7 NWLR (Pt. 306) 383; *Nwangboma v. The State* (1994) 2 NWLR (Pt. 327) 380; *Nwachukwu v. State* (supra).

Exhibit 5, which is at page 16-18 of the record was recorded by PW3. It reads in part:

“... I used to go to Asase village in the North Bank to visit one of my brothers named Ugundu. So due to the visit I normally do to my brother, Ugundu, I came to know the parents of the deceased Msutgher... and even sometimes I used to eat food from their house. So it was on 28/7/2004 at about 0800 hours when the de-

ceased child i.e. *Msughter* was playing with two other children whom I don't know their names, by then I was with one Abu, an Igala boy who is leaving (sic) with me in the same room in Ugev village in N/Bank but now Abu run to Abuja. ... So as I was telling you, when we went to that compound in the morning at about 0800 hours, while
 B the father of the deceased child was taking his bath, Abu went and called the child named *Msughter* about three years old while he was playing with two other children of his age mate. Myself, I hide myself in one uncompleted building with
 C my knife, waiting for Abu to come. So as soon as Abu came with the child he (Abu) put the child down, Abu now pray in Igala language later Abu removed something from his pocket and robbed (sic) on the neck of the child exactly where he wanted me to slaughter. After doing that, he handed over the knife to me and I finally
 D slaughter the child *Msughter*. Though at the time we were doing all these the child did not cry or raised (sic) any alarm."

The above statement contains a chilling and cold-blooded account of how the appellant and his accomplice, the said Abu, who is now at large, lured an innocent, unsuspecting little boy away from
 E playing with his friends to a gruesome and untimely death. It is clear, direct and positive as to the involvement of the appellant in the commission of the offence. The post-mortem report, Exhibit 3, issued by one Dr. E.E. Okwori of the Federal Medical Centre is consistent with the narrative in Exhibit 5 of how the deceased was killed. The doctor
 F found that the deceased's neck was slashed and the cause of death was due to cardiac respiratory failure from laceration of the trachea and carotid arteries and jugular veins.

PW1, under cross-examination at page 32 of the record, stated
 G that while searching for his son, he met the children his son was playing with in the nearby compound and asked for his whereabouts. It is consistent with the statement in Exhibit 5 that the deceased was playing with his friends in a nearby compound. He also testified that appellant confessed to the crime in his presence at the Police station. He
 H maintained this assertion under cross-examination. PW2 was the person who discovered the body of the deceased and alerted PW1. His evidence was not discredited in any way under cross-examination.

After a review of the evidence, the court below held at pages 136-138 of the record:

“In the instant matter, it is patent on the record of appeal that the deceased victim, a human being, died. PW1, the father of the deceased identified the corpse of the deceased to the medical doctor who carried out a post-mortem on the deceased. Exhibit 5, the confession of the appellant contains the details of the methodical acts of and the manner in which the appellant savagely terminated the life of the deceased, by slashing his throat with a knife.

He stated how one Abu, his companion, who had since the incident been at large, lured the deceased child away from his play-mates into an uncompleted building where he was killed. While Exhibit 3 the medical report contains the findings of the Doctor who carried out the post-mortem on the deceased. viz: Slaughtered boy. Laceration of the trachea, carotoid (sic) arteries and jugular veins. And the cause of death was certified to be cardio respiratory failure from laceration of the trachea and carotid arteries and jugular veins.

Hence, Exhibit 3 is consistent with the manner in which the appellant confessed in Exhibit 5 to have killed the deceased, that is slashing the neck of the deceased with a knife. The death of the deceased was the direct consequence of the act of the appellant.

There is no doubt from Exhibit 5 that the killing of the deceased was premeditated by the appellant and his “run away” crony. He laid in ambush in an uncompleted building from prying eyes, while his crony lured the deceased from his playmates into the ready hand of the appellant, who is the hatchet man of the evil team. It is very clear that this act of the appellant that is, the slashing of the neck of the deceased was intended to cause the death of or grievous harm or fatal injury to the deceased.

Consequent upon the above elucidation, I agree with the learned trial judge that, on the facts of this matter, the respondent, as prosecution at the trial Court, succeeded in proving beyond reasonable doubt that the appellant, by slashing the neck of the deceased with a knife, in collaboration with his crony who has been at large since the incident, intended to kill the deceased or to cause him grievous harm. Therefore, the acts of the appellant fall within the ambits of the offence of conspiracy to commit and culpable homicide with which he was charged.”

The above finding is in full accord with the evidence on record. It is unassailable. There is no reason for this court to disturb it. The

appellant must certainly pay the price for his dastardly act. This issue is accordingly resolved against the appellant.

In conclusion therefore, I find that the appeal is totally lacking in merit. It is hereby dismissed. The judgment of the lower court, which affirmed the conviction and sentence of death passed on the B appellant, is hereby affirmed.

GALADIMA JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother KEKERE-EKUN, JSC. I agree with the reasoning contained therein leading to the conclusion dismissing of this appeal. I too dismiss the appeal.

The judgment of the Court of Appeal which affirmed the conviction and sentence of death passed on the Appellant herein is hereby D affirmed.

PETER-ODILI JSC

I am in total agreement with the judgment and reasoning just delivered by my learned brother, Kudirat Kekere-Ekun JSC and to E underscore my support I shall make some comments.

This is an appeal filed by the appellant against the decision of the learned Justices of the Court of Appeal, Makurdi Judicial Division delivered on the 2nd day of May, 2014 which said judgment affirmed the decision of the trial court that convicted the appellant for F culpable homicide and sentenced him to death.

The detailed facts are well adumbrated in the lead judgment and there is no need restating them.

On the 3rd day of December, 2015, learned counsel for the G appellant, Wilson Dirinari Esq. adopted the Brief of Argument filed on the 4/9/2014. In it he distilled three issues for determination which are thus:

1. Whether it is the original Certified True Copy of Exhibit 5 (that is, the appellant's alleged confessional statement to the police), H being a public document that is admissible in evidence under the evidence Act, 2011. Distilled from Ground 1

2. Whether the defence of alibi raised by the appellant, but was not properly considered by the courts below, would avail the appellant. Distilled from Ground 2.

3. Whether if this Honourable court agrees with our contention under issue 1 above, to the effect that it is only Certified True Copy of Exhibit 5 and not the original that is admissible in law, the respondent herein has proved the guilt of the appellant beyond reasonable doubt, with cogent; credible and compelling evidence as required under Nigerian criminal jurisprudence to secure the conviction and sentence of the appellant. Distilled from grounds 3 and 4. B

Mr. J. N. Adegba, learned counsel for the respondent adopted the Brief of Argument of the Respondent, filed on 5/2/2015 and deemed filed on the 18/2/2015. He crafted two issues for determination which are, viz: C

1. Whether Exhibit 5 is a public document requiring certification to be admissible. (Distilled from Ground 1)

2. Whether having regard to the weight of Evidence, the Court of Appeal rightly held the respondent proved its case against the appellant and that the defence of Alibi does not avail the appellant. (Distilled from Grounds 2, 3 and 4.

The issues as drafted by the respondent seem more apt to utilise in the determination of the appeal and so I shall use them.

ISSUE NO 1 E

Whether Exhibit 5 is a public document requiring certification to be admissible.

Learned counsel for the appellant submitted that Exhibit 5, alleged confessional statement emanating from the custody of the Nigerian Police Force qualified within the ambit of the law and for purposes of admissibility under the Nigeria Evidence Act, 2011 as a public document and so without certification is inadmissible. He cited section 18(1) of the Interpretation Act, Cap 192 laws of the Federation, 2004; Section 318 (i) (h) of the 1999 Constitution, sections 102 (a) (iii), 104 (i) and 105 of the Evidence Act, 2011; *Tabik Investment Ltd v. GTB Plc* (2001) 17 NWLR (Pt. 1276) 240 at 261 - 262. F

That Exhibit 5, the basis for the conviction and sentence of the appellant by the courts below being inadmissible evidence and wrongly admitted showed the respondent failed to prove the guilt of the appellant beyond reasonable doubt. H

For the respondent it was contended that the confessional statement of the appellant made at "C" Division of the Police Station Makurdi promptly upon his arrest soon after the commission of the

crime is not one of the public documents under the purview of section 104 of the Evidence Act, 2011. That Exhibit 5, the said statement is primary evidence under section 86(1) of the Evidence Act, 2011 as it was the original statement and not a photocopy. The stance of the appellant is that the confessional statement exhibit 5 being a public document and without certification is inadmissible and having been wrongly admitted should be expunged would lead to a change in the verdict as pronounced and affirmed by the court below. This standpoint contested by the respondent on the ground that the said exhibit 5 being in its original form is a primary evidence needing no certification to qualify for admission as evidence. That the appellant came from wrong premises, which point can only avail if the said document was a photocopy in which case it would need certification before it is admitted.

In the consideration of the arguments on the issue at the court below, that appellate court held thus:

“Regarding the admissibility of exhibits 4 and 5, the position of the learned counsel for the appellant that these are official documents which require certification for them to be admissible in evidence in my humbly view is misconceived. For the position of the law is that the contents of documents may be proved either by primary or secondary evidence. See section 93 of the Evidence Act. Primary evidence has been defined in section 94 as the document itself, that is the document in its original Form, which may be produced for the inspection of the Court. Exhibits 4 and 5 in my view are in their original forms and not photocopies it is only where a person demands for use of a public document that a copy of such document, is produced and certified as a true copy of such document or any part thereof upon payment of the legal fees. The certificate true copy can then be used as if it were an original. See section III (1) of the Evidence Act.

The connotation of the Supreme Court decision in the case of Araka v Egbue (2003) 17 NWLR (Pt.848) P. 1 cited and relied on by the appellant’s learned counsel is that, where primary evidence of a public document is not available, the only acceptable secondary evidence is certified copy of the document. Therefore, exhibits 4 and 5 being in their original forms which are available for use as such, they are primary evidence which do not require certification for the pur-

pose of their admissibility.”

In relation to the admissibility of documents, the Evidence Act, 2011 has made provisions under sections 85, 86(1), 87(1), 88, 89 (1) (e) & (f), 90 (1) (c), 102 (a) (iii), 103, 104 (1) (2) (3) and 105. I shall recast them below for ease of reference and that is as follows:

Section 85 of the Evidence Act, 2011 provides thus

B

“The contents of documents may be proved either by primary or secondary evidence”,

Section 86 (1) of Evidence Act, 2011 provides

“Primary evidence means the document itself produce for the inspection of the court.”

C

Section 87 (1) of Evidence Act, 2011

“Secondary evidence includes certified copies given under the provisions hereinafter contained.”

Section 88 of Evidence Act, 2011

D

“Documents must be proved by primary evidence except the cases hereinafter mentioned”

Section 89(1)(e) and (f) of Evidence Act, 2011 provides

“Secondary evidence may be given or contents of a document in the following cases:

E

(e) when the original is a public document within the meaning of section 102 of the Act.

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in Nigeria.

Section 90 (1) (c) of the Evidence Act, 2011 provides:

F

1. “the secondary evidence admissible in respect of the original document referred to in the several paragraphs of subsection (1) of this section is as follows:

(c) in paragraph (e) or (f) a certified copy of the document, but no other kind of secondary evidence, is admissible.

G

Section 103 of the Evidence Act, 2011 provides:

“All documents other than public documents are private documents.”

Sect. 104 (1) (2) and (3) of the Evidence Act, 2011 provides H

(1) “Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees prescribed in that respect, together with a certificate written at the foot of such

copy that it is a true copy of such document or part of it as the case may be.

(2) *The certification mentioned in subsection (1) of this section shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, when, whenever such officer is authorized shall be called certified copies.*

(3) *An officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section. “*

Section 105 of the Evidence Act, 2011 provides:
“*Copies of documents certified in accordance with section 104 may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies”*

Section 102 (2) (iii) of Evidence Act, 2011:
“*The following documents are public documents - documents forming the acts or records of the acts - of public officers, legislative, judicial and executive, whether in Nigerian or elsewhere.*”

Having perused these statutory provisions of the Evidence Act in context with the document in issue which the court below had no difficulty in concluding that it was an original statement of the appellant and not being a photocopy, therefore fell into the category of a primary evidence and not secondary and so the applicable section of the Evidence Act is section 86(1) of the Act and not section 104 as appellant posits. This condition of the lower court cannot be faulted as it represents the law and so all the arguments put across by the appellant are misconceived along with the judicial authorities cited by learned counsel for the appellant as they are not applicable to the case in hand. Indeed that is the correct position of the law and the implication is that the issue is resolved against the appellant.

ISSUE NO 2

Whether having regard to the weight of Evidence, the Court of Appeal rightly held the respondent proved its case against the appellant and that the defence of alibi does not avail the appellant.

It was submitted for the appellant that the courts below failed to appreciate the fact that the appellant could not have raised the said defence of alibi at the police station when he was making his statement because the appellant was compelled into confessing the killing of the deceased. That the police station was therefore not the

appropriate place to raise the defence of alibi. He referred to the case of the *Magit v Uniagric Makurdi* (2005) 19 NWLR (Pt. 959) 211 at 247; *Olaiya v State* (2010) 3 NWLR (Pt. 1181) 423 at 436 etc.

That the conviction of the appellant was against the weight of evidence and so should be set aside. He cited *Almu v State* (2009) 10 NWLR (Pt. 1148) 31 at 46. B

Learned counsel for the respondent submitted that the defence of alibi did not avail the appellant as the “appellant was clearly linked with the death of the deceased. That the medical report, Exhibit 3 which was unchallenged was supportive of the confessional statement. That the prosecution proved all the essential elements of the offence of culpable homicide permissible under section 221 of the Penal Code. He cited *Akalezi v State* (1993) NWLR (Pt. 273) 1; *Oreoluwa Onakaya v. Federal Republic of Nigeria* (2002) 11 NWLR (Pt. 779) 595; *Dibie v State* (2007) 3 SC (Pt. 1) 176. C

On the defence of alibi, it is indeed strange that it was raised by the appellant when he was presenting his defence and not at the earliest opportunity before trial to enable the prosecution, investigate the alibi and agree with the appellant or disprove it. Therefore bringing up an alibi at the defence stage which creates the impression that the court would embark on this investigative journey of disproving the alibi a situation that one finds difficult to place under any of our laws. It becomes of no use raising that defence when it is brought up at the trial as the police cannot investigate such an alibi which is too late at that stage. I rely on the case of *Ndidi v The state* (2007) 13 NWLR (Pt. 1052) 633; *Unongo v Aku* (1983) 2 SC NLR 332. D

On whether or not the prosecution met the standard of proof which is proof beyond reasonable doubt in the conviction of the appellant; The court is mindful of the fact that the said standard is not beyond the shadow of doubt or the prosecution have a magic wand before such a standard can be said to have been attained, rather what is asked for is that the evidence produced by the prosecution before the court is so strong, convincing, persuasive against the accused that no reasonable man would doubt the probability that the accused/appellant committed the offence charged. I place reliance on the cases of *Chukwuma v Federal Republic of Nigeria* (2011) 198 LRCN 73 at 77; *Kim v. State* (1991) 2 NWLR (Pt. 175) 622 at 625; *Dibie v. State* (2007) 3 SC (Pt. 1) 176. E

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G

H

With the standard of proof in view and taking it along with the confessional statement of the appellant, exhibit 5 which was positive and direct to his commission of the said offence as it was detailed and the narration flowed smoothly including the role played by one Abu in such a way that of itself alone a conviction can be procured. See B *Nwachukwu v The State* (2005) 4 LRCN 53; *Arogundare v The State* (2009) 169 LRCN 17 at 23; *Akinmogu v The State* (20'00) 6 NWLR (Pt. 662) 608.

All that apart, there are other pieces of evidence linking the appellant to the death of the deceased such as exhibit 3, the medical C report showing the cardiac respiratory failure from laceration of the trachea and carotid arteries and jugular veins, consistent with the description of how the appellant slaughtered the deceased as seen in the confessional statement which are corroborative of the confes- D sional statement. These lead to the conclusion that the essential elements of the offence of culpable homicide punishable with death under section 221 of the penal code on which the appellant is charged were proved. These ingredients of the offence being:

(a) The death of the victim of the crime in this case, a 3 year E old child has occurred.

(b) That death of the deceased resulted from the act of the appellant who slashed his throat with a knife.

(c) That appellant slashed the throat of the deceased inten- tionally knowing that death would be the probable consequence. F

Indeed the evidence proffered by the prosecution has drowned the presumption of innocence of the appellant and enabled the court reach the compelling conclusion that the proof as made is beyond reasonable doubt. See *Alkaleziz v State* (1993) NWLR (Pt. 273) 1; G *Onakaya v Fed. Republic of Nigeria* (2002) 11 NWLR (Pt. 779) 595.

This issue from the foregoing is resolved against the appellant. The two issues having gone against the appellant and from the better reasoning in the lead judgment, I dismiss the appeal. I abide by the consequential orders made by my learned brother, Kekere-Ekun JSC.

H

OGUNBIYI JSC

I read in draft the lead judgment of my learned brother Kekere-Ekun, JSC and I agree that the appeal is lacking in merit and should be dismissed. I seek to add also that my brother has consid-

ered all the issues raised in the appeal comprehensively and I adopt the judgment as mine.

I wish to say briefly that the facts of this case are very unfortunate and disturbing. The caliber of the appellant with his callous behavior is not a man fit to live in a decent society. This I say especially where the appellant claimed he was hired by one Abu to murder the victim (a boy of three) for a fee. In one of the two statements made to the police, the appellant confessed that he was hired for a fee of N60,000.00 (Sixty thousand Naira). B

The two statements made by the appellant at Exhibit 4 & 5 were confessional and the law is well settled on the admissibility and effect of such documents which are sufficient to convict the appellant thereon. Consequently, the defence of alibi raised by the accused during his testimony was too late in the day and only an afterthought. C

At pages 44 - 45 of the record, the confessional statement Exhibit 5 was tendered through the bar without any objection from the appellant's counsel. As rightly submitted by the respondent's counsel, the document which was the appellant's own statement and recorded on his own volition is primary evidence in nature under section 86(1) of the Evidence Act 2011. The same needs no certification as it is not classified as secondary evidence, contrary to the contention held by the appellant's counsel. Section 104 of the Evidence Act does not therefore apply to Exhibit 5. It is the appellant's original statement in its original form that was tendered. D

On the question of proving the appellant's guilt, it is obvious that the defence of alibi raised at the stage of his defence, was belated and did not avail him. This is especially in the face of his confessional statement Exhibit 5 which, alone, was sufficient to have convicted the appellant thereon. E

The confession was positive and direct that he (appellant) committed the said offences. It was also detailed and flowed in fluent narrative as to how he conspired with one Abu and slaughtered the deceased, an innocent child of 3 years old boy, with a knife in an uncompleted building. F

In addition and to corroborate Exhibit 5 is also Exhibit 3, the medical report, which was not challenged or controverted by the defence. The cause of death according to the report was as a result of: G

H

“Cardiac respiratory failure from laceration of the trachea and carotid arteries and jugular veins.”

My brother Kekere-Ekun, JSC has said it all in his lead judgment, there is surely no mercy for the appellant, whose guilt has been proved by the prosecution beyond all reasonable doubts. In the same vein as my brother, therefore the concurrent findings of the two lower courts are unassailable as there is no reason to disturb same. The appeal is lacking in merit and I also dismiss same and affirm the conviction and sentence of death passed on the appellant.

C —————
SANUSI JSC

At the High Court of Justice Benue State, Makurdi Division (the trial court) the appellant herein, was arraigned and charged with the offences of culpable homicide punishable with death contrary to Section 221 of the Penal Code and the offence of criminal conspiracy under Section 97 or the same Penal code.

When the two charges were read and explained to him he pleaded not guilty, hence his trial commenced in earnest. During the trial, the prosecution now respondent in proof of their case, called three witnesses and tendered some exhibits which included the confessional statements of the accused person, (now appellant) which were marked as Exhibits 4 & 5. The appellant in presenting his defence testified in his own defence but did not call any witness.

Briefly put, the facts of the case are that on July 2004 at Asase, village in the North Bank which is in the outskirts of Makurdi, one Abu was alleged to have lured the deceased, a young boy of about 3 years old called Msugherr Yortyon from his parents house, where he was playing with other children and led him to an uncompleted building where the appellant was waiting with a knife based on his conspiracy with the said Abu. He floored the deceased down while the Appellant slashed the boy’s (deceased’s) throat with the knife, and killed him. Both Abu and the appellant left the scene leaving their victims corpse in the uncompleted building. The corpse was later discovered by PW2 who led PW 1 the father of the deceased to the place where the corpse was dumped when he heard about the search for the deceased was being mounted. On discovery of the deceased person’s corpse, investigation was intensified leading to the arrest of the appellant who was later tried for the two offences mentioned

above. Somewhere in his confessional statement Exhibit 5, the accused now appellant confessed that the said Abu promised to pay him a fee of 60,000.00k if he assisted in killing the deceased.

At the end of the trial, the trial High Court found the appellant guilty of the two offences charged, convicted and sentenced him to death. Aggrieved by the Judgment of the trial court, the appellant B appealed to the Court of Appeal (herein after referred to as “the Lower or Court below”) which said lower court affirmed the decision of the trial court which convicted the appellant and sentenced him to death. Still dissatisfied with the Judgment of the Court below, the appellant further appealed to this court. He filed a notice of appeal C dated 13/3/2014 containing four grounds of appeal. Out of the four proposed by appellant in his brief of argument filed on 4/9/14 settled by one Wilson Diriwari Esq. The issues are reproduced hereunder

1. Whether it is the original Certified True Copy of Exhibit 5 D (that is, the appellant’s alleged confessional statement to the police), being a public document that is admissible in evidence under the evidence Act, 2011.

2. Whether the defence of alibi raised by the appellant, but was not properly considered by the courts below, would avail the E appellant.

3. Whether if this Honourable court agrees with our contention under issue 1 above, to the effect that it is only Certified True Copy of Exhibit 5 and not the original that is admissible in law, the respondent herein has proved the guilt of the appellant beyond reasonable doubt, with cogent; credible and compelling evidence as required under Nigerian criminal jurisprudence to secure the conviction and sentence of the appellant. F

On its part, the respondent formulated two issues for determination of this appeal as contained in its brief argument which was G filed on 5/2/15 but deemed filed on 18/2/2015 and settled by J Adegba an Assistant Director Legal Drafting with Ministry of Justice Makurdi Benue State. The two issues raised therein read thus:-

(a) Whether exhibit 5 is a public document requiring certification to be admissible. H

(b) Whether having regard to the weight of evidence, the Court of Appeal rightly held that the Respondent proved its case against the appellant and that the defence of alibi does not avail the

appellant.

My noble lord Kekere-Ekun JSC, has thoroughly treated the above issues raised by the learned counsel to the parties which are more or less the same but merely differed in the manner they were couched. The reasons and conclusion she arrived at in finally dismissing this appeal are agreeable to me and I hereby adopt them as mine. That notwithstanding, I would like to add few comments on some of the live issues canvassed by the parties learned counsel especially with regard to the proof of the case by the respondent herein.

It is the contentions of the appellant's counsel that the Lower court wrongly rejected the appellant's defence of alibi which he raised while presenting his defence. The learned appellants counsel argued that the appellant could not have raised such defence promptly at the police station or when he was making statement to the police because he was coerced, forced, compelled and tortured. Learned appellant's counsel further submitted that the court is always duty bound to consider the defence posed by an accused no matter how stupid it might be. See *Ogunye vs The State* (1999) 5 NWLR (pt 604) 548 at 570/571 at paragraphs G to A. In his reply, the learned respondent's counsel submitted that the defence of alibi as was raised by the accused/appellant in court was raised belatedly hence the two lower courts were correct in rejecting it. He argued that alibi defence could only be considered if raised by the accused at the earliest opportunity by giving details and particulars of the place he was, at the time of the commission of the offence. In the circumstance, I tend to agree with the submission of the learned counsel for the respondent that, until and unless an accused person raised defence of alibi at the earliest time, the police investigator would have no time to investigate and verify the assertion of the accused on where he was at the time of the commission of the crime. It is not the law, that the police should embark on a wild goose chase for the whereabouts of any accused person at the time the crime was committed. No, that is not the duty or function of the police. It is pertinent to note that the defence of alibi proffered by the appellant was introduced for the first time in his oral evidence when on page 46 of the Record of appeal he stated as follows:- *"I do not know anything about the death of Msughter Iortyom on the 28/7/2004 when Msughter was allegedly killed, I was at TSE Bagu."*

For a defence of alibi to be valid and upheld by the court, the accused must give specific particulars of where he was at the material time to enable the police move straight to that place to carry out its investigation as required by law. See *Raji vs The State* (1984) 10 SC (reprint) 128; *Adio vs the State* (1986) 6 SC (reprint) 83, *Ochemeje vs the State* (2008) 6-7 SC (pt. 11) 1, *Nwaturuocha vs State* (2011) 2-3 (pt 1) 111 and *Shehu Vs the State* (2010) 2-3 SC 168. In any case, this court in its settled principle of law stated that it is not every failure of the police to investigate an alibi defence raised by an accused person that is fatal to the case of the prosecution. See *Ochemaje v. State* (supra) *Eke vs The State* (2011) 1-2 SC (pt 11) 214. I am inclined to agree with the concurrent findings of the two courts below, that the defence of alibi posed by the appellant was belated in that is mere afterthought. It should even be noted that such defence was not even raised at the time when the accused/appellant made his statements to the police which were tendered in evidence without objection from the defence. *Moreso*, for the scanty defence raised by the accused as quoted from the excerpt on page 45 of the record, such defence is vague or nebulous besides being scanty from which there was no time for the police to verify or ascertain the truth of same. This issue is therefore resolved against the appellant.

The third issue for determination has to do with whether the prosecution had proved the allegation made against the accused/appellant beyond reasonable doubt. It is settled law that an offence of culpable homicide punishable with death under Section 221 of the Penal Code can only be established if cogent, credible and reliable evidence is led to prove the following ingredients of the offence. These ingredients include:-

- (a) The death of the deceased was caused.
- (h) That the death of the deceased has resulted from the act of the accused/appellant.
- (c) That the act or omission of the accused which caused the death of the deceased was intentional with full knowledge that death or grievous bodily harm was its probable cause/consequence.

In the instant case, the prosecution, now respondent, had led credible evidence to prove that the victim *Msughter*, a small child of about 3 years was killed by knife cut on his throat as confirmed by the medical report Exhibit 3.

This is evident from the confessional statements of the accused Exhibit 5 which was tendered and admitted in evidence without any objection from the defence and which said statements were free and voluntarily made and was even duly corroborated by the testimonies of PW1 the victim's father, PW2 who led PW1 to the uncompleted building where the boy's corpse was dumped.

On the 2nd and 3rd ingredients of the offence raised supra, evidence abound from the confessional statements of the accused Exhibit 5 in which the appellant implicated or identified himself with the commission of the offence. The confessional statement, namely Exhibit 5 was made voluntarily by the appellant and were duly admitted without any objection from the defence. The trial court therefore had rightly admitted them in evidence and acted or relied on them in convicting the accused person/appellant, as charged. It is therefore my considered view that the prosecution, now respondent, had proved its case against the accused/appellant beyond reasonable doubt as required of them by Section 135 of the Evidence Act 2004. Similarly, the lower court was also correct in affirming the Judgment of the trial court which convicted the accused/appellant as charged.

This court stated in numerous of its decisions that, it is always hesitant in interfering or disturbing concurrent findings of two lower courts, except in a situation where such findings are perverse or where miscarriage of justice was occasioned. There is no evidence of such perversion or miscarriage of Justice from the facts and surrounding circumstances of this case, to warrant any interference with such findings by this court. Hence, I also affirm the decision of the court below.

In the result, for these few comments I make here, and for the fuller and more detailed conclusion arrived at in the lead judgment of my learned brother, Kudirat Motonmori Olatokunbo Kekere-Ekun JSC, I also adjudge this appeal unmeritorious and I accordingly dismiss it. I affirm the Judgment of the Court of Appeal which had affirmed the decision of the trial court in convicting and sentencing the accused/appellant to death. Appeal is hereby accordingly dismissed.