

SUPREME COURT OF NIGERIA
FRIDAY 10TH JUNE, 2016. SC. 805/2014
CORAM:- S. GALADIMA, O. RHODES-VIVOUR,
N. S. NGWUTA, M. D. MUHAMMAD, J. I. OKORO, JJSC

AYIERE GODSGIFT (ALIAS ALEX) APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Reply brief - Purpose of - It is limited to any new point arising from respondent's brief - And appellant is deemed to have conceded such new point - Where he fails to file a reply (H1)

EVIDENCE - Crime - Unchallenged evidence - Admissibility - Evidence adduced in court that has not been contradicted - Becomes credible and reliable at the trial of accused (H2)

IDENTIFICATION PARADE - Conduct of - The parade is not necessary in this case - In view of the overwhelming evidence - Linking appellant with the offence he committed (H3)

ALIBI - Defence - Condition - Accused must raise the defence at the earliest possible opportunity - Giving particulars of his whereabouts at the crime time - So that police can conduct their investigation (H4)

COURTS - Alibi - Test of - Court must test evidence of alibi against evidence led by prosecution in rebuttal - And where it doubts the guilt of accused - Accused must enjoy the benefit of such doubt (H5)

ALIBI - Investigation of - When unnecessary - In view of the overwhelming evidence - That specifically pinned appellant to the crime scene - Police is not mandated to investigate the alibi (H6)

MURDER - Doctrine of last seen - Where accused was the last person to be seen with deceased - He must explain how the latter met his death - Otherwise he is deemed to be the murderer (H7)

EVIDENCE - Confession - Objection - Where accused alleges that his confession is not voluntary - He must object to its admissibility when the statement is sought to be tendered (H8)

FACTS

Accused/appellant was charged before the High Court of Cross River State for murder contrary to Section 319(1) of the Criminal Code C16 Vol. III, Laws of Cross River State 2004. He pleaded not guilty to the charge. Prosecution/respondent's case is that appellant on a certain day went to the private primary attended by the deceased – one master John Okon Edem (aged 10). Appellant deceived both the security man and the deceased's teacher – PW2. He showed them snack he bought for the young boy. As the teacher, who was holding some things in her hand and turned around to drop them, appellant who the boy affectionately referred to as "Uncle" disappeared taking the boy along with him. Having waited for a while for appellant to return with the deceased to no avail, the teacher raised an alarm. The father of the deceased – PW1 was alerted and a search was commenced for the deceased.

While the search for the deceased was going on, PW1 received a telephone call from someone who identified himself as Johnson and demanded for a ransom of N3 Million Naira for the release of the deceased. PW1 identified the voice of the caller as that of the appellant, since the latter was PW1's former employee. The matter was reported to the police. Bait was set and appellant was eventually arrested. At the trial, respondent called five witnesses, while appellant testified for himself. At the end of the trial, appellant was convicted and sentenced to death. Dissatisfied, appellant appealed to the Court of Appeal, Calabar Division. The Court dismissed the appeal and affirmed the decision of the trial court. Aggrieved further, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Was the Court below right in coming to the conclusion that since the Appellant did not file a reply brief in response to the arguments canvassed in the respondent's brief, the appellant had conceded to the arguments put forward by the respondent?"

2. Whether the Court below was right in finding that there was no perversity in the evaluation of the evidence carried out by the

learned trial Judge.

HELD (Unanimously dismissing the appeal per GALADIMA JSC)

APPEALS - Reply brief - Purpose of

1. The Appellant's learned counsel rightly stated the main purpose of a reply brief, as repeatedly explained in a plethora of decisions of this Court. It is simply to answer any new points arising from the Respondent's brief of argument. A reply brief is filed when an issue of law or argument raised in the respondent's brief calls for a reply where it is necessary it should be limited to answering any new points arising from the Respondent's brief. A reply brief required to be filed by an Appellant under Order 18 Rule 5 of the Court of Appeal Rules 2011 (*supra*) only affords an appellant an opportunity to respond to any new points arising from the respondent's brief. It is obviously not a necessity or mandatory.

Failure to file a reply brief to a respondent's brief can only be fatal to the case of the Appellant, if the points raised in the respondent's brief are weighty, substantial, competent and relevant in law.

I agree with the learned counsel for the Respondent that the Appellant ought to have filed a reply brief to the points raised by the Respondent's brief to the effect that PW2 and PW3 who gave evidence identifying the Appellant were never cross-examined by the appellant and their evidence therefore remained unchallenged.

The Court below was right. That is the position of the law on this point. I have said that filing of a reply brief by an Appellant is not mandatory; but where a Respondent's brief raises a point of law not covered in the Appellant's brief, an Appellant ought to file a reply. Failure to file one without an oral reply to the points raised in the Respondent's brief may amount to a concession of the points of law or issues raised in the Respondent's brief. In other words, Appellant is deemed to have conceded all the new points or issues arising from the Respondent's brief. (pp. 2806 E/2807 A/F/2808 A)

EVIDENCE - Unchallenged evidence - Admissibility

2. Despite the foregoing direct clear and weighty identification evidence against the Appellant by PW1, PW2, PW3 and PW5 they were not cross-examined. Their pieces of evidence were never challenged or contradicted in any way. It is trite law that any relevant evidence adduced in Court that has neither been successfully challenged nor contradicted, becomes credible and reliable at the trial of the accused person.
(p. 2813 E)

IDENTIFICATION PARADE - Conduct of

3. In any case, formal identification parade is not necessary in this case in view of the overwhelming evidence linking the Appellant with the offence he had committed including his voluntary confessional statements (Exhibits 9 and 10).
(p. 2813 G)

ALIBI - Defence - Condition

4. On the issue of alibi, the Appellant has contended that the defence was not considered by the trial Court. In other words, the Lower Court failed to pronounce on the defence alibi when it was made by the Appellant.

This Court has said so many times that an accused person who raises a defence of alibi has a duty to do so at the earliest possible opportunity and give particulars of that other place(s) where he was at the time of the crime so that the police can investigate and call necessary evidence in rebuttal. The particulars supplied should be such that if accepted, the conclusion should be that the accused could not have been both at the place where the offence was committed and this other place where he claims to be. (p. 2814 G)

H Alibi - Test of

5. On its part, a Court of trial faced with evidence tending to show that the accused person was somewhere else at the time of the commission of the crime is under a duty to test such evidence against the evidence led by the prosecution in rebut-

tal and if on the whole, the Court is in doubt as to the guilt of the accused, such accused must enjoy the benefit of such doubt and be acquitted. (p. 2815 B)

ALIBI - Investigation of - When unnecessary

6. However, in the case at hand the overwhelming evidence of the prosecution witnesses before the trial Court specifically pin down the Appellant to the scene of crime thereby making the investigation of the alibi unnecessary.

Where the defence of alibi consists of vague accounts which are simply placed before the Court as mere make-beliefs or plea of that defence, and which are completely devoid of material facts worthy of investigation, the police in the circumstance would least be expected to embark on a wild goose chase, all in the name of investigation. In such a situation the Court would have nothing before it to consider by way of alibi. (pp. 2815 D/2816 B)

MURDER - Doctrine of last seen

7. Under the doctrine of last seen, where an accused person was the last person to be seen in the company of the deceased person he has the duty to give an explanation relating to how the latter met his or her death. In the absence of such explanation, a trial Court and even an appellate Court will be justified in drawing the inference that the accused person killed the deceased. (p. 2817 B)

EVIDENCE - Confession - Objection

8. Exhibits 11 and 12, the confessional statement of the Appellant were tendered at the trial Court in the presence of the Appellant and his counsel and no objection was raised. The retraction of the Exhibit at his retrial is of no moment. The law is that when an accused person alleges that the confessional statement credited to him is not voluntary, objection must be raised to its admissibility when the statement is sought to be tendered and not after it had been admitted in evidence. The Appellant was represented by counsel who it is assumed to know or ought to know what to do at each stage of the pro-

NOTABLE POINTS OF INTEREST

GALADIMA JSC

1. Circumstantial evidence can prove guilt of an accused

- B In the case of *Adeniyi v. The State* (2001) FWLR (Pt. 57) 809 at 813 the Supreme Court clearly stated that where direct evidence of an eye witness is not available, the Court may infer from the facts proved the existence of the facts that may logically tend to prove the guilt of
C the accused. (p. 2811 C)

2. Accused may be called upon to establish his innocence

- The Courts further stated that generally there is no duty on the accused to prove his innocence. Circumstances may however arise where
D some explanation may be required from the accused person such as where apparently demanding circumstances are established against the accused. (p. 2811 D)

REPRESENTATION

- E Godwin Omoaka, Esq. with him, E. N. Arnold Ushiad, Esq. and Deinma Kalama (Miss), for the Appellant
E. A. Oyebanji, Esq. with him, M. O. A. Olawepo, Esq., A. A. Ismail, Esq. and Ademola Olarewaju, Esq., for the Respondents

CASES REFERRED TO

- Olufisoye v. FRN (2004) 4 NWLR (pt. 864) 580
Longe v. FBN Plc (2010) 6 NWLR (pt. 1189) 1
Brown v. State (2012) 3 NWLR (pt. 1287) 207
G Ochamaje v. State (2008) 6 7 SC (pt. II) 1
Basinco Motors Ltd. v. Woemann Line (2009) 5 - 6 SC (pt. II) 123
Dada v. Dosunmu (2006) 5 SCNJ 1
Abudu v. State (1985) 1 NWLR (pt. 1) 55
Wakala v. State (1991) 8 NWLR (pt. 211) 552
H Ojukwu v. State (2002) 4 NWLR (pt. 756) 80
Utie v. State (1989) 3 NWLR (pt. 110) 455
Adesina v. State (2012) 14 NWLR (pt. 1321) 429
Musa v. State (2013) 2-3 SC (pt. 11) 75
FR.N. v. Iweka (2011) 11-12 SC (pt. 1) 109

Eligwe v. Okpokiri (2014) 12 SC (pt. I) 33

Cameroon Airlines v. Otutuizu (2011) 1-2 SC (pt. III) 200

STATUTE & RULES REFERRED TO

Criminal Code C16 vol. III Laws of Cross River State 2004, ss. 319(1),
371(1) B

Court of Appeal Rules 2011, O. 18 r. 5

LEAD JUDGMENT BY GALADIMA JSC

This Appeal is against the judgment of the Court of Appeal, Calabar Division (Court below) delivered on the 4th day of July, 2014 which affirmed the judgment of the Cross River State High Court, Calabar Judicial Division (trial Court) delivered on the 17th day of March, 2010. The Appellant herein was convicted of the offence of murder of a teenager, John Okon Edem, of Grace and Gold Nursery/Primary School, Calabar, contrary to Section 319(1) of the Criminal Code C.16 Vol. III, Laws of Cross River State 2004 (Criminal Code) and sentenced to death. D

The facts of this case are summarized as follows: The Appellant, on 8/10/2007 between 12.00 noon and 1.00pm went to Grace and Gold Nursery/Primary School State Housing Estate, Calabar and enticed one John Okon Eden aged 10 years. He deceived both the security man and Edem's teacher. He showed them snack he bought for the young boy. As the teacher, who was holding some things in her hand turned around to drop them, the appellant, who the boy affectionately referred to as "Uncle" disappeared taking the boy along with him. F

Having waited for a while, for the Appellant to return with John to no avail, she confronted the security man at the security post to enquire for the whereabouts of John, she was told that the Appellant had not brought John back to school. G

Testifying as PW2, the class teacher said she had to promptly alert the head teacher who called the father of the deceased (PW1) on phone to find out if he has sent someone to pick his son, John from school. The parents said they did not send anybody. H

While the search for John was going on. PW1 received a telephone call from someone who identified himself as Johnson and demanded for a ransom of N3 Million Naira for the release of John

Okon Edem.

This pathetic account as narrated by PW1 continues thus: On 11th October, 2007 the faceless “Johnson” directed PW1 to take ransom money to PW5, an operator of Commercial Centre located at No. B52, Border Road, Ikom. The fake “Johnson” also sent a Commercial Motorcyclist, one Samuel Ezaka (PW4) to pick up the money from PW5 at Ikom. PW1 who had become familiar with the voice of the Appellant, his former employee, reported the case to the police who arranged some Paper Naira in a bag to be given to Johnson. It was when the PW4 came round to pick the money from PW5 that he was arrested by the police. As soon as PW4 was arrested, the Appellant who kept a distance took to his heels and disappeared. Later on that day the Appellant was also arrested by the police. He denied any involvement in the kidnap and eventual murder of John Okon Edem.

Appellant was charged before the High Court. At his trial, in proof of its case, the prosecution called 5 witnesses and tendered several Exhibits, while the Appellant testified for himself. At the conclusion of the trial, the learned trial Judge, convicted the Appellant of the offence of murder and sentenced him to death. However, the charge of fraudulently enticing and child stealing contrary to Section 371(1) of Criminal Code was struck out on the ground that the capital offence cannot be joined with any other charge.

Dissatisfied with the judgment of the trial Court, the Appellant appealed to the Court of Appeal, Calabar Division. The Court dismissed the appeal while affirming the decision of the trial High Court. Further dissatisfied with the judgment of the Court below, he has now appealed to this Court by a Notice of Appeal dated 15/7/2014 and filed on 4/8/2014 containing 3 Grounds of Appeal.

In the brief of argument settled by GODWIN OMOAKA ESQ of counsel to the Appellant filed on 3/12/2014, 2 issues distilled for determination in this appeal are as follows:-

“1. Was the Court below right in coming to the conclusion that since the Appellant did not file a reply brief in response to the arguments canvassed in the respondent’s brief, the appellant had conceded to the arguments put forward by the respondent? (Ground 1)

2. Whether the Court below was right in finding that there was no perversity in the evaluation of the evidence carried out by the learned trial Judge. (Grounds 2 and 3)”

In the Respondent's brief filed by E. A. OYEBANJI ESQ on 16/6/2015, but deemed filed on 1/7/2015, the 2 issues submitted for determination of the appeal are as follows:-

1. Whether the learned Justice (sic) of the Court of Appeal were right when they held that the Respondent having adequately replied all the points canvassed in the Appellant's brief, failure of the Appellant to file a reply brief gave the Lower Court liberty to take the position as stated by the Respondent brief. (Ground 1) B

2. Whether the learned Justices of the Court of Appeal were right when they affirmed the conviction and sentence of the Appellant for murder for the reason that the learned trial Judge properly evaluated the evidence adduced at the trial. (Grounds 2 and 3)" C

On 17/3/2016 this Court heard the appeal. Learned counsel for the respective parties promptly adopted and relied on the arguments proffered in their briefs of argument. No further amplifications of oral arguments were presented before us. Whilst the learned counsel for the Appellant urged the Court to allow the appeal and set aside the decision of the Court below, the learned counsel for the Respondent. On the other hand urged us to dismiss the appeal and affirm the decision of the Court below. D
E

I have observed that the two issues submitted by the respective counsel for the Appellant and the Respondent are substantially similar in substance, though couched slightly different.

ISSUE 1:

Appellant's main complaint in his issue 1, is that the Court below erred when it held that by failing to file a reply brief to the Respondent's brief of argument, the Appellant had conceded to the arguments and submissions made by the Respondent therein. Relying on Order 18 Rule 5 of the Court of Appeal Rules 2011, learned counsel submitted that the Appellant before the Court of Appeal is not always obligated to file a reply brief in response to a Respondent's brief of argument except for the sole purpose of dealing with new points raised in the Respondent's brief. Against the foregoing, learned counsel submitted that where a Respondent's brief of argument has only responded to arguments in the Appellant's brief, without more, the Appellant has no obligation filing a reply brief. Reliance was placed on the cases of OLUFISOYE v. FRN (2004) 4 NWLR (Pt.864) 580 at 644; LONGE v. FBN PLC (2010) 6 NWLR (PT.1189) 1 AT 55; F
G
H

BROWN v. STATE (2012) 3 NWLR (PT.1287) 207 AT 246. It is finally submitted that on the authority of the foregoing decisions, the law is settle that the Appellant herein, was perfectly entitled not to file a reply brief having found that the respondent's brief did not raise any new issues.

B Responding, the learned counsel for the Respondent submits that the Appellant ought to have filed a reply brief to clarify the points raised by the Respondent in its brief to the effect that PW2 and PW3 gave evidence identifying the Appellant. That since the Appellant failed to file a reply to state his own position, challenging evidence of PW2 and PW3, the Court below was right when it took the position of the respondent on the point. Also that the Respondent while replying to the issue of alibi set up by the Appellant raised a new point to the effect that evidence of prosecution witnesses specifically and unequivocally pinned down the Appellant to the scene of crime, thereby making investigation of alibi unnecessary.

D It is further submitted that the point raised by the Respondent that the confessional statement of the Appellant, Exhibits 11 and 12 were admitted by the trial Court with no objection, should have elicited a reply from the Appellant to clarify the point. Having failed to do so, the Appellant could not after wards be heard to complain about their admissibility.

The Appellant's learned counsel rightly stated the main purpose of a reply brief, as repeatedly explained in a plethora of decisions of this Court. It is simply to answer any new points arising from the Respondent's brief of argument. A reply brief is filed when an issue of law or argument raised in the respondent's brief calls for a reply where it is necessary it should be limited to answering any new points arising from the Respondent's brief. FRN v. ALHAJI MIKA ANACHILE & 3 ORS, (In Re: Chief Adebisi Olafisoye) (2004) 1 SCNJ; OKOLO OCHAMAJE v. THE STATE (2008) 6 7 SC (PT.II) 1; BASINCO MOTORS LTD v. WOEMANN LINE (2009) 5 - 6 SC (Pt.II) 123. A

H ***reply brief required to be filed by an Appellant under Order 18 Rule 5 of the Court of Appeal Rules 2011 (supra) only affords an appellant an opportunity to respond to any new points arising from the respondent's brief. It is obviously not a necessity or mandatory:*** ALIM I AKA NBI DADA v. CHIEF JONATHAN

Failure to file a reply brief to a respondent's brief can only be fatal to the case of the Appellant, if the points raised in the respondent's brief are weighty, substantial, competent and relevant in law.

The Respondent herein, in its brief of argument filed in the Lower Court meticulously answered all the points raised and argued in the Appellant's brief, shedding more lights on the identity of the Appellant as the one who was responsible for the death of the young school boy he took away from his school, contrary to the Appellant's contention that there was no proper evidence of identification of the Appellant to secure his conviction. The Respondent has argument that this is not the case of disputed identity, because PW1 (the deceased's father and former employer of the Appellant) stated in his evidence that he received a phone call and immediately recognized the voice of the caller as that of "Alex" (Appellant's other name). The Respondent also stated in their brief that PW2 and PW3 who are the deceased's class teacher and security man respectively in the school where the deceased was kidnapped identified the Appellant as the very person who came to the school and took away the deceased. They testified in Court to this effect. However, both PW2 and PW3 were not cross-examined by the appellant as the respondent therefore argued in its brief that the evidence identifying the appellant remained unchallenged.

I agree with the learned counsel for the Respondent that the Appellant ought to have filed a reply brief to the points raised by the Respondent's brief to the effect that PW2 and PW3 who gave evidence identifying the Appellant were never cross-examined by the appellant and their evidence therefore remained unchallenged. Since the Appellant failed to file a reply brief to state his own position of challenging evidence of PW2 and PW3, the Lower Court was right when it held that it had to take the position stated in the Respondent's brief. It held at 166 of the record thus:

"Having gone through the two briefs of arguments filed in this case, I notice that all the points, one after the other canvassed in the appellant's brief have been adequately replied to in the respondent's brief. What remains is that the appellant has to file a reply brief if the

answers were not as stated in the respondent's brief. No reply brief has been filed. Consequently, we have to take it that the position is as stated by the Respondent's brief."

The Court below was right. That is the position of the law on this point. I have said that filing of a reply brief by an
 B **Appellant is not mandatory; but where a Respondent's brief raises a point of law not covered in the Appellant's brief, an Appellant ought to file a reply. Failure to file one without an oral reply to the points raised in the Respondent's brief may**
 C **amount to a concession of the points of law of issues raised in the Respondent's brief.** See HARKA AIR SERVICES (NIG) LTD v. EMEKA KEAZOR ESQ (2011) 6 - 7 SC (Pt.II) 1. **In other words, Appellant is deemed to have conceded all the new points or issues arising from the Respondent's brief.** See MRS. MATILDA
 D ADERONKE DAIRO v. UNION BANK RAILWAY CORPORATION (2007) 7 SCNJ 13 P.1.

In his brief, the Appellant set up the issue of alibi. The Respondent while replying to this issue raised a new point to the effect that the evidence of the Respondent's witnesses specifically and unequivocally
 E pinned down the Appellant to the scene of the crime thereby making the investigation of the defence of alibi unnecessary. Again the Appellant failed to reply to this point raised in the Respondent's brief. He is deemed to have conceded this point raised in the Respondent's brief. Yet, another point raised by the Respondent,
 F which the Appellant ought to have replied to, was the point that the confessional statement of the Appellant, Exhibits 11 and 12 were admitted by the trial Court without objection from the Appellant or his counsel. The Appellant had submitted in his brief that there Exhibits
 G ought not to have been acted upon by the trial Court on the ground of involuntariness.

The Appellant failed to file a reply brief to respond to the issue of admissibility of the Exhibits. This amounts to a concession of the said issue raised in the Respondent's issue. HARKA AIR SERVICE
 H (NIG) LTD v. EMEKA KEAZOR ESQ (supra). SHUAIBU v. MAIHUDU (1993) 3 NWLR (Pt. 284) 748; DADA v. DOSUNMU (supra).

As pointed out the Appellant ought to have filed a reply brief to respond to new points raised in the Respondent's brief. Having failed to do that, the Court below was right when it held that it had to

take the position stated by the Respondent in its brief.

In view of the foregoing, this issue is resolved in favour of the respondent.

ISSUE 2:

The contention of the Appellant under this issue is that the evaluation of the evidence by the trial Court and affirmed by the Court below was perverse. The Appellant in his brief has demonstrated under four subheads the reasons for saying that the Court below was entirely wrong in holding that the trial Court properly evaluated the evidence firstly the question of identification of Evidence; secondly defence of alibi and thirdly the issue of circumstantial evidence, fourthly the inadmissibility of Exhibits 11 and 12.

On the first subhead, learned counsel for the Appellant submitted that due reliance by the trial Court on the identification evidence given by PW2, PW3, PW4 and PW5 in convicting the Appellant was improper and that the Court below erred to have found no perversity in the finding of the said trial Court on the point. It is argued that there has been some established principles for the consideration of identification evidence in *ABUDU v. STATE* (1985) 1 NWLR (Pt. 1) 55; *WAKALA v. STATE* (1991) 8 NWLR (Pt.211) 552; *OJUKWU v. STATE* (2002) 4 NWLR (Pt. 756) 80; *UTIE v. STATE* (1989) 3 NWLR (Pt. 110) 455; *ADESINA v. STATE* (2012) 14 NWLR (Pt. 1321) 429.

Reviewing the statements of the prosecution witnesses, learned counsel has contended that the learned trial Judge did not evaluate some obvious contradictions and make any finding on them. As such the Court below erred to have found that there was no perversity in the evaluation of evidence undertaken by the trial Judge.

The defence of alibi, is the second sub-head under issue 2. Learned counsel for the Appellant has submitted that the learned trial Judge did not consider the defence: and when this point was brought before the Court below, it was as well not pronounced upon. The Court rather took the view that there was nothing wrong in the evaluation of the evidence by the trial Court. It is argued that since the learned trial Court did not consider the defence of alibi put forward by the Appellant, the learned trial Judge abdicated an important responsibility requiring the consideration of all defences open to an accused person at his trial. Reliance was placed on *EDOHO v.*

STATE (2010) 14 NWLR (Pt. 1214) 651; GALADIMA v. STATE (2012) 18 NWLR (Pt. 1333) 610; JEREMIAH v. STATE (2012) 14 NWLR (Pt. 1320) 2480.

It is therefore submitted that the Court below was wrong in reaching the conclusion that there was no perversity in the evaluation of the evidence by the learned trial Judge. That if the Court below had considered the totality of the evidence of alibi, it would have found, as a fact, that the defence was proved and it is so urged.

On the issue of circumstantial evidence, which is the third sub-head, learned counsel for the Appellant submitted that the Court below was wrong to have affirmed the findings of the trial Court on circumstances that suggest that the Appellant was the person who killed the deceased. That the circumstantial evidence was not cogent: positive and unequivocal as to lead to the irresistible conclusion to the guilt of the appellant. That even the purported confessional evidence in Exhibits 11 and 12 relied upon by the trial Court which were involuntarily obtained from the Appellant were inadmissible in law and ought to be expunged. Given the circumstances surrounding the entire case and the severity of the charge against the Appellant, this counsel has urged this Court to invoke its powers under Section 22 of the Supreme Court Act, Cap S. 16. Laws of the Federation of Nigeria, 2006 and Order 6 Rule 12 (2) and 5 of the Supreme Court Rules, 1985 (as amended) to determine those issues which the Court below ought to have so determined.

The contention of the Appellant under Issue 2 is that the learned trial Court failed to properly evaluate the evidence adduced at the trial leading to his conviction and sentence for murder of the deceased: for this reason the affirmation by the Court below ought to be perverse. On his part, the learned counsel for the Respondent has argued strenuously that the findings and evaluation of facts by the trial Court and affirmed by the Court below were from direct evidence of the witnesses before the trial Judge who had the opportunity to see, hear and watch the general demeanour of all the witnesses.

Churning out so many passages of the trial and the Lower Court on the issue of evaluation of evidence of witnesses, the learned counsel submitted that their concurrent findings on the point were not perverse and there was no basis for interference by this Court.

Consequently, it was argued that all the points on the identification evidence alibi and circumstantial evidence were shallow and merely after thought, and the findings in them by the Courts below were not perverse.

The findings and evaluation of facts by the trial Court as affirmed by the Court below were from direct evidence of the witnesses before the learned trial Judge who had every opportunity to see, hear and watch clearly the demeanour of the witnesses. The learned trial judge while evaluating the evidence placed before him recorded the following findings at pp 86 to 87 of the Record of Appeal.

In the case of *Adeniyi v. The State* (2001) FWLR (Pt. 57) 809 at 813 the Supreme Court clearly stated that where direct evidence of an eye witness is not available, the Court may infer from the facts proved the existence of the facts that may logically tend to prove the guilt of the accused.

The Courts further stated that generally there is no duty on the accused to prove his innocence. Circumstances may however arise where some explanation may be required from the accused person such as where apparently demanding circumstances are established against the accused.

As in this case PW2 and PW3 saw the accused take the deceased away from his class room and through the school gate and that was the last time the deceased was seen alive. Also PW5 who had a phone booth business centre identified the accused as the person who came to make a call on 10-10- 07.

He slated thus:

"He moved away from me and made the call. He later returned to tell me that I should take custody of a traveling bag which someone was bringing for him, a certain Samuel Ezaka actually came to pick up the bag stating that he had been sent by the accused to pick it up. It is in evidence that the bag was supposed to have contained the N3m to be paid as ransom. The accused person who stood at a distance of course ran away as soon as his messenger was arrested by the police.

Finally, it is also in evidence that the accused person took the police to the bush and showed them the strangulated body of the deceased in a decomposing state.

No doubt, these facts inevitably and irresistibly point toward the accused person being the one who know what happened to the deceased. The accused person was the last person to be seen with the deceased. Apart from the confessional statement it cannot be disputed that this is also a case with the strongest possible circumstantial evidence against the accused person”.

The Court below in agreeing that the trial Court carried out the proper evaluation of evidence of witnesses, held at page 166 of the record of appeal as follows:

“The Appellant in his brief of argument filed by Mr. Godwin Omoaka was against the evaluation of evidence by the learned trial Judge. An appeal Court like this Court is always slow or reluctance to interfere with the findings of fact by a trial Court which had the opportunity of hearing and seeing the witness. It only interferes where the finding of facts and evaluation of evidence and ascription of probative value to such evidence were improperly done, the trial Court made imperfect or improper use of its opportunity to hear and see the witness or to draw a wrong conclusion from the accepted or proved facts or a wrong conclusion or arrived at a perverse decision. Here there is no question of perversity in the evaluation said to be done by the learned trial Judge. See EBBA v. OGODO (1984) 15 NWLR 370 and LION BUILDING v. SHODIPE (1976) 12 SC 135. The lone issue, for these reasons is therefore resolved against the appellant.”

It is very clear that the above concurrent findings of the two Courts below will not lightly be disturbed or interfered by this Court because the findings are not perverse. This principle of law has been firmly settled by this Court in a plethora of cases: AMOS BAMGBOYE v. RAIMI OLAREWAJU (1991) 5 SC 164; UBANI & ORS v. THE STATE (2003) 12 SC (pt. II) 1 (2003) 12 SCNJ III at 127 - 128; SOKWO v. KPONGBO (2008) ALL FWLR (Pt. 410) 680 at (Pt. 695) OLADOTU OGUNBAYO V. THE STATE (2007) LPELR 232 SC. Etc.

I shall now comment briefly on some points raised by the Appellant in his brief of argument. There is contention of the Appellant that there was no proper identification. I agree with the learned counsel for the Respondent that there was overwhelming evidence identifying the Appellant as the person who was responsible for the death of the deceased. The PW1 (father of the deceased and former employer

of the Appellant), at the earliest opportunity while making his statement (“Exhibit 1”) to the police on 11/10/2007 stated at pages 5-7 of the record of appeal, that he received a phone call and he immediately recognized the voice of the caller as that of the Appellant “Alex”. Again, on 4/3/2008 on page 52 of the record, PW1 explained why it was easy for him to identify the voice of the Appellant thus: B

“While he (appellant) was working with me, I always chatted with him on phone. So I was familiar with his voice”

The Appellant himself corroborated this piece of evidence of PW1 in his defence for 2/7/2009 pp 64 and when he admitted that he knew the PW1 and had worked with him in his computer centre. C

To further strengthen the foregoing pieces of evidence, PW2, one Elizabeth Essien, a deceased’s teacher testified as she identified the Appellant on page 54 of the record thus:

“I saw the person who came to take Joseph away very well because I interacted with him and kept looking at his face. After that date, I only saw the young man at the police station among a crowd and I recognized him as soon as I saw him as the boy who took the deceased out of my class. I know the accused as the boy who picked the deceased from my class. The boy at the dock is the one who came to my class” D E

Despite the foregoing direct clear and weighty identification evidence against the Appellant by PW1, PW2, PW3 and PW5 they were not cross-examined. Their pieces of evidence were never challenged or contradicted in any way. It is trite law that any relevant evidence adduced in Court that has neither been successfully challenged nor contradicted, becomes credible and reliable at the trial of the accused person. STATE v. OLADOTUN (2010) 6 NCC 428 at 442; MOSES JUA v. STATE (2010) 5 NCC 143 at 169; JIMOH AWOPEJO & 6 ORS v. THE STATE (2002) 2 SCM 47; KENNETH OGOBALA v. THE STATE (1991) 3 SCNJ 61. F G

In any case, formal identification parade is not necessary in this case in view of the overwhelming evidence linking the Appellant with the offence he had committed including his voluntary confessional statements (Exhibits 9 and 10). See NWATURUOCHA v. STATE (2011) 6 NCC 462 at 484 - 485; IKEMSON v. STATE (1989) 6 SC (Pt. 1) 114 also (1989) 3 NWLR H

(PT. 110) p. 455; EYISI v. THE STATE (2000) 12 SC 24; ORIMOLOYO V. THE STATE (1984) 10 SC 1.

On the defence of alibi Appellant herein has contended in his brief of argument that the defence was not considered by the trial Court and therefore failed to pronounce on the defence when it was raised by the Appellant.

In the case of OSUAGWO v. STATE (2013) 1 - 2 SC (PT. 1) 37 at 79, this Court per MOHAMMED (JSC) as he then was, while contributing to the lead judgment of RHODES-VIVOUR, JSC, on the issue of identification of the accused as required by law, had this to say.

“From the record of this appeal particularly the proceedings of the trial Court on the trial of the Appellant, his identification as a participant in the act of the armed robbery for which he was convicted, was not at all in doubt. At the scene of the armed robbery, he was identified by PW2 and PW3 who were witnesses and victims of the armed robbery. While two other participants in the gang of armed robbers escaped from the scene, the Appellant was engaged in a duel with PW2 whom the Co-accused of the Appellant had hit with but of a gun on the head to let the Appellant escape. All the same, the Appellant was pursued from the scene by people who were shouting ‘thief’, ‘thief’. Although the Appellant managed to escape the scene, he was later arrested in the bush ear the express way in possession of two rounds of ammunition. To cap it all, the gun set in the commission of the offence was recovered in the bush near where the Appellant was arrested. This evidence left the trial Court with no doubt at all as to the offence of the Appellant as one of the participants of the offence of armed robbery for which he was convicted”.

On the issue of alibi, the Appellant has contended that the defence was not considered by the trial Court. In other words, the Lower Court failed to pronounce on the defence alibi when it was made by the Appellant.

This Court has said so many times that an accused person who raises a defence of alibi has a duty to do so at the earliest possible opportunity and give particulars of that other place(s) where he was at the time of the crime so that the police can investigate and call necessary evidence in rebuttal. IKEMSON v. STATE (supra); DANLAMI OZAKI & ANOR v. THE

STATE (1990) 1 SC 109; IHMEGBULAM ONYEGBU v. THE STATE (1995) 4 SCNJ 275. ***The particulars supplied should be such that if accepted, the conclusion should be that the accused could not have been both at the place where the offence was committed and this other place where he claims to be.*** ESANGBEDO v. THE STATE (1989) 7 SC (Pt. 1) 36. B

On its part, a Court of trial faced with evidence tending to show that the accused person was somewhere else at the time of the commission of the crime is under a duty to test such evidence against the evidence led by the prosecution in rebuttal and if on the whole, the Court is in doubt as to the guilt of the accused, such accused must enjoy the benefit of such doubt and be acquitted. WASARI UMANI v. THE STATE (1988) 2 SC (Pt. 1) 63. C

However, in the case at hand the overwhelming evidence of the prosecution witnesses before the trial Court specifically pin down the Appellant to the scene of crime thereby making the investigation of the alibi unnecessary. RAPHAEL NWABUEZE & ORS v. THE STATE (1988) 7 SC (Pt. II) 157; MATTHEW AGU v. THE STATE (1985) 2 NSCC (Pt. III) 1195. D E

In the case of EBRI v. STATE (2005) P. 1 NCC at P14 my learned brother NIKI TOBI, JSC held as follows:

“Where the evidence of prosecution witnesses specially and unequivocally pins down an accused person to the scene of crime and says that he committed the offence, failure to investigate the alibi by the police will not result in an acquittal of the accused. In such a situation, the failure to investigate the alibi is not only superfluous but also otiose. In light of the evidence of PW2, PW2 and PW3 specifically pinning him to the murder of the deceased, it was, with greatest respect, not available to the Court of Appeal to discharge and acquit the 2nd Appellant on the so-called alibi”. F G

Furthermore, the Appellant herein failed to raise in his defence alibi at the earlier opportunity availed him to allow the police investigate it. As an afterthought he only raised the defence in his brief of argument. Earlier in his defence before the trial Court, the Appellant had denied ever making any statement to the police. At page 67 of the Record of Appeal continuing his defence, the Appellant, inter alia, stated thus:- H

"I did not make any statement to the police. I don't know who (sic) dialect is. I did not know any of the IPOs in this matter I have said, I never made any statement to the police".

I must say that the Appellant having denied making Exhibits 9 and 10 in his defence before the trial Court, he cannot now rely on B defence of alibi. I cannot see how he can adopt his previously dis-owned extra judicial statements.

Where the defence of alibi consists of vague accounts which are simply placed before the Court as mere make-beliefs or plea of that defence, and which are completely devoid of material facts worthy of investigation, the police in the circumstance would least be expected to embark on a wild goose chase, all in the name of investigation. In such a situation the Court would have nothing before it to consider by way of alibi.
 C
 D ISONG AKPAN UDOEBRE & ORS v. THE STATE (2001) 8 SCM 127; ABUBAKAR DAN v. STATE (1995) 1 NCC 24 at 46.

The Appellant has also contended in his brief of argument that the finding of the trial Court affirmed by the Court below on the circumstantial evidence was perverse. In overall circumstances of this E case evidence adduced by the prosecution witnesses is credible and compelling sufficient enough for me to arrive at the irresistible conclusion that the deceased and nobody else was last seen with the Appellant. At the risk of repetition, but with added emphasis, the record of appeal contains this evidence. On 8th October, 2007, at F about 12.30pm the deceased was last seen with the Appellant who lured him out of the school. PW2 and PW3 who testified to this fact, were not cross examined. The deceased disappeared thereafter until his decomposed corpse was found with the assistance of the Appel- G lant himself at the Bondeghe Ekiem forest along Ikom-Obudu road, which is over 200 kilometers away from the deceased's school. The Appellant admitted all these facts and gave vivid explanation for his action in his extra judicial statements tendered and admitted, without objections, as Exhibits 11 and 12.

H It is on the strength of the evidence of the prosecution witnesses and the confessional statements of the Appellant Exhibits 11 and 12 that the learned trial judge rightly concluded at page 87 of the record of appeal thus:-

"No doubt these facts inevitable and irresistibly point toward

the accused person being the one who know what happened to the deceased. The accused person was the last person to be seen with the deceased. Apart from the confessional statement it cannot be disputed that this is also a case with the strongest possible circumstantial evidence against the accused person.

In the light of all the above I am of the opinion that there is abundant evidence that the deceased Joseph Okon Edem was murdered and the accused person is the murdered”. B

Under the doctrine of last seen, where an accused person was the last person to be seen in the company of the deceased person he has the duty to give an explanation relating to how the latter met his or her death. In the absence of such explanation, a trial Court and even an appellate Court will be justified in drawing the inference that the accused person killed the deceased. IGABELE v. THE STATE (2006) 6 NWLR (Pt. 975) 100, ADENIJI v. THE STATE (2001) 87 LRCN 1970, IGHO v. THE STATE (1978) 3 SC 87 at 254, ILIYASU v. STATE (2015) LPELR 2403. C

The Appellant also raised in his brief and contended that Exhibits 11 and 12 were not admissible as they were not made voluntarily by him: moreso that failure by the trial Court to consider the reflection of the statements, has occasioned a miscarriage of justice, and that the Court below erred in not resolving the issue in his favour. E

The learned trial Court while evaluating the Exhibit 11 and 12 (admitted without objection) on page 85 to 86 of the record of appeal held as follows:- F

“The law is that where voluntary confessional statement is direct, positive and unequivocal as to the admission of guilt, the statement is enough to ground a conviction. In the case before the Court, the confession of the accused person is further corroborated by the evidence of PW1 who recognize the voice of the accused person on phone, and that of PW2 and PW3 who identified the accused person as the one who came to the school premises on that day and enticed the deceased away from his class. G

However, the retraction of the confessional statement by the accused in his evidence during trial does not adversely affect the situation. Once the Court is satisfied that it is the truth and can rely solely on it. In the case of MUSTAPHA MUHAMMED v. STATE 2007 30 H

NSC @ P.364. The Supreme Court held thus:

“When an accused person confesses to a crime, in the absence of an eye witness, he can be convicted on his confession alone, if the confession is positive, direct and properly proved. A free and voluntary confessional alone is sufficient without further corroboration to warrant a conviction.”

Exhibits 11 and 12, the confessional statement of the Appellant were tendered at the trial Court in the presence of the Appellant and his counsel and no objection was raised. The retraction of the Exhibit at his retrial is of no moment. The law is that when an accused person alleges that the confessional statement credited to him is not voluntary, objection must be raised to its admissibility when the statement is sought to be tendered and not after it had been admitted in evidence.

ABAYOMI OLALEKAN v. THE STATE (2002) 2 SCN 104. **The Appellant was represented by counsel who it is assumed to know or ought to know what to do at each stage of the proceedings.** HENRY ODEH v. FEDERAL REPUBLIC OF NIGERIA (2008) 3-4 SC 57; (2008) 4 SCNJ 50; JAMES CHIOKWE v. THE STATE (2012) 12 SC (Pt. 5) 147.

In view of the foregoing, I find that the Court below rightly affirmed the decision of the trial Court that Exhibits 11 and 12 were properly admitted in evidence and acted upon.

In sum, I hold that this appeal is lacking in merit and it is accordingly dismissed. The judgment of the Court below which endorsed the judgment of the trial Court is hereby affirmed.

RHODES-VIVOUR JSC

I have had the privilege of reading in advance the judgment of my learned brother Galadima, JSC. I agree with him that the appeal has no redeeming features. I subscribe to his view that the appeal should be dismissed. I also dismiss it. I wish to say a few words of mine.

Appeals are heard in our appellate Courts on briefs. Appellant’s brief, respondent brief and reply brief (filed by the appellant). The appellant files an appellant’s brief. This is served on the respondent, who files respondent’s brief. A respondent’s brief responds to the

appellant's brief and in the process defends the judgment from which the appeal emanates. The respondent's brief should be restricted to answering all the points raised in the appellant's brief. If the respondent's brief into issues that are relevant but not addressed in the appellant's brief the appellant is expected to file a reply brief. A reply brief must be restricted to addressing new points in the respondent's brief and should not be used to repeat arguments in the appellant's brief or give the appellant a second chance to improve his argument or supply omissions in his brief. A reply brief is only necessary when an issue of law or argument in the respondent's brief calls for a reply. If it becomes necessary for the appellant to file a reply brief but he fails to file it the Court would assume that the appellant concedes all the new points or issues arising from the respondent's brief. If there are no new points in the respondent's brief but the appellant goes on to file a reply brief, such a reply brief would be disconnected. See *Cameroon Airlines v. Otutuizu* (2011) 1-2 SC (Pt. III) p.200. *Harka Air Services Nig. Ltd v. Keazor* (2011) 6 7 SC (Pt. II) p.1 . *F.R.N. v. Iweka* (2011) 11-12 SC (Pt. 1) p.109, *Eligwe v. Okpokiri & 2 Ors* (2014) 12 SC (Pt. I) p.33, *Godwill & Trust Investment Ltd. & Anor v. Witt & Bush Ltd.* (2011) 2-3 SC (Pt.1) p.176.

The appellant relied on alibi. The respondent raised new points in his respondents brief to wit:

(a) that there was compelling evidence from the prosecution witnesses which made it so obvious that it was the appellant who was responsible for the murder, thereby making investigation of alibi unnecessary.

(b) that confessional statements of the appellant were admitted with no objection.

The appellant ought to have to respond to the new facts raised in the respondent's brief. Failure of the appellant to file reply brief is indicative of the fact that the appellant concedes that his alibi is worthless.

Furthermore, not filing a reply brief is fatal as both (a) and (b) above are conceded by him.

The Supreme Court is always slow to upset concurrent findings of fact by the Courts below but will be quick to set aside concurrent findings of the Courts below if the findings are found to be per-

verse, of cannot be supported from the evidence, of there was miscarriage of justice or, violation of some principle or law or procedure. See *Mil. Gov. of Lagos State & 4 Ors v. Adeyiga & 6 Ors* (2012) 2 SC (Pt.1) p.68, *Arowolo v. Olowookere & 2 Ors* (2011) 11-12 SC (Pt.ii) p.98, *Onwubuariri & Ors v. Igboasoiiyi 4 Ors* (2011) 1-2 SC (Pt.III) B p.109.

The reason is simple. The trial judge has the advantage of watching the demeanour of the witnesses, and so is in a good position to make correct assessment of witnesses testimony. Findings of fact by a trial judge after examination in chief, cross-examination and re-examination should be highly regarded and not upset on the whim and C fancies of an Appeal Court, but only when there are exceptional circumstances.

Both Courts below found as a fact that the appellant kidnapped D a nine years old boy (the deceased) and when he realized that he would not be able to collect the reason from the child's father he killed the child.

These are concurrent findings of fact by both Courts below. The appellant was unable to satisfy this Court that the findings are E perverse or unreasonable. Concurrent findings of fact are in the circumstances correct.

For this, and the more detailed reasoning in the leading judgment the appeal is dismissed.

F _____

NGWUTA JSC

I had the advantage of reading in draft the lead judgment just delivered by my learned brother, Galadima, JSC. I agree with the G reasoning leading to the conclusion that the appeal is devoid of merit.

I would like to chip in a few words on the extra-judicial statements made by the appellant to the police in the investigation of the case. He made Exhibits 9-11 and one of these statements reads, in part:

H *"...So the following day I went accordingly and carried the said Joseph Okon Jnr. from the school and we put him on a motor cycle and drove him away to eight miles and we took him on a bus to Ikom and when we dropped at Ogoja road and took him on a bike to that forest which Police recovered the corpse. We killed him be-*

cause the father refused to pay the N3,000,000 we requested from him. That is all my statement."

Attestation:

"Today being 8/11/07 at about 1700 hrs the suspect Ayiere Godsgift Alias Alex was brought before me by the IPO Sgt. John Abua, the suspect confessed to have made the above confessional statement voluntarily. That he was not tortured before making it.

Signed: ASP Joseph A, 8/11/07".

At the trial, the above confession to heinous crime of cold blooded slaughter of an innocent child was admitted without objection either by the appellant whose neck is on the line or his Counsel who should have watched the entire proceedings with the clinical concentration of a heart surgeon at work.

In his direct testimony, the appellant made oblique reference to the effect that:

"...and when he returned he asked if I could write and I replied that at that moment I was not in the position to write anything."

In answer to a question that should nor have been asked by a cross examiner in the circumstances he stated "I did not make any statement to the Police". Yet in answer to another amateurish question: "You made Exhibits 9 -11 to the Police", he retorted "I have said I never made any statement to the Police."

Though the learned prosecuting counsel, perhaps out of sheer zeal gave the appellant the unmerited opportunity to deny having made a statement to the Police, the belated denial is ineffective. The trial Court is not expected to go back in time to conduct a trial within trial to establish the voluntariness vel non of a confession that was admitted without a hint of objection by the defence.

A denial or retraction of a confessional statement, which had been admitted in evidence without objection, cannot avail the accused who makes same in cross-examination or even in examination in chief.

In my humble view, the confession reproduced above was freely made, it is positive, direct and unequivocal. In the case of *Musa v. State* (2013) 2-3 SC (pt. 11) 75 at 92-94 paras 35-15, Mary U. Peter Odili, JSC, speaking for the apex Court, restated the following six point test which when satisfied, will support a conviction on a confessional statement:

(1) Is there anything outside the confession to show that it is true - the victim was killed as claimed by the appellant.

(2) Is it corroborated - the demand for N3 million failure to pay which led to the killing of the victim.

(3) Are the relevant statements made in it of facts true as far as they can be tested - the facts of demand for money and the killing are ascertained facts.

(4) Was the prisoner one who had the opportunity of committing the crime - he abducted his victim and took to the forest where he killed him.

(5) Is his confession possible - the appellant had his victim in his custody and had the motive.

(6) Is it consistent with other facts which have been ascertained and have been proved the confession is consistent with the facts established at the trial.

Appellant's confession is wholly and incontestably voluntary, thus appellant has given himself up to the law and become his own accuser see *Ashcraft v. Tennessee* 322 US 143, 161(1944).

In my view, all the issues raised and canvassed in this appeal pale into insignificance in the face of the appellant's damning and voluntary confession to the brutal slaughter of an innocent child for failure of his father to pay ransom.

My Lords, the sordid facts of this case demonstrate that the appellant who rejoices in the name, Godsgift, is more of the devil than any other thing.

For the above and the fuller reasons in the lead judgment I would also dismiss the appeal and I do hereby dismiss same and affirm the judgment of the Court below. I would suggest that the sentence imposed on the appellant be carried out publicly to send the necessary message to would-be kidnappers. Appeal dismissed.

MUHAMMAD JSC

I read in draft the lead judgment of my learned brother Galadima JSC, with whose reasoning and conclusion I entirely agree and adopt same as mine in dismissing the unmeritorious appeal. I also abide by the consequential orders made in the lead judgment.

OKORO JSC

This appeal is against the judgment of the Court of Appeal, Calabar Judicial Division delivered on the 4th day of July, 2014 which dismissed the appellant's appeal and affirmed the judgment of the Cross River State High Court, Holden at Calabar delivered on 17th March, 2010 wherein the appellant was convicted of the offence of murder contrary to Section 319(1) of the Criminal Code Cap. C. 16 Vol. III Laws of Cross Rivers State, 2004 and sentenced to death. B

I read in advance the lead judgment of my learned brother, Suleiman Galadima, JSC just delivered. I agree with the reasons marshaled to reach the conclusion that this appeal is unmeritorious and ought to be dismissed. My learned brother has meticulously and quite efficiently resolved all the salient issues distilled for the determination of this appeal. I shall make a few comments in support of the judgment only. C

The facts leading to this appeal have been well captured in the lead judgment and I do not intend to repeat the exercise except as may be necessary to recap in the course of this judgment. Two issues have been formulated for determination. They are: D

1. Was the Court below right in coming to the conclusion that E since the appellant did not file a reply brief in response to the arguments canvassed in the respondent's brief, appellant had concede to the arguments put forward by the respondent?

2. Whether the Court below was right in finding that there was no perversity in the evaluation o the evidence carried out by the learned trial judge. F

Appellant's grouse in the first issue stems from part of the decision of the Court below as can be found on page 116 of the record of appeal which states thus: G

"Having gone through the briefs of argument filed in this case, I noticed that all the points, one after the other, canvassed in the appellant's brief have been adequately replied to in the respondent's brief. What remains is that the appellant has to file a reply brief if the answer were not as stated in the respondent's brief. No reply brief H has been filed. Consequently, we have to take it that the position is as stated by the respondent's brief."

The above position of the Court below is that the appellant had reason to file a reply brief but he failed to do so, the effect of

which is that he has admitted the issues raised in the respondent's brief. The question may be asked: When is a reply brief necessary? By Order 18 Rule 5 of the Court of Appeal Rules, 2011 under which the Lower Court acted upon, the following is provided:

"The appellant may also, if necessary, within fourteen days of the service on him of the respondent's briefs, file and serve or cause to be served on the respondent a reply brief which shall deal with all the new points arising from the respondent's brief."

This Court has held in quite a number of cases that a reply brief is necessary and usually filed when an issue of law or argument raised in the respondent's brief calls for a reply. Where a reply brief is necessary, it should be limited to answering new points arising from the respondent's brief. Now, although an appellant's reply brief is not mandatory as argued by the appellant in the instant case, where a respondent's brief raises issues or points of law not covered in the appellant's brief, and appellant ought to file a reply brief. See *Longe v. First Bank of Nigeria Plc* (2010) 6 NWLR (Pt.1189) I (SC); *Edjenode v. Ikwie* (2001) SCNJ. 184, *Okonji V. Njokanma* (1999) 12 SCNJ 259.

It should be noted that when a respondent has raised new points in his brief and the appellant fails to file a reply to the new points argued, he will be deemed to have admitted the truth of everything stated in the respondent's brief in so far as such is borne out by the record. This was the exact position taken by the Lower Court in the instant case. See *Unity Bank Plc. v. Mr. Edward Bouari* (2005) 7 NWLR (Pt.1086) 372, *John Holt Ventures Ltd V. Oputa* (1996) 9 NWLR (Pt.470) 101.

Let me also state that failure to file a reply brief to a respondent's brief can only be fatal to the case of the appellant if the issues raised in the respondent's brief are weighty, substantial, competent and relevant in law. Where they are not, the appellant need not file a reply brief. See *Dada v. Dosunmu* (2006) 18 NWLR (Pt.1010) 134.

In the instant case, the appellant argued issue of alibi. The respondent raised a new point to the effect that the evidence of prosecution witnesses pinned the appellant to the scene of the crime and as such investigation of alibi was not necessary. Appellant failed to reply to this issue. Another issue relates to Exhibits 11 and 12, the confessional statement of the appellant. The respondent in its brief

argued that the statements were admitted without objection. Appellant did not reply to this also. The Court held that having failed to react to these issues argued in the respondent's brief, the appellant is deemed to have admitted them. This is the pith and substance of issue one. I have no doubt in my mind that the Court below was right to have made the observation. Issue of alibi raised by the appellant was crucial to his case and Exhibits 11 and 12 were also inimical to appellant's case. Thus, any new arguments made in respect of the two points ought to have elicited a reply brief to put the records straight. The failure of the appellant to file a reply, as was rightly held by the Court below, meant that the conceded to those arguments. As it stands, I agree that the first issue does not avail the appellant.

The second issue which has to do with evaluation of evidence has been admirably resolved in the lead judgment. I adopt same as mine.

On the whole, I agree with my learned brother, Galadima, JSC that there is no merit in this appeal. It is accordingly dismissed. I affirm the judgment of the Court below which upheld the conviction and sentence of the appellant to death. Appeal Dismissed.